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Wood, V.C., Dec. 18, 1865.

In re RAWLING'S SETTLED ESTATES.

14 W. R. 218; L. R. 1 Eq. 286; 13 L. T. 626.

19 & 20 Vict. c. 120, & 21 & 22 Vict. c. 77, were repealed by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18).

*Lease of settled estates—Surrender of old lease—*19 & 20 Vict. c. 120, ss. 2, 5—21 & 22 Vict. c. 77, s. 5.

SETTLED LAND.—*The Court will authorise the grant of a new lease upon the surrender of an old one, if the best rent which, under all the circumstances of the case, can be obtained is reserved.*

This was a petition under the Leases and Sales of Settled Estates Acts, and under the Property and Trustees Relief Amendment Act, praying for the opinion of the Court as to the management of the trust property, and also for its sanction to an agreement made under the following circumstances:—

The settled property had been leased in the year 1860 for a term of twenty-one years. This term had become vested in a Mr. Jameson, and Mr. Jameson had agreed with the trustees of the settlement that the lease should be surrendered and a new repairing lease for sixty years granted to him, provided the sanction of the Court could be obtained to the arrangement. The rent payable on the old lease was 140*l.* per annum. That proposed for the new lease was 225*l.*

The 5th section of the later Act (21 & 22 Vict. c. 77) and the 5th section of the earlier Act (19 & 20 Vict. c. 120), taken together, expressly confer the power of surrendering any lease, and of granting new leases of the same hereditaments, and there was evidence of the sufficiency of the rent of 225*l.*; but, inasmuch as the surrender of the old lease must form part of the consideration for the grant of the new one, it was doubted whether the section requiring the best rent to be reserved would be satisfied.

Bovill appeared for the petitioners.

James, Q.C., and *Bagshawe*, and *Giffard, Q.C.*, and *Kekewich*, for other parties.

Wood, V.C., said that the true construction of the Acts was that the best rent which could be obtained under all the circumstances of the case should be reserved. He therefore gave his sanction to the agreement.

KINDERSLEY, V.C., Dec. 23, 1865.

HEWITT v. WHITE.

14 W. R. 220; 13 L. T. 787; 12 Jur. N.S. 46.

Practice—Costs of written bills.

COSTS.—*Where, on the hearing of a cause, all matters, including the costs, were disposed of, but the costs of three written bills overlooked by inadvertence, a motion that, on the taxation of the costs, these omitted costs might be allowed, was granted on the authority of a case before Vice-Chancellor Wood, and on the terms of the applicant paying the costs of the motion.*

Ellis moved in this case that on the taxation of costs the plaintiff might

be allowed the costs of three written bills—namely, the copy for the Court, the copy for counsel, and the copy for service, the case having been one of great pressure. Being a heavy matter when it was disposed of, this item had been, by inadvertence, overlooked. It was also asked that the plaintiff might have his costs of this application, which was renewed from a former day. In *Elt v. The Burial Board of Islington* (Kay, 449), Vice-Chancellor Wood had allowed the costs of a written bill under somewhat similar circumstances: *Viney v. Chaplin* (3 De G. & J. 282).

G. W. Collins, for the defendant, referred to the 18th rule of the 40th order, which provided that no costs of a written bill should be allowed unless the Court, in disposing of the costs of the cause, should direct the allowance thereof. The notice of motion was not to amend the order or alter the decree which it ought to have been: 35th rule, 40th order. This was, in fact, a second notice of motion.

Ellis, in reply.—Vice-Chancellor Wood made no order as to the plaintiff's costs, this application ought not to have been opposed.

KINDERSLEY, V.C.—I confess if this were *res integra*, I should feel strongly disposed to refuse the motion. It was the duty of the solicitor when the cause came to a hearing to be prepared for everything, and it is no excuse to say that this was overlooked; it was a culpable neglect which I should not have been disposed to look at indulgently; but after the decision of Vice-Chancellor Wood I cannot take upon myself to say I shall not make the order. But this I am sure of, that the party guilty of the negligence ought to pay the costs. It is said that the application ought not to have been opposed; I think the opposition perfectly justifiable, and if it had not been for the case cited I should have refused the motion with costs. The order must be made, but the applicant must pay the costs, and I cannot regard it as two notices of motion. I gather from Mr. Leach (the registrar in Court) that two guineas is the proportion of the costs as to these bills, let it be mentioned as the amount.

CRANWORTH, L.C., Nov. 23, 25, Dec. 9, 1866.

Ex parte THE ATTORNEY-GENERAL. *In re* GRAHAM.

14 W. R. 235; L. R. 1 Ch. 175; 13 L. T. 542.

See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 66-71.

Bankruptcy Act, 1861—Official assignees—Remuneration.

BANKRUPTCY.—*The salary made payable to official assignees by section 31 of the Bankruptcy Act of 1861 is in discharge of all duties to be performed by them (including those of official liquidators and trustees under trust deeds) after the 11th of October, 1861, and official assignees are entitled to no further recommendation.*

Where bankruptcies have come under the jurisdiction of the Court of Bankruptcy before the 11th of October, 1861, but have not been wound up till after that date, official assignees are entitled, (1) in respect of duties wholly performed before that date, to remuneration under the old scale established by the Act of 1849, and General Orders under that Act; (2) in respect of duties performed partly before and partly after that date, to an apportionment to be made for each particular bankruptcy of the fees received under the old scale; and (3) to no remuneration beyond the fixed salary in respect of duties performed after the 11th of October, 1861.

This was an application by the Attorney-General upon the relation of the Chief Registrar of the Court of Bankruptcy, that Mr. Patrick Graham, an official assignee, might be ordered to pay to the credit of the Chief Registrar's fund a sum of 1,663*l.*, and to the credit of the unclaimed dividend fund 578*l.* 10*s.* The question as to the latter sum was mainly whether Mr. Graham had properly retained it to recoup himself for a large number of small expenses and sums paid out of pocket by him in respect of a large number of bankruptcies which had been duly audited, on the ground that the account of the expenses in question had been submitted to and passed by one of the registrars of the Court of Bankruptcy. As to the sum of 1,663*l.*, the question was, whether Mr. Graham was or was not entitled to retain certain sums as remuneration for business done in respect of bankruptcies which came under the jurisdiction of the Court before the 11th of October, 1861, but had not been wound up till after that date. The Bankruptcy Act of 1861, 24 & 25 Vict. c. 134, which came into operation on the 11th of October of that year, provided that official assignees should receive the annual salaries therein mentioned (section 31), and should, every six months, make a return of the amount of fees received by them during the preceding six months, and should not be entitled to any further remuneration in respect of any duties performed by them; such annual salaries being, however, exclusive of the cost of necessary clerks and reasonable office expenses.

Before the passing of this Act the official assignees had received their remuneration in the form of allowances or fees, to which they had become entitled under the Act of 1849 (12 & 13 Vict. c. 106, s. 44) and the General Order of the 19th of October, 1852, section 130, and which, with slight alteration (introduced by 17 & 18 Vict. c. 119, s. 11, and Orders of February 3rd, 1855, and June 19th, 1856), had continued to be the method of remunerating them up to the passing of the Act in 1861.

Sir Roundell Palmer, A.G., Sargood, and H. B. Miller, at the relation of the Chief Registrar, contended that fees earned partly before and partly after the 11th of October, 1861, ought to be apportioned in respect of each particular bankruptcy, and that while fees earned before that date might be payable to Mr. Graham, the Act imperatively provided that the salary should be the only remuneration after that date.

Sir H. Cairns, Q.C., and Bayley, for Mr. Graham, contended that as to 950*l.*, part of the 1,600*l.*, that sum had been earned by Mr. Graham as official liquidator under the Joint-Stock Companies' Winding-up Act (19 & 20 Vict. c. 47, ss. 88, 92), and as trustee under the trust deeds, which offices, they argued, were to be treated independently of his position as official assignee. As to the remainder of the sum, it was very inconvenient to apportion the fees earned upon bankruptcies which extended over the 11th of October, 1861, and it had been the practice that Mr. Graham should retain as remuneration eighty per cent. of the fees received by him in all such cases, and over the remaining twenty per cent. only. This arrangement had been sanctioned by one of the commissioners in passing the accounts.

The Attorney-General, in reply, contended that the duties of official liquidators were imposed upon the official assignees in virtue of their office as official assignees, and were part of the duties for which the salary was paid to them.

Dec. 9.—**LORD CRANWORTH, C.**, said that Mr. Graham contended that he had a right to retain the remuneration allowed to an official assignee under the 44th section of the Act of 1849, under which "the Court might order and allow to be paid out of any bankrupt's estate to the official assignee, as a remuneration for his services, such sum as should, upon consideration of the amount of the bankrupt's property, and the nature of the duties performed by such official assignee, appear to be just and reasonable." Under that section a scale of fees was framed in 1852, which, with slight alterations, remained

in force until 1861; but by the Bankruptcy Act of 1861 a material change was made. By the 31st section of that Act the mode of remuneration was altered entirely; but fees, which he (the Lord Chancellor) considered to be the same as remuneration, were still to be taken, though they were not to go to the official assignee himself. That section directed that each official assignee was to make a return half-yearly to the Chief Registrar of the amount of fees received by him during the past half-year; but, instead of receiving a remuneration depending on the state of the bankrupt's property, he was to get a fixed salary of 1,200*l.* if his duties were performed in London, and the section was express that the official assignees were not to be entitled to any further remuneration in respect of any duties performed by them. That Act received the royal assent late in 1861, and consequently a General Order was not passed till February, 1862, and the General Order directed that in April and October of each year the official assignee was to make a return to the Chief Registrar of the fees received by him, according to forms which were then provided; and in March a circular letter was sent to each official assignee, giving him the forms in which he was to make his return, and that he was to include therein all fees received since the 11th October, 1861, whether the duties were performed before or afterwards. Now Mr. Graham claimed that where the duties were performed before the 11th October, 1861, he had a right to retain the remuneration attached to them, and this claim he rested on the 230th section of the Act of 1861, wherein it was provided that the section of the Act of 1849, regulating the remuneration of official assignees was repealed, but that such repeal should not affect any right that had arisen in respect of any transaction, act, matter, or thing done prior to the commencement of this Act under or by virtue of any part of an Act so repealed. It was, therefore, considered a fair mode of dealing with this matter that all sums earned before the passing of the Act should, notwithstanding the 31st section, which forbade any remuneration beyond the salary of the official assignee, be paid over to his own use. The next question arose as to sums earned partly before and partly after the passing of the Act. It was said that a fair apportionment ought to be made between the duties which were performed before and those after the 11th of October with respect to each particular bankruptcy, and that the sums earned after October should be paid in to the credit of the Court. He (the Lord Chancellor) did not at present go into the question whether it was right or not, but upon this basis it appeared that as a matter of fact Mr. Graham received, after the 11th of October, 1861, 227*l.* 18*s.* 7*d.* in respect of matters which he had done previously to the passing of the Act, for bankruptcies entirely wound up, and which, on this basis, was to be considered his own money; and with respect to fees which had been earned partly before and partly after the passing of the Act, that he had earned before the 11th of October, 396*l.* These two sums together made up 724*l.*, and must be deducted from the entire amount which Mr. Graham was called upon to account for. But Mr. Harding stated in his affidavit that subsequently to the 11th October, 1865, Mr. Graham had received 2,950*l.*, so that there would remain to be accounted for 2,226*l.* Mr. Graham had paid into court 401*l.*, and there was a sum of 168*l.* 1*s.* 8*d.*, which, if it was to be accounted for at all, must come into another fund. The entire sum, therefore, at issue between the Attorney-General and Mr. Graham would be about 1,860*l.*, but Mr. Graham appeared to claim 950*l.* as earned by him in his capacity of official liquidator under the Joint-Stock Companies' Winding-up Act and under the trust deeds, and if this were so no blame could be attributed to Mr. Graham for claiming this 950*l.*, other than that he misconstrued these Acts of Parliament; but in his (the Lord Chancellor's) opinion there was a misconstruction of the Act, for he had come to the conclusion that the official assignee was to receive his salary in discharge of all the duties which were to be performed by him, no matter how those duties arose. If this 950*l.* was not made up in this way, Mr. Graham was very much

to blame for not including these sums. But even supposing that this was earned from special duties, Mr. Graham would have no right to retain it. The next important question was, whether Mr. Graham was entitled to remunerate himself for duties partly performed before and partly since the Act of 1861, by retaining 80 per cent. of the entire fees paid in respect to those duties. Mr. Graham claimed this right because the Commissioner had approved of such a scale, and had allowed him to retain the amount actually earned with the exception of 20 per cent. He (the Lord Chancellor) was of opinion that the Commissioner was wrong in sanctioning the passing of accounts in which it appeared that Mr. Graham thus retained 80 per cent. If Mr. Graham had a sort of vested right in respect of the emoluments arising from bankruptcies which came under the jurisdiction of the Court before October, 1861, the Commissioner might, upon this supposition, have said—"You are now in a different position than before; the public provide you with clerks, and any part of your fees which before went for payment of clerks should now go to the public. This part I value at 20 per cent. of the entire." But this was a wrong principle. Mr. Graham was a public officer, who, before the 11th October, 1861, was entitled to be remunerated in a certain way; but for duties done after that date was to receive no remuneration other than his salary, and it was not in the power of the Commissioners of the Court of Bankruptcy to prescribe any other mode of remuneration. Mr. Graham must, therefore, account for any fees received in this way. But it had been said that as Mr. Graham was acting on the authority of the Commissioner of the Court, that was supposed to justify him. Now if this was a question whether Mr. Graham has to pay the costs or not, that argument might be a very good one; or, if this was a question as between litigant parties brought before the Commissioner, the authority of the Commissioner might be quoted, but he did not see what right the Commissioner had to draw a different conclusion to that laid down by the Act of Parliament. So far with respect to the claim that was made against Mr. Graham with regard to the Chief Registrar's fund. But there was another demand made upon Mr. Graham—viz., for a sum of 578*l.* for the unclaimed dividend account. This was an account into which small sums which could not be credited to particular bankruptcies were paid. Mr. Graham had paid into court 96*l.* to the credit of this fund, and no blame could be attached to him in respect of that sum, as it arose from the sale of old books, which the proper officer at first refused to receive, on the ground that it could not be apportioned. There was thus 483*l.* to be accounted for. Mr. Graham stated that this amount was made up of two sums—one of 164*l.* 1*s.* 8*d.*, which had been received from 119 estates, and the other of 319*l.* 17*s.* 4*d.*, which had been received from over 500 estates, and that the charges were as low as two shillings on account of the expenses out of pocket and other matters for which he was entitled to retain fees. It appeared, however, that only eighteen of these estates had been duly audited, and that the rest had been submitted to one of the registrars of the Court of Bankruptcy, and passed by him. He (the Lord Chancellor) did not feel justified, acting, as he was, for the public, to accept Mr. Graham's affidavit as conclusive on this point, and he would simply direct an inquiry whether this 483*l.* had been properly retained by Mr. Graham.

The Attorney-General said if it appeared that the registrar who had audited these accounts was a suitable person, perhaps any further inquiries would be unnecessary.

The LORD CHANCELLOR said that would satisfy all purposes.

Sir H. Cairns, Q.C., said that an inquiry ought to be directed as to what portion of the fees should be retained by Mr. Graham.

The Attorney-General had no objection to this inquiry.

The LORD CHANCELLOR said an inquiry must also be directed to ascertain

what amount of fees had been received by Mr. Graham as official liquidator for winding up joint-stock companies, and as trustee under trust deeds of 1849. He would reserve the question of costs until these inquiries had been made.

KINDERSLEY, V.C., Nov. 24, Dec. 6, 7, 8, 9, 11, 1865.

PEARSE v. DOBINSON.

14 W. R. 256; 13 L. T. 519.

Practice—Plea and answer—Amendment.

PRACTICE.—*A bill is filed to set aside certain orders to carry out a compromise, on the ground of fraud, charged in the most general and sweeping manner against all parties concerned. To this bill pleas and answers are put in, denying the fraud generally by the pleas, and specifically by the answer, the plea containing a slip and some objectionable averments.*

Held, that the plea must stand for an answer, with liberty to except, the plaintiff not being entitled to require the setting out of certain accounts.

This cause came on upon three pleas to a bill filed by the husband of an annuitant under the will of Henry Parker, to set aside two orders made upon petition, and dated in 1849 and 1852, on the ground of fraud. The bill was extremely voluminous, and contained allegations of a fraudulent nature in the most varied form against the plaintiff's former solicitor and the solicitors of the defendants, as well as against the defendants themselves; but this case was, in substance, this:—

Thomas John Parker was possessed of very large and then valuable estates in the island of Jamaica, yielding a rental of from 12,000*l.* to 15,000*l.* a year, which he encumbered to the amount of 40,000*l.*, both by way of mortgages for value as well as voluntary charges for the carrying out of certain family arrangements. Questions arose as to the priority of the different sets of incumbrances, and Henry Parker, one of the mortgagor's sons, being entitled to three-fourths of the 40,000*l.* beneficially, made his will, dated in 1825, whereby he gave the annuity in question, of 150*l.*, to his sister-in-law, the widow of his brother, and also provided for her children.

Messrs. Timperon & Dobinson were the agents and consignees of the estates in question, and were appointed such by the testator for his life and for twenty-one years after, and they had kept accounts and rendered them from time to time, the last being rendered in 1846, when a final settlement took place with the trustees of the testator's will, and 25,000*l.* was paid into court. Subsequently this sum was made the subject of the orders now sought to be set aside, which were orders made for the purpose of carrying into effect a compromise of a suit of *Pearse v. Brooke*, which had been commenced in 1835, and under which the money was to be divided between the parties to that arrangement (the plaintiff not being one). The 25,000*l.* had been paid in by the Commissioners of the Slave Compensation Court, and the estates themselves had lately been sold for 7,000*l.* This bill was now filed to set aside the orders for compromise on the ground of collusion and fraud by all parties concerned, as against the plaintiff, who alleged that he was quite ignorant of his rights, and that the agreement had been come to without his consent.

To this bill three pleas were put in, the pleas being to part only of the bill, and answers being filed as to the rest. The pleas set up the original orders, with averments denying the allegations of fraud; and that denial was supported with great distinctness in the answer.

Baily, Q.C., E. F. Smith, Q.C., J. H. Palmer, Q.C., Karlake, Maskelyne, Dickinson, and Surridge, appeared in support of the pleas.

It was contended that the allegations in the bill were so general that it was almost impossible to frame a plea to meet them, although the general effect was an imputation of the broadest and strongest kind, and hence a mistake in language had occurred, the word "or" being put for "nor," but the Court would allow that to be amended as a mere slip: *Thompson v. Wild* (5 Madd. 82), *Jackson v. Rowe* (4 Russ. 515; Smith's Chan. Prac. 1, 168), *Mitford's Pleading*, 4th edit. 303, 313.

Glasse, Q.C., and Roberts, for the plaintiff.

Dec. 11.—KINDERSLEY, V.C. (after referring to the circumstances at great length) said—There is great difficulty in dealing with these pleadings as they now stand. The question is, what is to be done with the pleas. There are cases in which the Court has allowed pleas to be amended when they stood alone, but I do not find any in which such amendment was allowed where they were coupled with an answer, or where the amendment is required to averments, or where the plea covered too much. At the period when *Thompson v. Wild* (*supra*) was decided, the Courts were beginning to entertain the view that it was very objectionable to allow the amendment of an answer, and the learned Vice-Chancellor who decided that case allowed amendments on the plea in averments, but when, on a future day, the case again came before him, he observed that henceforth he would never give leave to amend a plea when it was supported by an answer, even in the case where the leave to amend in the averments merely referred to a slip. That is not this case, because there are other objections to the averments, and if I allowed the pleas to be amended I should, in point of fact, be allowing an amendment of the answer, because the averments answer on oath, and the same objection applies as in the answer; and where the plea covers too much another answer would be required, and this creates another difficulty. If the plea and original answer were amended, a further answer would be necessary to make the plea comprehensible. If there were no answer no doubt there would be little objection to allowing to the defendants to plead anew by simply overruling the plea; but, there being an answer, the very form of the record creates a difficulty, and I should not give the defendants any relief by taking that course, the bill being so framed that it is almost impossible to meet it by plea and answer. But there is a mode, I think, of relieving the defendants as to the charges of fraud, and which, in the case of a plea and answer like this, would be most appropriate. I mean to order the plea to stand for an answer. That merely determines that it contains the defence or part of it, though not properly pleaded, and I think that that is so in the present case, and if it is ordered to stand for an answer it is allowed to be a sufficient one to so much of the bill as it covers, unless by the order liberty be given to except, which may be given so as to protect the defendants from any particular discovery which they should not be compellable to make, and the Court will do that as to further accounts.

I shall adopt that course; the only reason why the defendants desire to protect themselves, I suppose, is to avoid going into the accounts from 1796, which would be a great oppression. The plea, therefore, will stand for an answer with liberty to except, but so that the plaintiff shall not be entitled to require the defendants or any of them to set out the mortgagees' or consignees' accounts in respect of the estates or any of them, or any charges on the estates.

STUART, V.C., Dec. 21, 1865.

WATERS v. THE EARL OF SHAFTESBURY.

14 W. R. 259; 13 L. T. 558; 12 Jur. N.S. 3.

Practice—Production of documents.

DISCOVERY.—*Where the defendant, in a suit for account after the suit had been commenced, instituted criminal proceedings against the plaintiff, in respect of some of the items in question in the suit, and, before the hearing, moved for production by the plaintiff of some of the accounts.*

Held, that, as the accounts sought were not material to the plaintiff for resisting the relief sought at the hearing, and as the Court had reason to suspect they might be used as evidence against the plaintiff in the criminal proceedings, the defendant was not entitled to their production before the hearing.

The Court will not ordinarily allow items of account to be read as evidence at the hearing.

It is desirable that, in cases like the present, criminal proceedings in respect of matters in question in a suit in chancery, should be deferred till the result of that suit is known.

The plaintiff in this suit had, from the year 1851 to the year 1863, acted as steward to the defendant, and as manager of his estates. In July, 1863, he left the defendant's service, and in August, 1864, the bill in this suit was filed for an account and for a declaration of the plaintiff's rights under certain drainage contracts.

On the 2nd of March, 1865, the defendant put in his answer to the plaintiff's bill.

On the 27th of March, 1865, the plaintiff was arrested on a warrant obtained by the defendant on a charge of embezzlement in respect of some of the items which would necessarily form matter of account in the suit. He was subsequently admitted to bail; and the indictment was, by order of the Court of Queen's Bench, removed from the Dorsetshire Assizes to the Central Criminal Court.

In April, 1865, the defendant obtained the usual order in the suit, that the plaintiff should make an affidavit of documents, and in June, 1865, the plaintiff filed his affidavit.

On the 30th of June, 1865, the defendant obtained an order for the production by the plaintiff of the documents mentioned in the first part of the schedule to his affidavit, and of those numbered 95 and 96 in the second part of such schedule.

On the 5th of August, 1865, the defendant obtained a summons for a short order on the plaintiff to produce the documents mentioned in the order of 30th June. This summons was from time to time adjourned by the chief clerk and by his Honour with the view of allowing the criminal proceedings to be disposed of.

On the 21st November, 1865, notice of motion for decree was given in the suit.

On the 22nd November, 1865, the criminal trial came on for hearing at the Central Criminal Court, but was, at the plaintiff's request, and with the defendant's consent, adjourned till April, 1866, to allow of the result of the Chancery proceedings being known.

On the 8th of December, 1865, the defendant's summons again came on before his Honour at chambers, and, by an order made on that day by his Honour, it was ordered that, notwithstanding the order of 30th June, the plaintiff should not be required to produce the documents numbered 93 and 95, till after the criminal proceedings had ended. The last-mentioned documents

were statements of account between the plaintiff and the surveyors of the Land Drainage Company, who had contracted with the defendant for the drainage of his estates.

This was a motion to discharge the last-mentioned order.

Bacon, Q.C., and *Snape* for the motion.—The production of these documents should be of course. They are necessary to enable the defendant to prepare his defence in the suit.

Malins, Q.C., and *Roupel*, against it.—These documents are required by the plaintiff to prepare his defence in the criminal trial. The only reason the defendant can have for wishing for their production is to use them against the defendant in the criminal proceedings. The Court will not lend itself to this, especially as these proceedings were oppressive and were instituted after the suit in this court, in which the alleged embezzlement would have been discovered if it existed. Besides, the defendant did not want the documents to assist him in resisting a decree, as he had submitted to account.

STUART, V.C., said that the affidavit on which the present application was founded had been made in June last, and that what was now asked was that certain documents, the production of which the plaintiff had resisted, should, notwithstanding the reasons urged by the plaintiff, still be ordered to be produced. The cause had been set down for hearing, and the production of the documents in question could not be sought for the purpose of enabling the defendant to prepare his defence, as that defence was fully stated in his answer. They could not be sought for any legitimate purpose to be served at the hearing of the cause. It was well established that in suits for account the Court would not, ordinarily speaking, allow evidence as to items of account to be read at the hearing. That matter was well discussed in a case of *Law v. Hunter* (1 Russ. 100), and settled with the complete approbation of the profession. One part of the relief sought by the bill was a declaration that the plaintiff was under a certain contract, which was set out in the bill, entitled to a certain remuneration. That relief must depend on the terms of the contract, and not in any way on the accounts, the production of which was now sought. The other relief sought was a general account, and it was clear, as had been said before, that these documents could not be read as evidence on the question whether there should be an account or not.

It would be sufficient for the Court to refuse the motion on these grounds alone, but the fact must not be overlooked that after the plaintiff filed his bill for an account, the defendant thought fit to institute a criminal prosecution, the success of which must depend on the way in which the plaintiff's transactions appeared on taking the account. That might be a perfectly right proceeding on the part of the defendant; and the defendant said that he had so acted (as no doubt he had) with a view to the public interest. But the interest of the public should never be served at the expense of injustice to individuals, and still less by making use of the machinery of this Court to obtain, pending proceedings in the court to which a criminal prosecution related (and a prosecution, too, begun after the suit was instituted), the production of documents about the right to the production of which a doubt existed. In such a case the Court had good reason to suspect that the application was made in order to get some means of supporting the prosecution.

It appeared that the prosecution had been postponed. And it was time enough to go on with the prosecution after it should be seen on the result of the account taken in this court, whether the plaintiff had embezzled money or not. The counsel for the defendant had insisted that the use to be made in the prosecution of the documents sought to be produced did not concern the Court. He, the Vice-Chancellor, could not adopt that view. He thought that, looking at the defendant's own statements, he had sufficiently vindicated

all that he owed to the public, and that each of the parties should proceed in a fair way before this Court with the accounts. The defendant must pay the costs of the motion.

STUART, V.C., Jan. 12, 1866.

HOPE v. CARNEGIE.

14 W. R. 260; 13 L. T. 624: affirmed, 14 W. R. 489; L. R. 1 Ch. 320;
14 L. T. 117; 12 Jur. N.S. 284 (L. JJ.).

Injunction—Restraining proceedings in foreign court.

INJUNCTION. INTERNATIONAL LAW.—Where a decree had been made by the Court for the administration of the estate of a domiciled Englishman, who has died possessed of both real and personal estate in a foreign country, and proceedings have been commenced in the courts of that country, with a view to the distribution thereof of such real and personal estate, the Court will grant an injunction restraining such proceedings, and any other proceedings affecting the testator's personal estate, notwithstanding the testator's will contains a clause disclaiming an intention to interfere with the operation of foreign law over foreign property.

This was a motion in the above suit, which was supplemental to a former suit of *Hope v. Beresford Hope*, instituted for the administration of the estate of Adrian John Hope.

The testator, by his will dated the 29th August, 1862, gave all his residuary real and personal estate, whether in England, Holland, or elsewhere (but as to his foreign property only so far as he had power to dispose of the same by the laws of the country in which the same were situate, and, as not intending by his will to interfere with the operation of such law, or as preventing any of his children taking benefits under his will, from also taking under such law, or as depriving them of any benefit under his will by reason of their so taking) to trustees upon trust, subject to two legacies of 10,000*l.* each to the defendants Emily Hope and Henrietta Hope, for the plaintiff on his attaining twenty-one, with a contingent gift over in the event of plaintiff dying under twenty-one, for the defendants Emily Hope and Henrietta Hope.

The testator died in December, 1863, and in October, 1864, the suit of *Hope v. Beresford Hope* was instituted against his executors; and by a decree made in that suit on the 5th November, 1864, the usual accounts of the testator's estate were directed.

The bulk of the testator's property consisted of various stocks and securities of the Government of the Netherlands, and other personal estate in that country. The testator had also a landed estate in Holland called Bosbeck, the value of which was disputed.

After the date of the decree in *Hope v. Beresford Hope*, the defendant, Emily Hope, raised a contention that the testator died domiciled in the Netherlands, and on the 9th of May, 1865, she commenced proceedings there, with a view to have the testator's real and personal estate in Holland administered by the Courts of that country, as on an intestacy, and served a notice on the agent of the testator in Amsterdam, not to hand over any of his personal estate to his executors.

The suit of *Hope v. Carnegie* was then instituted in June, 1865, for the purpose, amongst other things, of obtaining a declaration that the testator's domicile was English, and of restraining the proceedings in Holland. Considerable delay was occasioned by the difficulties thrown by the defendants in

the way of service of the bill being effected on them, and at last an order for substituted service had to be obtained.

The bill alleged that by the law of the Netherlands a testator, subject to that law, dying possessed of real or immovable property in that country, forming less than one-fourth of his whole estate, wherever situate, might dispose of such property by will, at his discretion. And it prayed for an injunction restraining the defendant from intermeddling with any part of the testator's estate, whether in Great Britain, Holland, or any other country.

Malins, Q.C., and Hemming, for the motion.—The evidence is clear that the testator's domicile was English, and it follows that the clause in the will relating to the testator's foreign property must be construed according to English law, and that his personal property must be distributed by the English Court. The proceedings commenced in Holland affect both the real and personal estate there, and must be restrained.

Bacon, Q.C., and Swanston, for the defendant Emily Hope.—The insertion by the testator of the clause relating to his foreign property showed that he intended it to be dealt with by the foreign court, and it would be harsh of this Court to restrain Miss Hope, who was not even a British subject, suing for it in that court. The real property in the Netherlands was subject to the jurisdiction of the courts there, and Miss Hope had at all events a right to sue in respect of it. [STUART, V.C.—If the affidavit of Miss Hope had stated that the proceedings in Holland only sought to affect the real estate there the case would be different.] At any rate Miss Hope should not be put to fresh expense by having to commence her proceedings afresh as to the real estate, which would be the case if her present proceedings were restrained.

STUART, V.C., said that this was a case of the will of a domiciled Englishman, the trusts of which had been decreed by this Court to be executed. It appeared that there was a remarkable clause in the will relating to the disposition of the testator's foreign property. The construction of that clause must clearly be determined in this court according to the principles of English law. It further appeared that the testator was, at the time of his death, entitled both to real and personal estate in Holland. Now, it was settled law that personal property in a foreign country was subject to the law of the country in which the testator was domiciled, and that real property was governed by the *lex loci rei sitæ*. The evidence showed that Miss Hope was suing in a foreign court both as to the real and personal property. That was a proceeding this Court could not allow. Any further proceedings she might be advised to take as to the real estate alone were not at present in question, and no order would be made restraining such proceedings. There must be an injunction to restrain the defendant Miss Hope from continuing the proceedings in Holland, mentioned in the affidavit of Mr. Beresford Hope, or instituting any other proceedings in Holland or elsewhere in regard to the personal or moveable property of the testator, or otherwise intermeddling with such personal or moveable property.

STUART, V.C., Jan. 13, 1866.

BATSON v. ROWLANDS.

14 W. R. 261; 13 L. T. 663.

Will—Construction—Gift to children in remainder.

WILL.—A gift of a sum on death of a tenant for life, to the children

of A. B.:—Held to include only children of A. B. born at the death of tenant for life, notwithstanding that the gift was made by reference to another and independent gift, which included all children of A. B.

Thomas Batson, the testator in this cause, died in March, 1820, leaving a will which contained the following gifts:—The testator bequeathed 2,500*l.* in trust for his nephew, James Batson, and his (the nephew's) wife, successively for life, with remainder upon trust to pay and divide the said principal sum of 2,500*l.* unto and equally amongst the children of his said nephew, to be paid at the age of twenty-one, with a gift over to the survivors or survivor in case of any child dying under twenty-one. The testator also bequeathed 1,000*l.* in trust for James Johnson for life, and after his decease (in the events which happened), he bequeathed the capital in the following words:—"It is my will that such last-mentioned sum of 1,000*l.*, together with the dividends and annual produce thereof (if any), be paid and applied to and for the use of the child or children of my said nephew, James Batson, at such time or times, and in such manner in every respect, as far as circumstances will admit, as I have hereinbefore directed with respect to the sum of 2,500*l.*

James Johnson being dead, the bill sought a declaration that on his death the investments representing the legacy of 1,000*l.* became divisible between all the children of James Batson, who were born during the life of James Johnson, and that their shares were payable to them respectively on their attaining the age of twenty-one.

Malins, Q.C., and *W. W. Cooper*, for the plaintiff.

Archibald Smith, for the executors, submitted to the Court that, although the ordinary rule under such circumstances was to confine the gift to the children living at the death of the tenant for life, yet here, since the gift was made only by reference to a previous gift which, beyond all question, included all children of James Batson, the second gift should likewise include any children born after the death of the tenant for life. They cited *Iredell v. Iredell* (25 Beav. 485).

Martineau, Woodroffe, Brooksbank, and Beetham, for other parties.

STUART, V.C., was of opinion that notwithstanding the reference to the preceding gift, which included all James Batson's children, the ordinary rule of construction must be held to apply, and that the children who were born at the death of the tenant for life were entitled amongst them to the 1,000*l.* on their respectively attaining twenty-one years.

STUART, V.C., Jan. 16, 1866.

DAY v. DAY.

14 W. R. 261; 13 L. T. 625.

Mortgage debt—Locke King's Act—Primary fund for payment of.

EXECUTOR AND ADMINISTRATOR.—Where A. conveyed estate (No. 1) to B. on B.'s covenanting to pay off mortgage debt due from A. on estate (No. 2):—Held, as between real and personal representatives of B., that the personal estate was primarily liable to the mortgage debt.

This suit was instituted for administering the estate of Francis Day, who died in July, 1863, intestate, leaving two infant children (one of whom was his heir at law), and his widow, his next of kin.

The only question of importance which was raised, had reference to the fund out of which a certain mortgage debt due from the intestate was primarily payable. The material circumstances were as follows:—The father of the intestate was seised of certain real estates, and he, in pursuance of an arrangement entered into between himself and his son, conveyed to the latter estate (A.), in consideration of the intestate covenanting to pay off all incumbrances upon the same, and also to pay to the mortgagees of another estate of the father (estate B.) the sum of 10,000*l.* charged upon the last-mentioned estate.

Malins, Q.C., and *Everitt*, for the infant plaintiff, the heir-at-law, argued that the sum of 10,000*l.*, which the intestate had entered into a personal covenant to pay, was primarily payable out of his personal estate. They cited *Hood v. Hood* (5 W. R. 755, 3 Jur. N.S. 684).

Greene, Q.C., and *E. K. Karlake*, for the defendant, the widow, contended that the 10,000*l.* ought to be considered as charged primarily upon estate (A.). The conveyance of that estate to the intestate was part of a family arrangement, and, under the circumstances, it would be unfair to throw this sum on the personal estate in exoneration of the realty. They cited *Elliot v. Edwards* (3 Bos. & Pul. 181), and *Barnwell v. Iremonger* (9 W. R. 88, 1 Dr. & Sm. 255).

STUART, V.C., considered the case of *Barnwell v. Iremonger* inapplicable to the present case. The fact of the conveyance being part of a family arrangement was, in his Honour's opinion, immaterial. The case was simply one of a real representative getting an estate which was yet to be paid for, and in such a case the purchase-money is primarily payable out of the personal estate of the ancestor.

[IN THE COMMON PLEAS.]

Nov. 25, 1865.

DE VRIES v. CORNER.

14 W. R. 262; 13 L. T. 636.

Shipowners' association—Salary of secretary—Liability of members for—Agreement—Construction of.

COMPANY.—*The plaintiff was the secretary of a shipowners' association, which was unincorporated, and was managed by a committee, which might be chosen from persons who were not members of the association. The rules provided that a certain entrance fee and annual subscription should be paid for each vessel; and that, if the funds of the association were not sufficient to meet its liabilities, the committee might make calls after 100 vessels had been entered. The plaintiff was appointed secretary by an agreement, under which he was to have a salary and commission; it contained a clause whereby he exonerated the managing committee from liability for his salary, &c., holding the association, subject to the rules and regulations, alone responsible. The association was dissolved. 100 vessels were never entered. In an action brought against a member of the association for salary, commission, and disbursements:—Held, that the plaintiff could not recover, as on the true construction of the agreement, he had agreed to look for payment to the funds of the association, and not to the individual members.*

This case was tried in the Mayor's Court of London, before the Recorder.

The plaintiff was the secretary of the International Shipowners' Protection Association, and the defendant was a member of the association, and also a member of the managing committee. The plaintiff sued him as a member of the association for 95*l.* 19*s.* 5*d.*, for salary and commission, and disbursements for the association. The association was composed of shipowners and other mercantile men, and its object was to insure to its members a cheap and speedy mode of protecting their interests in prosecuting and defending claims arising out of maritime contracts or casualties. The association was not registered and not incorporated; it consisted of more than twenty members. The association was formed on August 15th, 1864, and an agreement was entered into on behalf of the association on that day with the plaintiff, by Preston, who was the solicitor for the association, that the plaintiff should be their secretary, at 150*l.* per annum, and twenty per cent. per annum on the moneys thereafter received by the association from the different members for entrance fees, and ten per cent. on renewals. The agreement contained this clause:—The plaintiff "exonerates and indemnifies the present or future managing committee of the said association from all liability in respect of the salary and appointments of the said plaintiff as secretary as aforesaid, holding the said association, subject to the said rules and regulations, alone responsible for such salary and appointments."

The first meeting of the association was held on August 17th, 1864, when the rules were passed, the material ones of which were—

Rule 5.—An entrance fee of 2*l.* 2*s.* shall be paid on the entry of every steamship, and for every sailing-vessel a fee of 1*l.* 1*s.* Also an annual subscription for every steamship of 3*l.* 3*s.*; for every sailing-vessel exceeding 200 tons, 2*l.* 2*s.*; exceeding 100 tons and not exceeding 200 tons, 1*l.* 11*s.* 6*d.*; and not exceeding 100 tons, 1*l.* 1*s.* Such subscription to be paid at the time of entry for the first year ending December 31st, and for each succeeding year on or before January 1st.

By rule 6 the business was to be managed by a committee, who were appointed by rule 8.

Rule 9.—That the plaintiff shall be the first secretary of the association, upon the terms contained in the memorandum of appointment entered into between him and the solicitor on behalf of the association, dated August 15th, 1864, &c.

Rule 15.—In case of recovery of any sum of money for freight, demurrage, &c., or damages for collision, or otherwise, by or through the association; or where the same has been applied for by the solicitor, at the request of the member, the member shall pay to the secretary a compensation or commission, at the rate of ten per cent. on amounts not exceeding 50*l.*; and for amounts exceeding 50*l.* and not exceeding 200*l.*, at the rate of five per cent.; and on amounts exceeding 200*l.* and not exceeding 500*l.*, at the rate of two and a-half per cent. after the first 200*l.*, and one per cent. additional on the residue beyond 500*l.* The secretary or solicitor shall hold all sums recovered by him for such member until such commission is paid, or shall deduct the same from the amount recovered.

Rule 30.—In the event of the funds of the association not being sufficient to meet its liabilities, the committee shall have power to make calls upon the members of the association of such sum as they shall consider necessary to meet such deficiency, &c.; but no call shall be made until at least 100 vessels shall have been entered in the association.

The committee might be chosen from persons who were not members of the association. The association was to be incorporated.

There was no dispute as to the amount due to the plaintiff.

On June, 15th, 1865, the plaintiff wrote to Preston, resigning the secretaryship at three months' notice, as required by the agreement appointing him. The association was dissolved on August 21, 1865. 100 vessels were never entered.

The jury found a verdict for the defendant. Leave was reserved to the plaintiff to move to set this verdict aside, and for a new trial, on the ground that on the proper construction of the agreement appointing the plaintiff, the defendant, as a member of the association, was not personally exonerated from liability. Another ground was also reserved, which is immaterial.

Philbrick, in this term, obtained a rule accordingly.

H. James now shewed cause, and contended that the plaintiff agreed to look to the funds of the association so far as they would go, and not to the individual members, for "association" in the indemnity clause meant the "funds of the association;" and he undertakes to hold the association, subject to the rules and regulations, alone responsible. Rule 30 must therefore be incorporated into the agreement. [BYLES, J., referred to *Furnivall v. Coombes* (5 M. & G. 736.)] [H. James was then stopped by the Court.]

Philbrick, in support of the rule, contended that the defendant was liable as a member of the association, and that the question turned on rule 5; and that, if the contentions on the other side were right, the plaintiffs might go on serving the association for years without any remedy unless 100 vessels were entered on the books; and that there was nothing in the rules to limit the common law liability of the members; and that the "association" in the indemnity clause meant the members of the association, and not the funds of it; and that the association not being incorporated, there was nobody which could be sued in a corporate capacity.

ERLE, C.J.—I am of opinion that this rule should be discharged. The action was brought by the plaintiff on a contract alleged to have been made with the plaintiff by the defendant through his agent. The plaintiff proposed the association, which was to insure the members a cheap mode of protecting their interests in prosecuting and defending claims arising under maritime contracts and casualties. The funds were to be made up by entrance fees and by annual subscriptions. The commission on the amounts recovered was to be 10 per cent. on amounts not exceeding 50*l.*, and at a smaller percentage for larger amounts. An arrangement was made that, if 100 ships were borne on the books of the association, the committee should have power to make calls. The contract is perfectly clear, and the secretary, on the face of the contract, is to have great profit, for, if the concern be carried on he is to have 150*l.* a year, and 20 per cent. on the entrance fees, and 10 per cent. on renewals. It is apparent, on the face of the contract, that the plaintiff intended to look to the association and the funds of it for what he was to be paid. Many ventures are entered into now, in which the prosperity of the association is contemplated, and the idea of its not being prosperous never is entertained. In this case Preston, on behalf of the association, made the contract with the plaintiff to give him 150*l.* a year and a certain percentage, and he agrees to hold the association, subject to the rules and regulations, alone responsible for his salary and appointments; and in that contract it appears that the members of the committee are not to be liable to be called upon individually for his salary or appointments. It is no use to exempt the members of the committee from liability if they are to be liable as members of the association. The rules shew what the funds of the association are. It seems to me, therefore, that on the true construction of this contract the plaintiff is not entitled to recover.

WILLES, J.—I am of the same opinion. The plaintiff in this case sues for salary as the secretary of a club on a contract made with the committee of the club, but on considering the provisions of the agreement and rule 30, I think that the plaintiff cannot recover. If I had not arrived at this conclusion, it might have been necessary to consider whether this association were such a club as the club in the case of *Fleming v. Hector* (2 M. & W. 172), in which an action was brought by a tradesman against a member of the

club for goods supplied to the club, and it was held that, though the committee had power to contract for goods while they had funds in hand, yet they had no authority to pledge the personal credit of the members: or such a club as that in the case of *Cockerell v. Aucompte* (26 L. J. C.P. 194; 2 C. B. N.S. 440; 5 W. R. 633), in which it was held that the members of a coal club were liable to a coal merchant for coals, which were ordered by the secretary of the club, he being authorized to order them. It is unnecessary here to consider whether this club comes under the class of clubs in the first case, or under that in the second, because the plaintiff has agreed by the contract that his salary is to be paid, not by the members of the association, each member being liable to pay the whole amount, but according to the rules the club is to be incorporated, and by rule 30, if there be funds, the debts of the association are to be paid out of the funds, and it is only in the event of the funds failing that the members are to be called upon in proportion to their shares.

BYLES, J.—I am of the same opinion. I quite agree with what has fallen from my lord and my brother Willes, and I only wish to add that the present plaintiff, having notice of the rules and regulations of the association, is not in the same position as a stranger would be.

KEATING, J.—I am of the same opinion. It seems to me that there is no other rule to which this part of the agreement could refer but rule 30.

Rule discharged.

STUART, V.C., Jan. 16, 1866.

BACKHOUSE v. PADDON.

14 W. R. 273; 13 L. T. 625.

Partition suit—Inquiry as to title between co-defendants—Right to.

PARTITION.—*In a partition suit a defendant is not entitled of right to an inquiry as to title as against a co-defendant, such inquiry not being asked for by the plaintiff.*

This was a suit for partition of certain real estates at Ilfracombe, of which Elizabeth Vye, who died intestate, in April, 1863, was seised at the time of her death.

The title of the plaintiff to one undivided moiety of the estates was admitted. The other moiety was claimed by one of the defendants, John Birch Paddon, in coparcenary with the plaintiff, but his title was disputed by the other defendants in the suit, who alleged that his (J. B. Paddon's) mother was illegitimate, and who, in the event of such contention proving true, were entitled to the second moiety. The bill prayed partition in the usual form; and that, if necessary, an issue might be directed between the defendant, J. B. Paddon, and the other defendants, to try whether his mother was legitimate. John Birch Paddon, in his answer, stated that a mistake had been made in the entry of his mother's baptism, at a church in Liverpool, where she was baptized, which had given rise to the question of her legitimacy, and he submitted that such entry was not evidence of the date of her birth. The other defendants, in their answer, simply denied the fact of the legitimacy, and they advanced no evidence to support the contention, although some of them made affidavits on the subject as witnesses for the plaintiff.

Malins, Q.C., and *W. W. Karlake*, for the plaintiff.

Bacon, Q.C., and *Everitt*, for the defendant John Birch Paddon.

Greene, Q.C., and *Westlake*, for the other defendants, asked for an inquiry as to the legitimacy of John Birch Paddon's mother. They contended that the defendants were entitled, as of right, to such an inquiry, although they had adduced no evidence on the subject.

Malins, Q.C., for the plaintiff, stated that he asked for no inquiry.

STUART, V.C., said that the inquiry sought, by some of the defendants, as against a co-defendant, was not a matter of right. The plaintiff did not require any such inquiry, and his Honour would not direct it. No suggestion had been made that further material evidence existed upon the question. The defendants who sought the inquiry should have adduced what evidence they had in their power at the hearing, if they wished to impugn the legitimacy of the co-defendant's mother in the present suit. His Honour was satisfied that Mrs. Paddon was legitimate on the evidence before him, and stated that he would make a decree which should give the plaintiff all that he asked, and it would not be necessary to insert any reservation of a right to dispute the legitimacy as between the defendants.

The following order was accordingly made:—Declare that the plaintiff declining any issue or inquiry as to the legitimacy of the mother of the defendant, J. B. Paddon, his Honour is of opinion, on the evidence before the Court, that J. B. Paddon's mother was legitimate. Decree partition between plaintiff and J. B. Paddon. Mutual conveyances between them to be executed. Dismiss the bill without costs as against the other defendants.

STUART, V.C., Jan. 19, 1866.

IRELAND v. TREMBAITH.

14 W. R. 275; 13 L. T. 626.

Equity to a settlement—Scotch domicil.

HUSBAND AND WIFE.—*Where a fund is standing in a cause to the credit of a married woman whose domicil is Scotch, the Court will not, on petition, order it to be transferred to her husband, but will order a commission to take the consent of the wife. The practice of the Court is not affected by the 23 & 24 Vict. c. 86.*

This was a petition by Mr. and Mrs. Boase for transfer to Mr. Boase of a sum of 540*l.* Bank Annuities, standing in the above cause to the account of Mrs. Boase.

The petitioners' domicil was Scotch.

Bevir, for the petitioners, quoted the Act 24 & 25 Vict. c. 86, s. 16 (Conjugal Rights [Scotland] Amendment Act), and said that no claim on the part of the wife had been made.

STUART, V.C., said that the wife's right to an equity to a settlement attached to her as a suitor of the court, apart from any question of domicil. The recent Act only confirmed what was the invariable practice of the Court. There must be the common order for a commission to take the consent of Mrs. Boase to the transfer.

Wood, V.C., Dec. 21, 1865.

Re THE MINERA MINING COMPANY (LIMITED).

14 W. R. 276; 13 L. T. 791.

Joint-stock company—Companies' Act, 1862, s. 35—Register of shareholders—Rectification.

COMPANY.—B., on account of some shares which he held in a defunct company, was entitled to an allotment of shares in a new company, formed to take over the business of the defunct company. An allotment of shares was accordingly made to him, upon condition that he paid one shilling per share on the shares so allotted. He never made the payment, and the directors of the company forfeited his shares. Before this was done, B. became a bankrupt. He gave up the certificates of his old shares to the assignee, and was then told that they were worthless, but he did not inform the assignee of his right to have shares in the new company. After B. had obtained his order of discharge, the directors again made him an allotment of shares in the new company, one of the directors paying the one shilling per share for B. out of his own pocket. More than two years afterwards, the new company having become a flourishing concern, the assignee transferred these shares for value to R. The shares being registered in B.'s name, and the certificates being in his possession, the company refused to register the transfer. On motion by R. to compel them to do so, the assignee making no complaint of what had been done:—Held, that the company was justified in its refusal. The motion was refused with costs.

This was a motion made under the provisions of section 35 of the Companies' Act, 1862, that the register of members of the above company might be rectified by entering the name of T. W. Rymer on the said register in respect of 115 shares in the said company, which had been allotted and belonged to William Bott in respect of his estate and interest in a mine called the Minera Union Lead Mine at the time of his bankruptcy on the 19th November, 1861, or, at all events, in respect of twenty-five shares standing registered in the books of the said company in the name of Bott, and that Rymer might be at liberty to inspect the books of the company, and for other consequential relief.

It appeared from the evidence that the Minera Union Mining Company (Limited) took over the business of an old mining company in which Bott had some interest, and that negotiations for this purpose were going on in October, 1861. A meeting of the shareholders in the old company was held on the 17th October, 1861, for the purpose of seeing how many of them would join the new company.

At this meeting it was arranged to allot shares in the new company to the shareholders in the old company in proportion to their existing interests therein, but that if any of the old shareholders should decline to take shares in the new company, or should neglect to pay one shilling per share thereon, the shares so allotted to them should be considered as shares to be re-allotted at the discretion of the directors. Bott was not present at this meeting, but 115 shares were so allotted to him. A letter was, however, written to him by the secretary, calling upon him to pay the one shilling per share on the 115 shares. Bott never made this payment, or replied to the letter. In December notice was again sent to Bott to remit the amount of the call within ten days, and that in default of his doing so the directors would consider he declined to take the shares, but he in no way replied to this communication. On the 19th November, 1861, Bott had been adjudicated a bankrupt, and a Mr. Kinnear was appointed his official assignee, but no creditors' assignee was ever appointed. At a meeting of the directors of the new company on the 3rd January, 1862, they were informed of Bott's bankruptcy, and it was then

resolved by them as follows:—"That as Mr. Bott has not responded to the call of the company, and has been adjudicated a bankrupt, resolved, that the 115 shares allotted to him be forfeited shares, and be the property of the company, to be distributed as the directors shall hereafter arrange." Bott did not enter in his balance sheet, filed in the bankruptcy any shares in either the old or the new company, but according to his evidence it appeared that he gave up the certificates of his shares in the old company at the assignee's office, on the 2nd January, 1862, when he completed his balance sheet, but the clerk at the office, who assisted him with his accounts, told him not to enter them as they were valueless. Bott left the certificates there, and never saw them again. On the 15th January, 1862, he obtained his order of discharge.

On the 30th January, 1862, Bott attended at a meeting of the directors of the new company and asked that he might be permitted to have the shares which had been proposed to be allotted to him. The chairman said he would guarantee the payment of all calls, and on the strength of this the directors resolved that the 115 shares should be re-allotted to Bott. The chairman paid the one shilling per share out of his own pocket. The new company was not registered till 15th September, 1862. The shares ultimately became of some value; and on the 1st April, 1865, Kinnear, the official assignee, executed a transfer of the 115 shares to Rymer for valuable consideration. This transfer was not in the statutory form, and, in particular, it did not state the numbers of the shares to be transferred. It purported to be a transfer to Rymer of all Kinnear's interest in all and every the shares and interest of Bott in the company, which were, by virtue of such bankruptcy, vested in Kinnear as such assignee as aforesaid.

When Rymer tendered this transfer for registration at the company's office, they refused to register it. It then appeared that Bott had already transferred ninety of the 115 shares to purchasers for value, in whose names they were registered. The company, however, offered to register Rymer in respect of twenty-five shares if he would produce a proper transfer and the certificates of the shares. This he could not do.

Druce now moved that Rymer's name might be entered on the register in respect of the twenty-five shares. It is clear from the resolution of the directors of the 3rd January, 1862, that an allotment of 115 shares had actually been then made to Bott. As no notice was ever sent to the official assignee, the directors' resolution to forfeit those shares was an utter nullity. The allotment to Bott was in respect of his shares in the old company, and it was made prior to his order of discharge. Therefore the new shares vested in Kinnear. The fact that the certificates are not produced by Rymer is no valid objection to his registration, because Bott has not given them up. Nor is there any weight in the fact that the transfer is not in the statutory form; for Kinnear is not the registered owner, and therefore any form of assignment by him is enough to entitle his assignee to call on Bott to do what is necessary to perfect his title: *Re Bank of Hindustan* (13 W. R. 883; 34 L. J. Ch. 609). When Bott gave up the certificates of his old shares, he ought to have stated his title to an allotment of shares in the new company.

Rolt, Q.C., and *Mounsey*, for the company, and

Amphlett, Q.C. and *Brooksbank*, for Bott, were not called on.

It did not clearly appear whether the assignee had been served with notice of the motion, but it was agreed to treat the matter as if he had been served.

Wood, V.C., said that this was not a case in which the assignee came here to complain of any wrong done by the bankrupt. The bankrupt appeared to have been entitled to some shares in a defunct company, and this seemed to have given him a right to some interest in the new company, and might have given him an equity to enforce that right. And so the directors of the

new company seemed to have thought before the bankruptcy. So far this was in favour of Mr. Druce's argument that Bott ought to have informed his assignee of his interest. But what really happened was this: he did hand over the certificates of his old shares at the assignee's office. Then the new company came to a resolution to offer shares to the shareholders in the old company, upon a payment of one shilling per share. Upon the offer being made to Bott, he took no steps to comply with the conditions; and upon the 3rd January the resolution to forfeit the shares offered to him was passed. Up to this time no shares had ever been really allotted to him. The company was not even registered till September, 1862. Then on the 30th January, 1862, after Bott had obtained his order of discharge, some friends paid the one shilling per share for him; and the shares in question were allotted to him. If these were recent transactions and the assignee were here complaining of what Bott had done, it might possibly be a question whether Bott could retain the shares, he not having disclosed to the assignee his right to some interest in the new company. But in the actual state of circumstances it appeared that two years afterwards Rymer took what was really a conveyance of such title to the shares as the assignee had, accompanied by a full indemnity to the assignee. The case in its inception would have been doubtful, even if Kinnear had been here to complain. But no fraud was alleged against Bott, and in fact no steps had been taken in the matter until the shares became valuable. The Court could not exercise this special jurisdiction in any other way than it could exercise its jurisdiction to enforce specific performance of a contract. This application must be refused with costs.

[IN THE COURT OF QUEEN'S BENCH.]

Jan. 20, 1866.

TRIGGS, *appellant*, v. LESTER, *respondent*.

14 W. R. 279; L. R. 1 Q.B. 259; 13 L. T. 701.

"Conducting or driving"—Conveying cattle in a van—Islington Parish Act—Drover.

STATUTE.—*By the Islington Parish Act, 1857, it is forbidden to conduct or drive cattle upon any street, road, or pathway within the parish of Islington between the hours of twelve on Saturday night and twelve on Sunday night:—Held, that the words "conduct or drive" did not apply to the conveyance of cattle in a van.*

This was a case stated on a complaint by the respondent against the appellant for conducting or driving cattle upon certain roads within the parish of Islington between the hours of twelve o'clock on Saturday night and twelve o'clock on Sunday night, contrary to the provisions of the Islington Parish Act, 1857 (20 & 21 Vict. c. xxi.).

By the 3rd section of that Act it is enacted "that it shall not be lawful for any drover or other person to conduct or drive in, upon, or through any of the roads, lanes, streets, squares, or other places, or on or over any of the footpaths which now are, or hereafter may be, within the parish of Islington, any oxen, sheep, swine, or other cattle between the hours of twelve of the clock on any and every Saturday night throughout the year, and twelve of the clock on any and every Sunday night throughout the year;" and the section imposes a penalty upon a drover or other person who shall be guilty of such offence.

It was proved that the appellant was driving horses which were drawing

a van containing cattle. It was contended on behalf of the appellant that this was not a conducting or driving within the statute. The magistrate convicted the appellant, subject to the opinion of the Court on the above case.

Underdown was heard in support of the conviction.

Besley, for the appellant, was not called on.

The COURT¹ being of opinion that the facts proved did not constitute a "conducting or driving" within the meaning of the statute.

Conviction quashed.

[IN THE COMMON PLEAS.]

Nov. 15, 1865.

WINTER v. DUMERGUE.

14 W. R. 281; 12 Jur. N.S. 56: affirmed, [1866] E. R. A.; 14 W. R. 699;
12 Jur. N.S. 726 (Ex. Ch.).

Vendor and purchaser—Lease—Assignment of, subject to consent of lessor—Failure to obtain consent—Rescission of contract.

LANDLORD AND TENANT.—*H.*, being lessee of certain premises, under covenant not to assign without the written consent of the lessor, became bankrupt, and his term was sold by order of the Court of Bankruptcy, and assigned to the defendant. The defendant agreed to sell the residue of the term to the plaintiff, subject to the covenants in the original lease, and 750*l.*, part of the purchase-money, was to be paid before the completion of the purchase. If the defendant was unable to obtain the lessor's consent to the assignment, she was to be at liberty to rescind the contract, and was thereupon to return the 750*l.* The plaintiff paid the 750*l.*, but the lessor refused to grant the defendant license to assign, though he offered the plaintiff a fresh lease for the same term and at the same rent, but containing fresh covenants. The defendant assisted the plaintiff in his endeavours to obtain a new lease:—Held, that the defendant had recognised her duty to obtain the lessor's license to assign to the plaintiff, and that, as she had not done so, the plaintiff had a right to rescind the contract and claim back the deposit he had paid; for as both parties had negotiated for the new lease and failed, they were remitted to their original rights.

This was an action to recover 750*l.* for money had and received by the defendant for the use of the plaintiff, and the defendant pleaded the general issue. At the trial before Erle, C.J., at the London sittings after last Hilary Term, a verdict was found for the plaintiff for the amount claimed, subject to a case for the opinion of the Court.

The case stated the following facts:—

In the summer of 1863 the plaintiff was engaged in the formation of a joint-stock company, which had for its object, *inter alia*, the provision of a central cooking depôt for the working classes, and the establishment of promenade concerts for their recreation; and with a view to carrying out the company's plans he was anxious to obtain a lease of some large buildings in a central situation. The fee-simple of St. Martin's Hall, Long Acre, was in the Warden and Commonalty of the Mystery of Mercers, who, in 1852, leased it to John Hullah for sixty-four years at a yearly rent of 100*l.*, and he covenanted

(1) Cockburn, C.J., Blackburn and Lush, JJ.

that he, his executors, administrators, and assigns, would not, except by will, assign or underlet the premises, or any part thereof, without the written consent of the lessors, and would not use the demised premises for any other purpose than as a music hall, or for public meetings of a religious and loyal character, or for meetings for the discussion of subjects of science and literature, or for the exhibition or sale of works of art.

On the bankruptcy of Hullah in 1860 the defendant purchased, and, in July, 1861, became assignee of Hullah's term, which had been sold by order of the Court of Bankruptcy.

By articles of agreement, dated October 23, 1863, the plaintiff agreed to purchase St. Martin's Hall from the defendant for the residue of the term of sixty-four years from September 29, 1852, subject to the rent of 100*l.* reserved in the lease by the Mercers' Company to Hullah, and "subject to the covenants and conditions therein contained, at the price of 15,000*l.*, to be paid by the purchaser in manner following, that is to say, 500*l.*, part thereof, to be paid to the vendor, on the execution of these presents, 250*l.*, further part thereof, on the 1st of December next, and 14,250*l.*, residue of the purchase-money, on the 1st of February, 1864. The vendor shall, provided the said sum of 250*l.* shall be paid on the said 1st day of December aforesaid, on or before the 15th day of December aforesaid, deliver to the solicitor of the purchaser an abstract of her title to the premises, commencing with the said lease under which the vendor holds." The purchaser was not to object to the title of the lessors, and the vendor and other necessary parties were to execute a proper assurance of the premises on payment of the 14,250*l.* on the 1st of February, 1864. If the purchaser insisted on an objection which the vendor could not remove, "or if the vendor shall be unable to procure the lessors' consent to the assignment to the purchaser, the vendor may, by notice in writing, to be given to the purchaser or his solicitor, at any time, and notwithstanding any negotiation or litigation in respect of any such objection or requisition as aforesaid, rescind this contract, and shall thereupon return to the purchaser the sum of 500*l.*, paid by him on the execution of these presents, and the said sum of 250*l.* if paid by him as hereinbefore stipulated." If the purchaser should fail to pay the 250*l.* on the 1st of December, and the residue of the purchase-money as aforesaid, and otherwise to complete his purchase, according to the several conditions, on the 1st of February, 1864, then the 500*l.*, and the 250*l.*, if paid, were to be forfeited to the vendor, and the contract to be absolutely void.

The two deposits of 500*l.* and 250*l.* were duly paid by the plaintiff, who made no objection to the defendant's title. By a subsequent agreement between the plaintiff and the defendant, the time for the completion of the purchase was extended to the 15th of February, and it was to be still further extended from time to time, if, by reason of any delay on the part of the Mercers' Company, the license to assign the lease was not obtained in time for the purchase to be completed at that date. After protracted negotiations the Mercers' Company finally, on the 11th of March, refused their license to assign Mrs. Dumergue's lease to the plaintiff, but were willing, "upon Mrs. Dumergue's surrendering the present lease, to grant a new lease to Mr. Winter for the residue of the term of the present lease at the existing rent. Such new lease to contain all the covenants of the present lease, and in addition further covenants" forbidding the use of any part of the premises for dancing, or as a public-house, &c., but permitting the conversion of the lower part of the building into a cooking depôt to the satisfaction of the company's surveyor. Thereupon the plaintiff gave notice to the defendant that he objected to become the covenantor of a new lease, when he had only contracted for the assignment of the old lease, and that, under the circumstances, he should adhere to a notice he had previously given, that, if the license was not obtained, and the assignment completed by the 18th of March, he should treat the contract as at an end. On the 28th of April the plaintiff gave formal

notice that he had rescinded the contract and claimed the re-payment of his deposit of 750*l*.

The Court to be at liberty to draw inferences of fact, which a jury ought to have drawn.

The question for the Court was whether the plaintiff was entitled to recover from the defendant the said deposit of 750*l*.

It further appeared from the case that the defendant knowing that the plaintiff intended to set up a cooking apparatus, &c., in the hall, had joined him in endeavouring to obtain a lease from the Mercers' Company, which would sanction the hall being applied to such a purpose.

Coleridge, Q.C., for the plaintiff, contended that, irrespective of the terms of the agreement, the defendant was bound to get the license to assign as part of the title she contracted to make for the purchaser, as otherwise she could not make a valid assignment at all, and cited *Sugd. Ven. & Pur.* 11th ed. pp. 390, 495, 253; *Lloyd v. Crispe* (5 Taunt. 249); *Stray v. Russell* (7 W. R. 641; 1 El. & El. 888); *Taylor v. Stray* (5 W. R. 528; 2 C.B. N.S. 175, 197). It may be said that, as there has been an assignment, the doctrine in *Dumport's case* (4 Rep. 119), applies, and the lessor's right of re-entry is gone. But an assignment of a bankrupt's lease is voluntary, and not such an assignment as to be within the doctrine (*Doe v. Bevan*, 3 M. & S. 353), so that there never has been a breach of the covenant. And, secondly, if there has, it is cured by 22 & 23 Vict. c. 35, s. 1.

Raymond, contra.—The purchaser can only put an end to the contract on one of two conditions, viz., if the vendor fails to make a good title, or if there is a condition in the contract itself that on certain things happening either party may put an end to it. If neither of these conditions exists, the contract can only be put an end to by consent of both parties. The statute 22 & 23 Vict. c. 35, applies to a license given by the lessors or to any act of theirs, but not to an assignment under the bankrupt law. The license was no part of the title the defendant was bound to make, though it would have been otherwise with regard to Hullah. The plaintiff so modified and protracted the original contract that he disabled himself from falling back on it and rescinding it.

Coleridge, Q.C., was not heard in reply.

ERLE, C.J.—I am of opinion that the verdict should stand for the plaintiff to recover the deposit he has paid. It was paid on a contract by the plaintiff to purchase leasehold premises from the defendant. The defendant held these premises under the Mercers' Company, and was bound not to assign them without license, on condition that if she did, the lessors might re-enter. In the contract between the plaintiff and the defendant she, as vendor, recognised her duty to obtain a license to assign, because she stipulated that if she failed to obtain such license, she should be at liberty to rescind the contract. That is, I think, an admission between the vendor and vendee that it was the duty of the vendor to get a license to assign, though I agree with Mr. Raymond that what follows is an optional privilege to rescind given to the vendor. I am also of opinion that by law the vendor of a lease, of which no valid assignment can be made without the consent of the lessor, is bound to make a good title, for which it is positively necessary to obtain the consent; and that otherwise there would be a failure of the condition to obtain a title. Here it is found that the vendor has been unable to get a license to assign, and that the attempts have been continued down to long after the time mentioned in the contract; and so that it never at any time was in the power of the vendor to get from her lessors a license to assign to the vendee. That, I think, was a failure of a condition precedent between the vendor and vendee, and of the essence of the contract; and if you fail to make good a step in the series of things to be done under the contract, which step is an essential part of the contract, the other side has a right to say the

contract is at an end and to treat it as rescinded; and, if it is lawfully rescinded, to claim back the deposit paid on the assumption that it would be performed. This point of the case is also disposed of by reference to *Dumpro's case*, for an assignment in law under the bankruptcy does not destroy the right of the lessors. But one of the points is sufficient to enable the vendee to recover. I believe that if the defendant had stood on her contract, and not listened to the plaintiff's application for his lease or to his scheme for setting up a cooking apparatus, she might have performed her contract. In the course of the treaty for the lease facts came out which induced the company to refuse their license to assign to the plaintiff. The defendant lost a considerable contract through her endeavours to further the plaintiff's wishes, but I cannot find a needle's point of ground on which I can give judgment in her favour.

BYLES, J.—On looking at the law of the case, it is clear that the defendant must make a title. The transfer of the lease would only be made good by her obtaining a license, and the necessity for the license still continued, notwithstanding Hullah's bankruptcy, both on the authority of *Doe v. Beavan*, and under the provisions of Lord St. Leonards' Act. The defendant was therefore bound to get a license, which she did not do. On the contrary, the Mercers' Company proposed to grant a new lease to the plaintiff on other terms—he was to be lessee, and not assignee, and therefore would be liable on the covenants for ever, subject to his indemnity being good or bad. It is said that negotiations for a lease took place in the interval, but both parties negotiated for that which failed, and were then remitted to their original rights, which required the defendant to make a title. This she did not do, and therefore at law the plaintiff must recover.

KEATING, J.—I am of the same opinion. If the company had given the ordinary license to assign, after they had been affected with notice of the purpose for which the plaintiff wanted the premises, they would have found it very difficult to enforce the prohibitions in the original lease as against the plaintiff.

Judgment for the plaintiffs.

[CROWN CASES RESERVED.]

Jan. 10, 1866.

REG. v. LOW.

14 W. R. 286; 13 L. T. 642; 12 Jur. N.S. 618; 10 Cox C.C. 168.

Doubted, *R. v. Dartnell*, 1869, 20 L. T. 1020 (N.P.).

Larceny as servant—False entries by warehouseman of monies paid to workmen—Evidence.

CRIMINAL LAW.—*The prisoner was warehouseman to a manufacturer, and it was his duty to give out materials to and pay the workmen. Two or three times a week he received cash from his employers, for which he accounted at the end of each week, giving a detailed account of the sum paid to each workman, and a statement of the aggregate sums received and paid; and carrying forward the balance for future payments. The money was kept in a separate till under his own key, and he had no authority to make any other payments. On three occasions he designedly made false entries in his account of larger sums as paid to a workman than those which he had in fact paid, and appropriated the excess:—Held, that he was properly convicted of larceny as servant.*

Case reserved from the Warwickshire Sessions, January, 1866, by T. C. Sneyd Kyndersley, Deputy-chairman :—

Henry Low was indicted for larceny as a servant to Charles Peters and others. The indictment, in three counts, charged the prisoner with the following larcenies, viz., stealing, on 18th August, 1865, 1s. 4d.; on 24th August, 1865, 1s. 4d.; on 16th September, 1865, 1s. 8d. The facts were as follows :—

The prisoner was warehouseman, at weekly wages, to the prosecutors, who are ribbon manufacturers at Coventry. It was his duty to superintend the manufacture of ribbons; to give out the material, and pay the workmen when they brought back the finished work. In order to enable him to make these payments he received, two or three times a week, cash from his employers, and at the end of each week he accounted with them for the several sum received and paid, giving both a detailed account of the sum paid to each individual workman by name, and also, at the end of the same week, a statement of the aggregate sums received and paid during the week, and carrying forward, a balance applicable to the payments for the following week, whatever sums remained in his hands. The money was kept in a separate till, under his own lock and key, and he was not authorised to make any other payments whatever on account of his employers. The book in which the several entries was made was entirely in his own handwriting. He left the service of his employers at the end of October, 1865, but was allowed four or five days afterwards finally to balance his accounts. An investigation subsequently took place, and the present indictment, with others, was the result.

From the evidence adduced on his trial it appeared that, on 24th August, David Coley, a workman to whom materials had been given out by the prisoner, took back to him finished work, and was paid by him according to the price previously agreed upon between them—the sum of thirteen shillings. Under the same date in the account furnished by the prisoner at the end of the week to his employers was an entry made by him of 14s. 4d., paid to David Coley for the same quantity of work, and the balance carried forward to the next week was calculated upon that sum instead of 13s. actually paid.

On the 16th of September the money paid to Coley by the prisoner was 13s., and the sum charged to his employers was 14s. 8d.

On 14th August the wife of Coley received from the prisoner for her husband's work 13s., and the entry in the prisoner's book was 14s. 4d. In the two latter cases the balance was also calculated on the larger sum.

The prisoner was indicted for the larceny of these three several sums of one shilling and fourpence, one shilling and eightpence, and one shilling and fourpence, being the difference between the sums paid by him and those charged to his employer. I directed the jury that assuming the statements of Coley and his wife to be accurate, the question for their consideration was whether the false entries in the prisoner's weekly accounts were made by him designedly and fraudulently, and with intent to appropriate the above sums to his own use, and whether, in fact, he did so appropriate them, and I told them that if they were satisfied in the affirmative of these questions, the acts of the prisoner, in my opinion, constituted the offence of larceny as a servant. They returned a verdict of guilty; but at the request of the prisoner's counsel, who had contended that his acts did not in law amount to larceny, the Court determined to reserve the question of law for the consideration of the Court for Crown Cases Reserved, whether my directions to the jury were correct, and whether the prisoner was properly convicted of larceny as a servant. The prisoner was discharged on recognizance of bail to appear at the next sessions and receive judgment if called upon, and I have very respectfully to crave the opinion of the Court upon the above case.

Chandos Leigh for the prosecution, was not called on. No counsel appeared for the prisoner.

ERLE, C.J.—We have all read this case and can scarcely conceive how any learned counsel could have the learning, courage, or countenance to get it reserved.

Conviction affirmed.

[LORDS JUSTICES.]

Jan. 27, 1866.

Re BROWSE'S TRUSTS.

14 W. R. 298; 14 L. T. 37; 12 Jur. N.S. 153.

Practice—Selection of court—Cons. Ord. VI. r. 6.

COMPULSORY PURCHASE.—Where it is sought to deal by one order with two funds in court, which have been separately dealt with by different branches of the Court, application should be made to that branch of the Court in which the first of the former orders has been made, and the matter in which the latter order has been made should be transferred to that branch of the Court.

Orders dealing with a fund already dealt with by the Court must be made in that branch of the court in which the former order was made.

In this case land, subject to the trusts of a will, had been taken by a railway company, and an order had been made by Vice-Chancellor Stuart for investment of the purchase-money and payment of the dividends. Subsequently land, subject to the trusts of a will of another member of the same family, had been taken by the same company, and a similar order had been made by Vice-Chancellor Wood.

A petition had now been presented to Vice-Chancellor Wood in the matter of the trusts of both wills, asking for payment out of the purchase-money. His Honour made the order asked for, but, entertaining some doubt whether he had jurisdiction to make an order in both matters, desired that the case might be mentioned to their Lordships.

Archibald Smith, for the petitioners, cited *Re Bilston Curacy* (10 W. R. 516), *Re Hayter's Trusts* (10 W. R. 557; Cons. Ord. VI. r. 6).

TURNER, L.J., said it could not be intended that every matter in respect of a purchase by the same railway company should be confined to the same branch of the Court, but after an order had once been made in a matter of this kind, subsequent orders relating to the same fund must be made in the same branch of the Court as the former order.

In the present case it appeared that the first order had been made by Vice-Chancellor Stuart, and therefore the present application should have been made to His Honour, and the matter in which an order had been made by Vice-Chancellor Wood should have been transferred to the court of Vice-Chancellor Stuart. But, as in this case, Vice-Chancellor Wood had already granted the order subject to the present application, the first matter might be transferred to His Honour's Court, and the order so made in both matters might stand.

KNIGHT BRUCE, L.J., concurred.

Their Lordships desired that the consent of Vice-Chancellor Stuart to the transfer should be asked.

Wood, V.C., Jan. 18, 1866.

HARRIS v. JOSE.

14 W. R. 303; 13 L. T. 699.

Pleading—Demurrer—Inclosure Commissioners—Statute 8 & 9 Vict. c. 118—Jurisdiction.

COMMON.—*An application had been made, under the statute 8 & 9 Vict. c. 118, to the Inclosure Commissioners, to inclose certain lands alleged by the parties applying to be common lands, but alleged by the plaintiff to be his own exclusive property. The Commissioners had given time to the plaintiff to vindicate his rights, but he brought no action at law. He afterwards filed his bill to restrain the defendants from proceeding before the Commissioners:—Held, upon demurrer, that this Court had no jurisdiction to interfere.*

This was a demurrer.

The material allegations of the bill were to the following effect:—

By the will of Thomas Harris deceased, dated the 11th August, 1843, he devised to the defendant Langford, and one Kniver (since deceased) in fee, an estate called Wringford, with the appurtenances, upon certain trusts therein mentioned, for the benefit of the plaintiff, with certain trusts in remainder for the benefit of the defendant Thomas Hawke, in case the plaintiff should die without leaving lawful issue.

Thomas Harris died on the 15th November, 1843, and Kniver died in April, 1863. Some pieces of land called Twelve Acres, and one-third part of Little Down, had from time immemorial been held and enjoyed as appurtenant to the estate called Wringford, and passed, as the plaintiff submitted, by the devise of that estate by Thomas Harris's will. The tenement called Wringford consisted of a messuage and arable and pasture land, comprised about forty-seven acres, and had (since the expiration of a lease in 1853) been held by the trustees upon the trusts of Harris's will, without interruption by any person. The piece of land called Little Down contained twenty-four acres or thereabouts, and was formerly land held in common, but by indenture of partition, dated 17th September, 1861, part thereof (being about six acres) was allotted to the plaintiff in fee. The piece of land called Twelve Acres, contained 150 acres, and had (ever since the expiration of the said lease of Wringford) been occupied with Wringford by the defendant Thomas Hawke, as tenant of the plaintiff. The piece of land called Twelve Acres had always been and still was used for pasturing sheep and cattle. It adjoined on the south-western part thereof to certain common land called Beeny Common, which was occupied and used for the like purpose by the defendants Stephen Jose, Hellyer, Garnier, Rawle, Hawke, and Nottle, or their tenants. Twelve Acres adjoined on the eastern part thereof to certain other common land called Gunwennap Common, which was occupied and used for the like purpose by the defendants Hellyer, Garnier, William Jose, and Rawle, or their tenants. The fences dividing Twelve Acres from Beeny Common and Gunwennap Common had long since fallen into disrepair, and the sheep and cattle of the two sets of defendants, lastly before-mentioned, or other the tenants for the time being of Beeny Common and Gunwennap Common, had strayed into and pastured on Twelve Acres, and the sheep and cattle of the plaintiff, or other the tenant for the time being of Twelve Acres, had in like manner strayed into and pastured on Beeny Common and Gunwennap Common. The plaintiff, or other the tenant of Twelve Acres, had always stocked such land to the full extent thereof, and no objection had ever been made by any person in respect of such stocking. The defendants S. Jose, Hellyer, Garnier, Rawle, and Hawke had lately applied to the Inclosure Commissioners to inclose Beeny Common and Gunwennap Common (being lands subject to be inclosed under the provisions of the Inclosure Acts) and the commissioners on the 15th August, 1864, made a provisional order for the inclosure thereof. The same defendants afterwards

represented to the commissioners that Twelve Acres was subject to rights of common, and that it in fact formed part of Beeny Common, and ought to be included in the inclosure thereof. The plaintiff had given notice to those defendants and likewise to the commissioners, that he alone, or his trustees, the defendant Langford, was entitled to Twelve Acres. The commissioners on receipt of this notice required the plaintiff to do some act in vindication of his title, and he thereupon, in February, 1865, commenced re-building the fences of Twelve Acres, and drove off the sheep and cattle of all persons other than himself and of his then tenant. But the said defendants pulled down the fences, and again drove in their own sheep and cattle on the said piece of land. Under the circumstances aforesaid the said Inclosure Commissioners threatened and intended forthwith to proceed to inclose Twelve Acres to the exclusion of the plaintiff. The plaintiff had offered to submit his title to Twelve Acres to the Commissioners and to be bound by their decision, but such offer had been refused. The plaintiff submitted that if the said defendants, or either of them, had acquired any common right in Twelve Acres, such common was only such limited right as is known as *common pur cause de vicinage*, and that the plaintiff had full right himself to such land, and that by such inclosure all right (if any) of the said defendants would be absolutely extinguished. The plaintiff also charged, that if by lapse of time and long usage, the said defendants or either of them had acquired any valid and indefeasible right of common in Twelve Acres, the plaintiff or his said trustee in his right had in like manner acquired a similar right in Beeny Common and Gunwennap Common, and that he was entitled upon any inclosure thereof to have an adequate share of Beeny Common and Gunwennap Common allotted to him or to his said trustee in trust for him accordingly.

The bill prayed that the Court would declare the rights of the plaintiff, and of his said trustee the defendant Langford, in Twelve Acres, Beeny Common, and Gunwennap Common, and that in the meantime the defendants—Stephen Jose, Hellyer, Garnier, Rawle, Hawke, and Nottle—might be restrained from proceeding to inclose, or promoting the inclosure, of any portion of the premises aforesaid, and that the said defendants, or some, or one of them, might pay the costs of the suit.

The bill was filed 12th December, 1865.

The last named defendants demurred for want of equity.

Giffard, Q.C., and *Bevir*, for the demurrer.—The bill shows that the plaintiff has only an equitable interest under the testator's will, his trustee having the legal estate; and there is no allegation that the trustee will not sue, or will not allow the plaintiff to use his name. But even if the plaintiff has an absolute legal title to Twelve Acres, there is no equity. He alleges a legal trespass, and his remedy must be at law. The General Inclosure Act, 8 & 9 Vict. c. 118, gives power to the Inclosure Commissioners to decide the question.

Rolt, Q.C., *C. Barber*, and *A. J. Lewis*, for the bill.—The legal right cannot be enforced except by this Court, and if the trustee himself were the plaintiff, the Court would assist him. The bill shows that the plaintiff has not had such an exclusive possession of Twelve Acres as to prevent the Commissioners from entering. At the same time the allegations show that he or his trustee has the legal title. The Commissioners have no power under the Act to determine a question of title. [Wood, V.C.—Why do you not bring an action of trespass?] The Commissioners will proceed without waiting for the result of any such action. And such an action would not settle the question. Ejectment would have to be brought against every commoner. There will be irreparable damage to the plaintiff if the proceedings before the Commissioners are allowed to go on. The powers of the Act are being used for a purpose to which it does not apply. It would be impossible for the plaintiff to carry in any claim for an allotment before the Commissioners, for by so doing he must admit the defendant's claim to common rights over Twelve Acres; and if he carried in a claim to the fee simple of Twelve Acres he would be precluded from taking in a second claim in

respect of common. They cited *Turner v. Blamire* (1 W. R. 190, 1 Drew, 402); *London and North-Western Railway Company v. Smith* (1 M. & G. 216); *Rigby v. Great Western Railway Company* (C.P. 1 Coop. 1).

WOOD, V.C. (without calling for a reply), said that the demurrer must be allowed. The plaintiff did not seem quite to know his own case; he wished to claim the fee-simple, and if he did not succeed in that, he then desired to set up common rights. The Commissioners had very fairly said to him, "if you wish to assert your title to the fee, do something to vindicate it." The Commissioners might very reasonably say that they could not stop their proceedings, because some man chose to make an assertion of title, and no doubt there would have been a certain amount of hardship on the plaintiff if he had been obliged at once to send in a claim as commoner, or lose his right. But the fact was that the Commissioners told him to do something to assert his right, and they gave him plenty of time, at least eleven months it appeared, for that purpose. They could not give him an indefinite time when he was doing nothing. The case came simply to this—a number of persons, who had no privity with the plaintiff, asserted their title to common; there was no other equity against them. If the Commissioners were acting wrongfully there might be a ground for interference; but there was nothing of that sort here. The cases where the Court had restrained persons from using an Act of Parliament inequitably were different from the present case. When Parliament had constituted a tribunal, how could this Court prevent persons, who were entitled to do so, from applying to that tribunal? If it were a case of irremediable damage, as in the case of the Great Western Railway Company, it would be a very different thing. Here there would be no irremediable injury at all, the plaintiff would only be put to bringing his ejectment after the award of the commissioners. If the Court could interpose in a case of this kind, then the mere assertion by any one commoner of a title in fee would be enough to stop the whole proceeding of inclosure. It would be very mischievous to interfere in this way. The demurrer must be allowed with costs.

Wood, V.C., Jan. 29, 1866.

MOORE v. HARPER.

HARPER v. HARPER.

14 W. R. 306; 14 L. T. 14.

Practice—Evidence—Statute 15 & 16 Vict. c. 86, s. 59.

EVIDENCE.—*The plaintiff in one suit put in his answer to the original bill in another suit respecting the same matter. The bill in the second suit was then amended, and the plaintiff died before putting in his answer to the amended bill. Replication was filed in the second suit, and the first suit was brought on by way of motion for decree. An order was obtained to use the evidence in the second suit on the hearing of the first:—Held, that the plaintiff's answer to the original bill was not admissible as evidence.*

These two suits related to the same matter, and came on together. The first came on by way of motion for decree; in the second, replication had been filed. Moore, the original plaintiff in the first suit, put in his answer to the original bill in the second suit. This bill was afterwards amended, and Moore died before putting in his answer to the amended bill. An order had been obtained to use the evidence in the second suit upon the hearing of the first, saving all just exceptions.

Sir R. Palmer, A.G., for the plaintiffs in the first suit, proposed to read Moore's answer in the second suit as evidence in the first suit.

Daniel, Q.C., for one of the defendants in the first suit, objected.

Wood, V.C., referred to statute 15 & 16 Vict. c. 86, s. 59, and said he saw nothing in the Act to make this answer admissible as evidence. It was not even evidence in the second suit.

Wood, V.C., Jan. 30, 1866.

HALDANE v. ECKFORD.

14 W. R. 306.

Practice—Supplemental order—Statute 15 & 16 Vict. c. 86, s. 52.

PRACTICE.—*Where a change of interest takes place by means of probate of a will being granted to one of four executors, who did not originally prove, he may be brought before the Court by the common supplemental order.*

The bill in this suit was filed against three out of four executors of a will, the fourth being in India, and not having proved the will. He afterwards returned to England and proved. It was then sought to make him a party to the suit by the common supplemental order, but the Registrar declined to draw up the order without the sanction of the Court.

Mackeson now mentioned the matter. The suit, as originally instituted, was perfect: *Dyson v. Morris* (1 Ha. 413), and the case falls within the terms of section 52 of the statute 15 & 16 Vict. c. 86.

Wood, V.C., said that he thought the result of the decisions was that whenever the change of interest had taken place by virtue of something altogether *dehors* the jurisdiction of this Court, it was a proper case for the common supplemental order. The probate of a will was of this nature. It would be different if it were a matter which could be tried here.

[PROBATE.]

Jan. 23, 1866.

Re J. H. ROLAND.

14 W. R. 317.

Will—Misdescription—Parol evidence.

WILL.—*Where there is a person corresponding in name and address, but not in other particulars, to the description of the legatee contained in the will, and another person corresponding in every particular except the Christian name, the Court admitted parol evidence to show that the latter was the person intended to be benefited.*

The testator gave a bequest to "James Graham," describing him as a "grocer" of Scotland-row. It appeared that there were two persons residing in that place of the name of Graham—one James Graham and the

other John Graham. It also appeared that the former was in no way connected with or known to the plaintiff, and had no reason to expect anything from him. It appeared further that he was not a grocer, but a fishmonger. The other—John Graham—was known to the testator, and it was given to be understood that the testator intended to leave him something in his will. He was a grocer and his shop was next to that of the testator. There were affidavits from both John Graham, the applicant in the present case, and James Graham, setting forth the above facts.

Middleton, Dr., now moved for grant of probate of the will of the testator with the word "James" corrected into "John."

Sir J. P. WILDE.—It is clear that when a description in a will does not apply to the person apparently intended to be benefited, I must admit parol evidence to show that it was a mere misdescription. Probate may therefore pass as prayed for.

[MATRIMONIAL.]

Jan. 31, 1866.

BROWN v. BROWN.

14 W. R. 318.

Dissolution of marriage—Cruelty—What sufficient evidence of.

DIVORCE AND MATRIMONIAL CAUSES.—*Where a husband threatened to cut his wife's throat, but did not accompany the threat with any act of violence, and subsequently, after cohabitation had ceased, broke into the house in which his wife was living, and kicked through her bed-room door:—Held, that these acts did not amount to legal cruelty.*

This was a petition for the dissolution of marriage brought by a wife against the husband on account of his adultery coupled with cruelty.

The respondent did not appear.

The marriage was celebrated on the 1st October, 1863, and after its celebration the petitioner and respondent lived at the house of Mrs. Bruxby, the petitioner's mother who kept an inn in Leicestershire. Early in 1865 the petitioner's mother expostulated with the respondent on account of certain familiarities which had been observed between the respondent and a maid-servant who was living in the house. Shortly afterwards a dispute arose between the petitioner and respondent, and on that occasion the respondent threatened to serve the petitioner as Baum had served his wife (Baum being a person who had lately been convicted of cutting his wife's throat). On the following day a razor case was found in the respondent's room between the bed and the mattress, but there was no evidence to show who had put it there.

An act of adultery was proved to have been committed by the respondent on the 7th April, 1865, in consequence of which he left the house where his wife and her mother were residing. Early on the following morning he came back and demanded admittance, this was refused, and he then entered the house through a window, and came to the room in which his wife and her mother were sleeping and tried to get in. On being refused he kicked in the panels of the door. He then went to bed in another room in which a carving knife was found.

Swabey, Dr., and *Jacques*, for the petitioner.

No one appeared for the respondent.

WILDE, J.O.—The charge of adultery is clearly made out, but there is no evidence of anything which amounts to legal cruelty. There is no evidence of any disagreement having taken place before the maidservant came to the house, and up to that time no act had been done by the respondent which could be charged as legal cruelty. He then said he would serve the petitioner as Baum had served his wife; but this was said in a moment of rage, was not accompanied by any act of violence, nor was the petitioner placed in any danger. A razor was subsequently found in the respondent's bed, but that was not shown to have been put there by the respondent. The next act of cruelty relied on took place on the occasion of his coming back and kicking the door after the cohabitation had ceased; but by doing this he only claimed his right to be where his wife was. The petitioner is not entitled to a dissolution of the marriage, but is entitled to a decree for judicial separation on account of the adultery.

Decree for judicial separation

Wood, V.C., Jan. 22, 1866.

EACHUS v. MOSS.

14 W. R. 327.

Demurrer—Injunction—Exclusion of principal by agent.

PRINCIPAL AND AGENT.—M., the manager of E.'s business, was allowed by him to send bills out to the customers in his (M.'s) own name alone. M. afterwards locked E. out of the business premises, and E. several times had to break the lock to get in. M. made an assignment of the premises and stock-in-trade to P., and P. advertised them for sale. E. filed his bill against M. and P. to restrain the exclusion and the sale. The defendants demurred for want of equity.

The demurrer was overruled with costs.

This was a demurrer.

The bill alleged that the defendant Moss was the manager of the business of an iron foundry belonging to the plaintiff, and that the plaintiff had allowed him to send out bills to customers for goods delivered to them in his (Moss's) name alone, as if he were the principal; that Moss had locked the plaintiff out of the business premises, compelling the plaintiff to break the lock in order to get in, and that he had actually broken the lock, and that this had happened several times, and that the defendant Poole, under colour of a pretended assignment from Moss, had advertised the premises and stock-in-trade for sale. The bill prayed an injunction to restrain Moss from excluding the plaintiff from his premises, and Poole from proceeding to the threatened sale.

The defendants demurred for want of equity.

Giffard, Q.C., and Horsey, for the demurrer.—According to the plaintiff's own showing he is in possession of his property, and a mere trespass has been committed, for which he can bring his action. A bill of this kind has only been entertained to quiet possession, where there has been frequent disturbance as in *Devonsher v. Newenham* (2 Sch. & Lef. 199).

Renshaw, for the bill, was not called upon.

Wood, V.C., said that the allegations were sufficient to require an answer. The fact of Moss being allowed to send out the bills in his own

name, held him out to the world to a certain extent as owner of the business. Then he was in lawful possession in the character of manager, and under colour of this lawful possession he had constantly turned the plaintiff out. By the assignment, too, Moss gave a colourable title to Poole, and together they were about to dispose of the plaintiff's property. Moss had acquired the outward insignia of ownership by virtue of a trust, and he took advantage of that to lock out the plaintiff, to assign his property to another, and to put it up for sale. It was very different from the case that had been cited. The demurrer must be overruled with costs.

[IN THE QUEEN'S BENCH.]

Jan. 18, 1866.

HENNING v. PARKER.

14 W. R. 328; 13 L. T. 795.

Discretion of arbitrator—Close of plaintiff's case—Refusal by arbitrator to re-open.

ARBITRATION. REFERENCE AND AWARD.—*At the close of the plaintiff's case the arbitrator intimated that he was of opinion that the plaintiff had no case, and that the verdict should be found for the defendant, whereupon plaintiff tendered some further evidence, but the arbitrator refused to re-open the case:—Held, that the Court had no power to set aside the award, it being a matter entirely for the arbitrator's discretion whether he would allow the case to be re-opened.*

This was an action on a promissory note.

The cause and all matters in difference were referred to an arbitrator. The plaintiff's counsel having called his witnesses, announced that he had closed his case, whereupon the arbitrator intimated that he should not call upon the defendant to produce any evidence, as the plaintiff's evidence proved the plea of no consideration.

The plaintiff's counsel thereupon tendered in evidence an affidavit of the defendant's admitting the consideration, but the defendant's counsel objected to the reception of any further evidence, on the ground that the plaintiff had closed his case.

The arbitrator refused to re-open the case, and subsequently by his award found generally for the defendant.

McIntyre now showed cause against a rule *nisi* to set aside the award on the ground that the arbitrator had improperly rejected the evidence. He contended that it was a matter for the discretion of the arbitrator whether he would allow the plaintiff, after the close of his case, to re-open it. [BLACKBURN, J.—Because the plaintiff once says that he has a *prima facie* case, is he precluded thereby from giving further evidence?] At all events, whether or no the arbitrator acted wisely, he had a discretion. Moreover, the evidence which the plaintiff sought to put in after the close of his case had been deliberately kept back in order to force the defendant to call witnesses. [BLACKBURN, J.—I suppose the affidavit tended to set up some of the special pleas.] It is not until the arbitrator at the close of the plaintiff's case gives his opinion that the verdict on the evidence should be found for the defendant, that the evidence purposely kept back is brought forward. The arbitrator found for the defendant generally, and not on the plea of no consideration only. The plaintiff ought, before he can set aside the award, to prove that

the rejected evidence would have been decisive. The real point is—was the arbitrator bound to receive the evidence tendered by the plaintiff after the close of his case.

Thrupp, in support of the rule, contended that the arbitrator was bound to have received the evidence tendered by plaintiff. [BLACKBURN, J., referred to Russell on Arbitration, ed. 1849, p. 181, where the case of *Spettigue v. Carpenter* (3 P. Wms. 361, is referred to.)] [MELLOR, J.—It is not at all certain that a judge at Nisi Prius would have admitted this evidence. Mere non-reception of evidence is not sufficient ground to set aside an award. There must be misconduct of the arbitrator.] [COCKBURN, C.J.—It is not like non-reception of evidence at Nisi Prius. We have a controlling power over the judge, who merely represents the Court as one of ourselves. We have no such power over the arbitrator.] It is clearly laid down in Russell on Awards, ed. 1849, p. 181, that if an arbitrator does not give one party a proper opportunity of going into his case, that this is good ground to set aside the award.

Rule discharged with costs

[IN THE QUEEN'S BENCH.]

Jan. 18, 1866.

REG. v. DAVIS.

14 W. R. 329; 13 L. T. 629.

Benefit society—Mandamus—Discretion of Court—3 & 4 Vict. c. 110.

FRIENDLY SOCIETY.—*The granting of a mandamus lies in the discretion of the Court. In the exercise of this discretion the Court refused to grant a mandamus to compel a magistrate to determine a complaint, made under 3 & 4 Vict. c. 110, s. 16, by a loan society with duly certified rules. The magistrate having refused so to do because the secretary of the society refused to answer questions put by the magistrate to discover whether the society was formed for an object within the scope of section 3 of 3 & 4 Vict. c. 110.*

Macnamara (Huddleston, Q.C., and Gray, Q.C., with him), showed cause against a rule nisi, obtained by Mr. McMahon, in Michaelmas Term, 1865, calling on the defendant to show cause why he should not hear and determine a complaint made by James Richardson, on behalf of the Longton Equitable Loan Society, against John Meakin, for having failed to pay the sum of ten shillings, being part of a loan of 3l. 2s. 6d.

The facts of the case were as follows:—The Longton equitable Loan Society is a society in Staffordshire, formed under the provisions of the 3 & 4 Vict. c. 110. The rules of the society were duly certified by John Tidd Pratt, the barrister-at-law appointed to certify the rules of such societies, and the Court of Quarter Sessions for the county of Stafford allowed and confirmed the said rules.

On the 16th of March the society lent to John Meakin 3l. 2s. 6d., to be repaid by instalments. John Meakin and his sureties afterwards made default in payment of the instalments, and James Richardson, the secretary of the society, took out a summons, under section 16 of 3 & 4 Vict. c. 110, against John Meakin.

This summons came on for hearing before the defendant, who is the stipendiary magistrate for the district in which Longton is situate. At the hearing the certified rules were produced, and the loan and default were duly

proved. The defendant, John Meakin, did not appear, and thereupon the defendant, Mr. Davies, believing, from information which he had received, that the society was formed for an object not within the scope of section 3 of 3 & 4 Vict. c. 110, put certain questions to the secretary of the society for the purpose of discovering whether or no the society was so constituted as to come within the provisions of the Act. These questions the secretary refused to answer, whereupon the defendant declined to adjudicate upon the case.

McMahon, in support of the rule, contended that as the rules of the society had been duly certified, and the loan and default proved, that under section 16 of 3 & 4 Vict. c. 110, the magistrate was bound to give judgment for the society, and that he had no right to ask any further questions relative to the constitution of the society. The society was "such" a society, and entitled to the benefit of the Act. [COCKBURN, C.J.—No judge is bound to allow the process of his court to be abused. The judge knows of certain malpractices, and asks questions with a view to prevent the process of his court from being abused. You come to ask us to exercise our discretion, and by *mandamus* compel the defendant to determine your complaint, we are not inclined to exercise that discretion.] The combined effect of sections 4 and 16 leave the magistrate no option but to determine the complaint. [COCKBURN, C.J.—Not if you refuse to answer questions tending to show that you are not "such" a society. It is not because your rules are certified as the rules of "such" a society that, if you act otherwise than as "such" a society, and carry on your business on quite a different footing, you are to have the benefit of the Act. Suppose the defendant had appeared at the police court by counsel, can you deny that the questions put by the magistrate might have been asked by the defendant's counsel on cross-examination.] Sections 4 and 16 render such questions irrelevant. [LUSH, J.—Not if you are not, in fact, "such" a society.] [BLACKBURN, J.—It may be that if you had answered the questions, and the matter had been investigated, the magistrate's suspicion might, or might not, have proved to have been wrong, but here you contumaciously refuse to answer the questions.]

Rule discharged with costs

[PROBATE.]

Jan. 16, 1866.

In re J. NORRIS.

14 W. R. 348.

Imperfect execution of will.—Codicil duly executed—Incorporation by reference—Affidavit.

WILL.—Where a duly executed paper refers to a written document then existing in such terms as to enable the Court to identify the latter document, probate will be granted of both documents, as containing the will of the testator.

The Court will require an affidavit that no will has been found except that propounded.

This was a motion to obtain probate of the will and two codicils of John Norris.

The will was contained in five sheets of paper, and in the last clause the

testator said that he had set his hand to each sheet. In point of fact he had signed the first four sheets only. The last sheet had his name written in pencil (not, however, in his handwriting) and an attestation clause, but without the signatures of any witnesses, there being only directions in pencil as to the place and mode in which the witnesses were to sign.

The will was dated 1863 at the beginning, but no day or month was given, although blanks were left for these. The date "16th November, 1863," was indorsed upon the will.

The first codicil bore date the same year as the will, but the blanks left for the day and month were not filled up.

By the will the testator appointed Richard Adcock and Benjamin Allen executors and trustees, and the codicil, after reciting this appointment, and referring to the will as bearing even date therewith, appointed the testator's wife, Jane Norris, an additional trustee and executor, and directed that the will should have the same operation as if she had been therein appointed in conjunction with Richard Adcock and Benjamin Allen.

The codicil was duly executed by the testator and attested by two witnesses, one of whom stated that he recollected the testator's turning over several sheets and signing his name more than once at the time he executed his will, but that he was not aware that both a will and codicil were signed at that time.

The second codicil, which was also duly executed, was dated 1865, but, as in the first, the blanks for the day and month were not filled up, but the codicil was endorsed June 24th, 1865. This codicil revoked a legacy of 150*l.*, which was therein stated to have been given by the will to the testator's sister-in-law, and also a bequest of certain property to his wife. These two legacies were contained in the second sheet of the will, and the revocation in the codicil embodied the precise words of the bequests in the will.

It appeared from the evidence of the testator's solicitor that on the 23rd of October, 1863, the testator gave him instructions to make his will, which he accordingly did, and the will was engrossed. Shortly afterwards the testator wished to have certain alterations made in the will, but the solicitor had these alterations embodied in a codicil, thinking that the more convenient plan, and on the 3rd November, 1863, he sent the will and codicil to the testator, with a letter containing instructions as to the mode in which they were to be executed.

The year "1863" was inserted in the will and codicil before they were sent to the testator, as also were the names "John Norris" in pencil and directions in pencil beneath the attestation clause as to the mode of attestation.

On the 12th April, 1865, the testator gave his solicitor instructions to prepare a second codicil. On that occasion the solicitor, in the presence of the testator, referred to the drafts of the will and first codicil, which were then in his (the solicitor's) possession. The second codicil was then drawn up in accordance with these instructions, and on the 29th April, 1865, the solicitor forwarded it to the testator for execution.

One of the attesting witnesses to the second codicil swore that it had, in fact, been executed on the 23rd June, and not on the 24th, which was the date of the endorsement.

Wambey, Dr., now moved for probate of the will and two codicils. The two codicils were properly executed, and referred in clear terms to the will. All the three documents should therefore be admitted to probate: *Van Straubenzee and Wife v. Monck* (3 Sw. & Tr. 6); *Smart v. Prujean* (6 Ves. 560). [Sir J. P. WILDE.—There is no affidavit that no other will is forthcoming. This must always be done unless the Court directs that it may be omitted.]

Sir J. P. WILDE.—There are two codicils in this case, and both refer to a will. The question then is, do they refer in such terms that I can infer to what will they refer. I think I can. The first codicil speaks of the will as one which "bears even date herewith." It appears that, after the will had

been engrossed, the testator gave instructions that certain alterations should be made in it. These alterations were embodied by the solicitor in a codicil, and the will and codicil were sent to the testator for execution. There is evidence that both were signed in one day. In the second codicil the testator says, "In other respects I ratify and confirm my said will and codicil." The provisions in the two codicils are consistent with those of the will, and the interpretation is carried on throughout the three instruments. I am therefore of opinion that the will propounded is that referred to in the codicils. An affidavit should be made that search has been made for other wills, and that none have been found.

Probate granted, subject to affidavits to the effect that no other will had been found.

[PROBATE.]

Jan. 23, 1866.

In the goods of SPILLER (deceased).

14 W. R. 349.

WILL.—*Interlineation or other alteration of will after testator's death—Costs.*

The testator made a will in 1849 and died in 1864 without having revoked or altered the will. He had frequently shown it to his friends, and it was much worn in consequence of being very much handled during the fifteen years which elapsed from the time of its execution to the death of the testator. After his death it was found by his family among some other papers of his. The executor, in the presence of the family of deceased, and with their approbation, interlined the words "everything but money to Rebecca Wilson," in the disposing clause of the will under the belief that there was nothing illegal or improper in doing so, and that it would best carry out the testator's intention.

Spinks, Dr., moved for probate of the will, expunging the interlined words.

Sir J. P. WILDE.—A more outrageous act can hardly be imagined than this insertion of a clause in a will after a testator's death. Something must be done to put an end to tampering with wills. I will follow the rule laid down in previous cases, and direct the will to be propounded in solemn form, and the costs will fall on the person who made the alteration.

Spinks, Dr.—It will be impossible to condemn him in costs if he will not chose to make himself a party to the suit by propounding the will.

Sir J. P. WILDE.—If he does not propound it then the costs will fall upon such person as was a consenting party to the alteration.

[MATRIMONIAL.]

Feb. 1, 1866.

MALLINSON *v.* MALLINSON.

14 W. R. 353; L. R. 1 P. & D. 93.

Evidence—Materiality.

DIVORCE AND MATRIMONIAL CAUSES.—*At the hearing of a petition by a wife for judicial separation on the ground of desertion, it was attempted to show that*



offers to return had been made by the husband. No charge of adultery appeared on the pleadings. The respondent was asked in cross-examination whether, at the time of the alleged offers, he was not living in adultery:—Held, that such question was material to the issue, as it went to show the bona fides of such offers.

This was a petition by a wife for a judicial separation on the ground of desertion. The respondent filed an answer denying the charge, and the cause was heard by the Judge-Ordinary without a jury.

The desertion was fully proved; but it was alleged on the part of the respondent that during his absence from his wife he had repeatedly sent letters to her in which he expressed his anxiety to return, and his willingness to live with her in whatever place she should select. These letters the wife distinctly denied ever having received.

Swabey, Dr., for the petitioner, now proposed to ask the respondent in cross-examination whether he were not living in adultery in Dublin at the time of writing the alleged letters to his wife.

Spinks, Dr., for the respondent objected to the question on the ground that no charge of adultery being made in the petition, such question not being pertinent to the charge of desertion, was irrelevant; also that it tended to criminate the witness.

WILDE, J.O.—Although no charge of adultery occurs in the pleadings, still, as the wife is not bound to accept the husband's offer to return to her, if, at the time of making it, he be living in adultery; I think that the question may be put, although the witness is not bound to answer it. The fact whether or no the husband were living in adultery, becomes very important when the offer to return to his wife comes to be considered. And such question is most pertinent, and material to the issue, as it tends to show the sincerity of the husband's professions, and the *bona fides* of his offers to return.

CRANWORTH, L.C., Nov. 10, 11, 13, 14, 16, 17, 1865; Jan. 22, 1866.

SEIXO v. PROVEZENDE.*

14 W. R. 357; L. R. 1 Ch. 192; 14 L. T. 314; 12 Jur. N.S. 215.

Applied, *Wotherspoon v. Currie*, [1873] E. R. A.; 42 L. J. Ch. 130; L. R. 5 H.L. 508; 27 L. T. 393 (H.L.). See *Raggett v. Finlater*, [1874] E. R. A.; 43 L. J. Ch. 64; 29 L. T. 448; 22 W. R. 53 (V.C.). Discussed, *Cope v. Evans*, 1874, L. R. 18 Eq. 138; 30 L. T. 292; 22 W. R. 453 (V.C.); *Montgomery v. Thompson*, [1891] E. R. A.; 60 L. J. Ch. 218; [1891] A.C. 217; 64 L. T. 748 (H.L.). See *Powell v. Birmingham Vinegar Brewery Co.*, [1896] E. R. A.; 65 L. J. Ch. 563; [1896] 2 Ch. 54; 74 L. T. 509 (C. A.): affirmed, [1897] E. R. A.; 66 L. J. Ch. 763; [1897] A.C. 710; 76 L. T. 792 (H.L.). Referred to, *Saxlehner v. Appollinaris Co.*, [1897] E. R. A.; 66 L. J. Ch. 533; [1897] 1 Ch. 893; 76 L. T. 617 (Ch. D.).

Trade mark—Similarity—Representation calculated to mislead—Injunction.

TRADE MARK.—*The right to an injunction to restrain the use of a trade mark or name does not depend upon the identity or close resemblance of the marks*

* Reported by H. H. COZENS-HARDY, Esq.

or names adopted by the plaintiff and defendant. It is sufficient to show that the defendant is offering his goods for sale in such a way as to lead ordinary purchasers to believe that they are the goods of the plaintiff.

The Leather Cloth Company (Limited) v. The American Cloth Company (Limited) (13 W. R. 873) *distinguished*.

The plaintiff in this case was a Portuguese nobleman and the proprietor of an estate in the province of the Alto Douro, known as the Quinta do Seixo, from which estate his title was derived. The estate has long been celebrated for the production of red port wine, and for many years the plaintiff has consigned his wine to Messrs. Sadler, Harrison, & Co., of London. The casks of wine thus consigned have a figure of a crown and eagle, with the letters B. S. (meaning Barao do Seixo) under it, burnt in on the head, and a figure of a crown with the name Seixo and the year of the vintage burnt in at the bung. Hence the plaintiff's wine has acquired in the London market the name of Crown Seixo wine, and a high reputation in connection with that name.

In the autumn of 1863 the plaintiff ascertained that the defendants, who carry on business in London under the style of Caldas Brothers & Co., were offering for sale 100 pipes of red port wine in casks marked or branded like the plaintiff's. The casks in question had the figure of a crown, with the letters C. B. and the words Seixo de Cima (meaning upper Seixo) and the year of the vintage on the head, and a figure of a crown with the letters C. B. and the words Seixo de Cima and the year of the vintage at the bung. The plaintiff accordingly filed a bill praying for an injunction to restrain the defendants from affixing or applying to any casks of wine shipped to their order, or used by them, the mark of a crown and the word Seixo or either of them or any other mark or word so contrived as by colourable imitation or otherwise to represent the marks or brands used by the plaintiff, and also from employing any marks or brands containing the figure of a crown and the word Seixo, or any mark similar to or only colourably differing from the marks or brands used by the plaintiff, or so contrived and prepared as to represent or lead to the belief that the wine offered for sale by the defendants was wine grown by the plaintiff or the produce of the Quinta do Seixo.

The bill alleged that the marks or brands adopted by the defendants so closely resembled those adopted by the plaintiff as to lead persons to suppose that the wine was of the plaintiff's growth, and that they were calculated and intended to attract the custom which would otherwise flow to the plaintiff. An *ex parte* injunction was granted by the Master of the Rolls on the 14th of September, 1863.

The defendants contended that their brands or marks did not resemble, and were not intended to imitate those of the plaintiff, and that they were not, and could not be mistaken in the trade for the plaintiff's; that they were entitled to use the crown, because it is a mark of rank of every grandee of Portugal, where the Baron de Provenzende was justified in assuming; that the letters were the true initials of the firm; that the words Seixo de Cima were the name of an estate rented by the defendants; that the expression "Quinta do Seixo" was a name applied not merely to the plaintiff's estate, but to an entire district, including the vineyards of the plaintiff and of the defendants; that the word Seixo, which means rocky or stony, was a term applicable to many places in Portugal, and that the plaintiff had no exclusive right to it.

The evidence in the case was extremely voluminous, turning, to a great extent, upon the names of various properties in the Douro district. It appeared that the vineyard which the defendant called Seixo de Cima, and which adjoins the plaintiff's vineyard, produced only a small proportion of the wine which they called by that name; but there was evidence to show that, according to the custom of the trade, it was justifiable to blend various wines produced in the same neighbourhood, and to give them all the name of the chief property. It was also proved that the defendants' vineyard had commonly been registered



under the name of Rio Torto, but never under the name of Seixo. Yet it appeared that it was sometimes treated as situate in the "Sitio de Seixo," or in the locality of Seixo. There was no evidence to show that the defendants ever offered their wine as "Crown Seixo," or as the plaintiff's wine; but it had been offered as "Crown Seixo de Cima," and from that circumstance it had been believed by Mr. Ruck, an experienced wine merchant, to be the produce of the plaintiff's vineyard.

The case came on to be heard before Vice-Chancellor Wood, in February, 1865, and his Honour granted a perpetual injunction to restrain the defendants "from affixing or causing to be affixed to any casks of wine, shipped to their or any of their order, or used by them or any of them, the brand or mark of a crown, and the word Seixo, or any other combination of marks or words so contrived as by colourable imitation or otherwise, to represent the marks or brands used by the plaintiff; and also from employing, or permitting to be employed, any marks or brands or other designation in respect of wines offered for sale by the defendants or any of them, which should be so contrived as to represent or to induce a belief that such wines are Crown Seixo, or the produce of the Quinta do Seixo, in the plaintiff's bill mentioned; and also from describing or offering for sale their wines simply as Seixo wine, or otherwise using the word Seixo in respect of such wines, without clearly distinguishing the same from wine produced on the plaintiff's said Quinta do Seixo"; and the defendants were ordered to pay the costs of the suit.

From this decree the defendants appealed.

Sir H. Cairns, Q.C., Amphlett, Q.C., and Macnaghten for the plaintiff.

Rolt, Q.C., and Cracknall, for the defendants.—This is not a case of fraudulent misrepresentation. We are justified in using every part of the mark we put upon our casks. The word Seixo is not a mere arbitrary name which the plaintiff is entitled to adopt to the exclusion of every one else. It is a name common to his vineyard and to ours, and also to many others in Portugal. The plaintiff can claim no title to what is a mere advertisement. There is no similarity between the two marks, and it is impossible that any person could mistake the one for the other. And there is no satisfactory proof that any one has been deceived. The *Leather Cloth* case is conclusive in our favour. At all events, the decree of the Vice-Chancellor goes too far.

Sir H. Cairns, Q.C., in reply.—The question of similarity does not depend upon the judgment of a man acquainted with the wine trade, and with the two casks before his eyes. It is enough for us if the common run of mankind would be deceived. Here it is clear that the defendants' wine would be commonly known as Crown Seixo wine. The jurisdiction of this Court is not limited to the piracy of trade marks, strictly so-called, but it extends to every representation, written or verbal, by which the defendants' goods are sold as if they were the plaintiff's. The Court ought not to limit its restraint to one particular mode of invading the plaintiff's right.

The following cases were cited and commented upon in the course of the arguments on each side: *Braham v. Bustard* (11 W. R. 1061; 1 H. & M. 447); *Edelsten v. Edelsten* (11 W. R. 328, 1 D. J. S. 185); *Cartier v. Carlile* (81 Beav. 292); *Clark v. Freeman* (11 Beav. 112); *Croft v. Day* (7 Beav. 84); *Perry v. Truefitt* (6 Beav. 66); *Knott v. Morgan* (2 Keen, 213); *The Leather Cloth Company (Limited) v. The American Cloth Company (Limited)* (18 W. R. 873); *McAndrew v. Bassett* (12 W. R. 777); *Harrison v. Taylor* (11 Jur. N.S. 408); *Seton on Decrees*, 915; *Burgess v. Burgess* (3 D. M. G. 896); *Hogg v. Kirby* (8 Ves. 215); *Mottley v. Downman* (3 M. & C. 1); *Franks v. Weaver* (10 Beav. 297); *Shrimpton v. Laight* (18 Beav. 164); *Glenny v. Smith* (15 W. R. 1032); *Lord Byron v. Johnston* (2 Mer. 29).

Jan. 22.—LORD CRANWORTH, C.—This is a bill to restrain the use of a trade mark. The plaintiff is a Portuguese nobleman, the owner of a vineyard on the south bank of the Douro called Quinta do Seixo. The word Seixo means

stony or pebbly. Portuguese noblemen usually mark the casks which contain the produce of their vineyards with a crown or crowns. The plaintiff has, since 1848, stamped the top of his casks with his coronet, the letters B.S., and the date of the year; and the side of the casks, at or near the bung, with his coronet, the word Seixo, and the date of the year. Hence the plaintiff's wine has obtained celebrity in the London market, and has acquired the name of Crown Seixo wine. The defendants have, since 1854, been proprietors or farmers of a vineyard adjoining that of the plaintiff, and of some other small vineyards near it but on the opposite bank of the Douro. Until about the beginning of 1861 they sold their wine to other growers or merchants, but at that time they established their present firm in London, Caldas Brothers, to which their produce is consigned for sale. They have adopted as their trade mark a brand on the top of the cask of a coronet, the letters C. B., the words Seixo de Cima, and the date of the year, and they put the same brand or stamp at or near the bung. The present bill was filed to restrain the defendants from using this mark. The defendants put in an answer, and a great mass of evidence was produced on each side. His Honour Vice-Chancellor Wood has made a decree in favour of the plaintiff, and from that decree the defendants appeal, on the ground that there is no infringement, and no similarity.

If the question turns on the inquiry whether a person having a cask of the plaintiff's wine and a cask of the defendants' placed before his eyes could mistake the one for the other, there can be no doubt as to the result. The marks on the one and on the other are altogether different. But that is not the question, or not the whole question, to be considered. The principle on which relief is given in these cases is that one man can not offer his goods for sale representing them to be of the manufacture of a rival trader. Supposing the rival to have obtained celebrity in his manufacture, he is entitled to all the advantage of that celebrity, whether resulting from the greater demand for his goods or from the higher price which the public are willing to give for them rather than for the goods of other manufacturers whose reputation is not so high. Where, therefore, a manufacturer has been in the habit of stamping the goods which he has manufactured with a particular mark or brand, so that thereby persons purchasing goods of that description know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp. By doing so he would be substantially representing the goods to be of the manufacture of the manufacturer who had previously adopted the stamp or mark in question, and so would or might be depriving him of the profit he might have made by the sale of the goods which *ex hypothesi* the purchaser intended to buy. The law considers this to be a wrong towards the person whose mark is thus usurped, for which he has a right of action, or, which is the more effectual remedy, a right to restrain by injunction the wrongful use of the mark thus pirated.

It is obvious that in these cases questions of considerable nicety may arise as to whether the mark adopted by one trader is or is not the same as that previously used by another trader complaining of its illegal use, and it is hardly necessary to say that, in order to entitle a party to relief, it is by no means necessary that there should be absolute identity. What degree of resemblance is necessary is, from the nature of things, a matter incapable of accurate definition *a priori*. All which courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use. If a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical



resemblance of the two marks to be the sole question for consideration. If the goods a manufacturer have, from the mark or device he has used, become known in the market by a peculiar name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival as the actual copy of his device.

It is mainly on this ground that I have come to the conclusion that the decision of the Vice-Chancellor in the present case was perfectly correct. Ever since the year 1848 the plaintiff had caused his casks to be stamped with his coronet on the top and with his coronet and the word Seixo at the bung, and the evidence shows that his wines had thus acquired in the market the name of Crown Seixo wine. When, therefore, the defendants, in the year 1863, adopted as their device a coronet with the words Seixo de Cima, meaning upper Seixo, below it, the consequence was almost inevitable that persons with only the ordinary knowledge of the usages of the wine trade from Oporto would suppose that in purchasing a cask of wine so marked they were purchasing what was generally known in the market as Crown Seixo wine. The present case is thus brought distinctly within the principle on which all these cases rest. The plaintiff had adopted a device or trade mark which had caused his wines to obtain celebrity under a name descriptive of that trade mark. The defendants have adopted a trade mark which could not fail to lead purchasers to attribute to the wines so marked the same name as that under which the plaintiff's wines were known, and so to believe that in purchasing them they would be purchasing the wines of the plaintiff. Against the use of such a trade mark the plaintiff has, I think, a right to have the injunction of this Court.

A long and elaborate attempt was made to show that the defendants had a right to the use of the trade mark which they have adopted. They have, either as owners or lessees, a vineyard adjoining that of the plaintiff, and several small vineyards on the opposite side of the river. Seixo, it was said, means stony or pebbly. *Vino do Seixo*, therefore, is the same thing as *Vino de Grave* in France, or *Steinwein* in Germany. The defendants' vineyards, it was said, were, or some of them were, if not forming part of the plaintiff's *Quinta do Seixo*, at all events situate in what is called the *Sitio de Seixo*—i. e., the district of Seixo. The evidence as to the precise nature of the defendants' title to their different vineyards, and of the names by which they are known, is by no means clear, but I think it is immaterial to pursue any inquiry on this subject. For, even assuming the truth of what is contended for by the defendants—i. e., that parts of their vineyards are known by the name of Seixo—that does not justify them in adopting a device or brand, the probable effect of which is to lead the public, when purchasing their wine, to suppose that they are purchasing wine produced from the vineyards—not of the defendants, but of the plaintiff.

Cases may be imagined—though very unlikely to arise—in which a person bringing into the market for the first time the producer of a newly established manufacture, to come into competition with one already established, may really be embarrassed as to the mode in which he should describe it, so as not to interfere with the description adopted by a manufacturer who has been before him. If such a case should arise, it must be dealt with on its own merits. But here I feel it impossible to doubt that the defendants, in adopting the trade mark which they, in fact, adopted, must have known that they would be thereby likely to gain for their wines some of the celebrity which had attached to those of the plaintiff. At all events, whether this was or was not present to the minds of the defendants, this was the inevitable consequence of the course they took.

The defendants rested their argument in part on the case of *The Leather Cloth Company v. The American Leather Cloth Company*, decided last session in the House of Lords. But the facts of that case bear no resemblance to the present. There both parties, plaintiffs and defendants, were manufacturing and dealing in the same article—that known in the market as American leather

cloth. Neither party had an exclusive right to that name, and the plaintiffs had not acquired any particular name for their American leather cloth, unless, indeed, the name of Crockett & Co. connected with it, and from whom they had purchased their business, could be so considered. But no one looking at the defendants' trade mark could be led to suppose he was purchasing goods from what was originally Crockett's manufactory. Unless a purchaser could be deceived by the similarity of the trade marks, he could not be deceived at all; and the House of Lords thought that the two trade marks were so different that no one could suppose them the same. That case, therefore, affords no support to the defendants. In order to assimilate that case to the present, we must suppose that the plaintiffs there had so marked their goods with the name of Crockett as to have obtained for them in the market the name of Crockett's American leather cloth, and then that the defendants had adopted a device which would lead purchasers to suppose that their cloth was not merely American leather cloth, which it was, but Crockett's American leather cloth, which it was not. The two cases are entirely different, and the present appeal must be dismissed, and, of course, with costs.

LORDS JUSTICES, Jan. 23, 24, 1866.

WYCOMBE RAILWAY COMPANY v. THE MINISTER AND POOR
MEN OF DONNINGTON HOSPITAL.*

14 W. R. 359; L. R. 1 Ch. 268; 14 L. T. 179; 12 Jur. N.S. 347.

Applied, *Bridgend Gas and Water Co. v. Dunraven*, [1886] E. R. A.; 55 L. J. Ch. 91; 31 Ch. D. 219; 53 L. T. 714; 34 W. R. 119 (Ch. D.).

Specific performance—Lands Clauses Consolidation Act—Persons not sui juris—Mistake.

COMPULSORY PURCHASE.—*Where a railway company files a bill for specific performance against a person under disability, and the provisions of the Lands Clauses Consolidation Act have not been complied with, the Court will not enforce the agreement.*

VENDOR AND PURCHASER.—*The Court will not enforce specific performance where the vendor proves that his understanding of the contract was other than that which the plaintiff wishes to have carried out.*

This was an appeal from the Master of the Rolls, who had dismissed a bill for specific performance filed by the plaintiffs.

The company required, for the purposes of their undertaking, part of a farm belonging to the Donnington Hospital, which was in the occupation of a Mr. Walsh, at a rent of 200*l.* a-year, under a lease. The rack-rent value of the farm was nearly double that paid for it, and the portion of the 200*l.* a-year payable for the land required by the company was estimated at 10*l.* 8*s.* The company entered into negotiations with Mr. Graham, the agent and solicitor of the hospital, for the purchase of the land which they required, and the price was fixed at 1,500*l.*, of which 900*l.* was set apart as the amount to be paid to the hospital.

Ultimately Mr. Graham signed the contract for 900*l.*, subject to the lease. In an affidavit filed in the cause, Mr. Graham stated that he signed this contract on the faith of a statement by the agent of the company that Mr. Walsh had

* Reported by W. BRADFORD, Esq.

been settled with, and under the belief that what was thereby meant was that the company had agreed with Walsh to compensate him on the footing that he was to continue to pay the entire rent of 200*l.* during the remainder of his lease. Two days after the day on which he had signed the contract, Mr. Graham wrote to his surveyor stating that the agreement had been signed, and that Walsh was to pay the full rent.

The Donnington Hospital was a charitable corporation which had no power to sell its land except under the provisions of the Lands Clauses Consolidation Act, 8 Vict. c. 18, and by the 9th section it is provided that the purchase-money for lands to be taken from persons under disability shall not, except where it has been determined by a jury or by arbitration, be less than shall be determined by the valuation of two surveyors, one to be nominated by each party, each of which surveyors shall annex to the valuation a declaration in writing subscribed by him of the correctness thereof. No surveyor on the part of the hospital signed the declaration required in this section, and the defendants declined to complete the purchase at 900*l.*, subject to an apportionment of rent.

The plaintiffs having lodged the 900*l.* in the London and Westminster Bank, took possession of the land, and filed this bill for specific performance.

The Master of the Rolls, on the ground of mistake, dismissed the bill without costs. The railway company appealed.

Baggallay, Q.C., and *J. Pearson*, for the appeal, contended that the terms of the contract were clear, and that the defendants could not have understood it to have such a meaning as they now alleged. If an agreement did not contain all that it was intended to contain, a mistake in the agreement was a sufficient defence (*Wood v. Smith*, 2 K. & J. 33); but there was no mistake in this agreement, but only a mistake as to its effect upon the rent to be paid by the tenant. No relief could be given for a mistake in law.

Hobhouse, Q.C., and *Swanston*, for the respondent, argued that there was a mistake, and that the laws of the Lands Clauses Act had not been complied with, and referred to *Helsham v. Langley* (1 Y. & C. C. C. 175); *Baxendale v. Seale* (19 Beav. 601); *Alvanley v. Kinnaid* (2 M. & Gor. 1); *Baker v. Metropolitan Railway Company* (11 W. R. 18; 31 Beav. 504); *Manser v. Back* (6 Hare, 443); *Leslie v. Thompson* (9 Hare, 268); *Swaishland v. Dearsley* (9 W. R. 528; 29 Beav. 430).

J. Pearson, in reply, cited *Gregory v. Mighell* (18 Ves. 328).

KNIGHT-BRUCE, L.J.—This is an appeal from a dismissal by the Master of the Rolls of a bill filed by the purchasers of an estate for specific performance of a contract to sell, the purchasers being a railway company, and the vendors a charitable corporation. The purchasers are in possession, but, in consequence of a dispute, they have not yet paid for the estate, and have not obtained the conveyance of it. The plaintiffs filed the bill for the purpose of obtaining this conveyance, and the dispute has been, and is, substantially about the price; though the form which it has assumed is that the charity should be subjected to a rent of 10*l.* 8*s.* a-year and upwards for a certain number of years, which should operate so far as to cause a diminution of the value of the land obtained from them. The purchasers contended that this was the intention and that it was so understood. The vendors assert that the true construction of the agreement was otherwise. It was sworn by the agent of the vendors, and a letter written by him contemporaneously with the agreement bears him out in this, that he understood the agreement to mean that there was to be no diminution of the price paid to the charity on account of the rent. This being so it would be contrary to the rules of this Court to enforce an agreement against a person so swearing, and, in fact, so proving, however mistaken and however erroneous in his opinion he may have been. But there is another ground on which the purchasers must fail. The vendor is not *sui juris*, and a mode has been settled by the Legislature for effecting contracts between railway companies requiring land and the proprietors of the land not *sui juris*. No

certificate has been obtained from the surveyors in the manner pointed out by the Legislature, and it would be wrong for us to treat this charity as liable to be dealt with on the footing of a private person. As the contract was not therefore complete, what has been done must go for nothing, and the bill must stand dismissed.

TURNER, L.J., agreed.—The 9th section of the Lands Clauses Act requires that the two surveyors to be appointed should certify whether they do or do not agree in their valuation. The object evidently was that the surveyors should meet and consider the proper amount, and I apprehend that it was not intended that they should fix the price without meeting. In this case there was no step taken to follow the provisions of the Act of Parliament, and I think that the Court cannot overleap this, and substitute for it the adoption of the contract without the Act of Parliament being carried out. It seems to me that this was not a complete and final contract, according to the provisions of the Act of Parliament, and that it is desirable that it should appear on the face of the order what was the ground of the Court's decision. There must be a declaration "that it appearing to this Court that the price to be paid by the company, in respect of the purchase in the bill mentioned, has not been ascertained in due conformity with the provisions of the Lands Clauses Act, and that the agreement, therefore, has not become final and complete, and ought not to be specifically performed, this Court doth order that the decree be confirmed, and the bill dismissed without costs."

Baggallay, Q.C., asked that the dismissal should be declared to be without prejudice to the plaintiffs to bring any such action as they may be advised.

STUART, V.C., Jan. 22, 1866.

DOUGLAS v. SIDMOUTH RAILWAY AND HARBOUR COMPANY.*

14 W. R. 361; 13 L. T. 788.

Specific performance—Demurrer.

CONTRACT.—*Demurrer to a bill by a contractor against a company, praying relief in the nature of specific performance. Allowed, with costs, on the ground that the plaintiff had omitted to perform a material stipulation which was a condition precedent to the performance of the contract by the company.*

This was a demurrer to a bill for specific performance of a contract entered into by the defendant company.

The following were the material facts appearing on the face of the bill:—

In February, 1864, the defendants, through Mr. Bird, their engineer, entered into negotiations with the plaintiff, as contractor, which resulted in an arrangement with him that he should complete the defendants' railway works. The terms of the arrangement were embodied in a draft contract, which was submitted to a board meeting of directors, held on the 3rd of March, 1865, at which it was resolved—That the draft contract as read should be adopted, subject to the approval of the company's solicitor. At another board meeting, held on the 8th of March, 1865, it was resolved—That the company's seal should be affixed to the order of contract with the plaintiff so soon as the tender in conformity with the draft contract should have been signed by the plaintiff, and the articles of contract, when sealed, should be retained in the company's possession, to be exchanged for the counterpart duly executed by

* Reported by W. B. SKENE, Esq.

the plaintiff, when he should have furnished the board with approved sureties, as agreed upon, and should have completed the arrangement for the advance of 5,000*l.* to the company.

These resolutions were communicated by the engineer of the defendants to the plaintiff, and in consequence thereof the plaintiff signed, on the 13th March, 1865, a tender for the contract, which was addressed to the directors, and was as follows:—

“Gentlemen,—I, J. Douglas, hereby offer to complete such of the works of the Sidmouth Railway as are comprised in a schedule of quantities which has been supplied to me by your engineer. . . . And I agree to give a bond (such bond being distinct from another bond for 5,000*l.* provided for in the contract deed), with two sureties to be approved of by the company’s solicitor, in the sum of 9,000*l.*, for the due performance of the contract. And I also agree, in consideration of the premises, to advance to the company, upon the execution of the contract deed, a sum of 5,000*l.* to assist them in procuring lands and for the purposes of the undertaking, upon such terms as may be arranged between the company’s engineer and myself.”

At a board meeting, held on the 24th March, 1865, the tender of 13th March, 1865, was read, and it was resolved that such tender should be accepted, and that the seal of the company should be affixed to the articles of contract with the plaintiff. And such seal was accordingly affixed.

The articles of contract were in duplicate, and one copy was executed by the company in manner aforesaid, and the counterpart was executed by plaintiff. The following were the material parts of such articles:—

“The contractor will make and complete the whole of the works in accordance with this contract on or before the 1st day of October, 1866, provided that if the contractor shall be delayed in the commencement, progress, or completion, of any part of the works by reason of delay not attributable to him in the obtaining of any of the land required for the railway, the company’s engineer shall grant to the contractor such an extension of time for the completion of the railway and works as he, the said engineer, shall think just.”

With a view to assisting the contractor, and in exchange for a bond in the usual form, executed by him and by two sureties (to be approved by the company’s solicitor), conditioned for the payment to the company of the sum of 5,000*l.* in the event of such non-performance by him of his part of this contract, such bond to be in addition to the bond of a similar nature agreed to be given by the contractor and two sureties for the payment of 9,000*l.*, the company will, upon the due execution of these presents, give to the contractor, as part payment in advance (of the single bonds agreed to be given by the company as consideration for works done and materials supplied under the first part of clause 30 of these presents), single bonds to the amount of 10,000*l.* Provided always, that in order gradually to pay themselves such advance, the company shall be entitled, until such advance be re-paid, to deduct from any payments to be made to the contractor, under the said first part of clause 30 of these presents, fifty per cent. in amount of the single bonds, which from time to time would (had such advance been made by the company) have been payable to the contractor under the said first part of clause 30 of these presents. Provided also, that so soon as the company, by means of the aforesaid deductions, by this clause authorised, shall have re-paid themselves the said advance of 10,000*l.* in single bonds, the aforesaid bond to be executed by the contractor, and his sureties, in the penal sum of 5,000*l.*, shall be cancelled and delivered up to the contractor.

At a board meeting, held shortly after the execution of the contract, on the 24th of March, 1865, the engineer reported that everything had been agreed on between him and the plaintiff with reference to the said contract, with the sole exception of the terms upon which the 5,000*l.* were to be advanced. After the last stated report, the terms on which the said sum of 5,000*l.* mentioned in the tender should be advanced were agreed on between

the plaintiff and the company's engineer, and were embodied in a letter of June 29, 1865, set out in the bill, and such terms were adopted by the directors, and had never been waived.

Shortly after the board meeting of the 24th of March, 1865, the plaintiff and the defendants jointly engaged in negotiations with capitalists, seeking, amongst other things, to procure a loan for the plaintiff, to enable him to advance 5,000*l.* to the defendants. Such negotiations failed, and the plaintiff thereupon applied separately to a finance company, who, in October, 1865, agreed to advance him 20,000*l.* The plaintiff, in the same month, gave notice of such agreement to the directors of the defendants' company.

On the 30th of October the plaintiff received a letter from the secretary to the directors of the defendants' company, in which he stated that having waited in vain for some signs of vitality in his proposition to become contractor for the railway, the board had come to the conclusion to consider his proposals as not made. In answer to a protest, addressed by the plaintiff to the directors on the receipt of the last-mentioned letter, he was told that the contract for making the railway had been entrusted to other hands. Some correspondence ensued between the plaintiff's solicitors and the directors of the defendants' company, which resulted in a refusal by the directors to hand the articles of contract to the plaintiff, or to employ him in making the works.

The bill prayed, amongst other things, for a declaration that the agreement made between the plaintiff and the defendants, by the tender of March 13, 1865, and the resolutions and the contract of 24th of March, were valid and capable of being carried into effect; and that (the plaintiff offering to advance the 5,000*l.*) the defendants might be ordered specifically to perform the agreement, and to exchange the articles of contract executed, but retained by them, for the bonds and counterpart copy of such articles in the plaintiff's hands; and also for a declaration that the plaintiff was entitled to an extension of time for the construction of the railway.

Kay for the demurrer.—The objects of the bill are (1) to make the defendants enter into a contract with the plaintiff; (2) to have specific performance of part of that contract; (3) to vary another part of it. There is, under the circumstances, no contract, for the plaintiff never fulfilled the condition relating to the loan of 5,000*l.*, which was a condition precedent to the contract. He quoted *The Leominster Canal Company v. Shrewsbury, &c., Railway Company* (5 W. R. 868); *Jackson v. The North Wales Railway Company* (6 Ry. Cas. 112).

Malins, Q.C., and *Stock*, for the bill.—The defendants never gave the plaintiff notice that they would abandon the contract unless he procured the 5,000*l.* at the time specified: *Parkin v. Thorold* (16 Beav. 59). Besides, even if there be objections to the specific performance of the entire contract, they do not apply to the simple delivery to us of the articles, which we are, at all events, entitled to: *Brett v. East India and London Shipping Company* (12 W. R. 596; 2 H. & M. 404); *Munday v. Joliffe* (5 M. & C. 167).

STUART, V.C., said that there was no sufficient agreement to induce the Court to interfere. The defendants had, with proper caution, inserted a stipulation for their own benefit which had not been fulfilled by the plaintiff, and the non-fulfillment of which barred his title to relief. That being so, it was needless to go into the other objections to the bill, which was one of a very unusual kind. The demurrer must be allowed with costs.

Wood, V.C., Jan. 31, 1866. Lords Justices, Feb. 8, 10, 1866.

STEELE v. THE MIDLAND RAILWAY COMPANY.

14 W. R. 367; L. R. 1 Ch. 275; 14 L. T. 3; 12 Jur. N.S. 218.

Referred to, *Smith v. Ridgway*, [1866] E. R. A.; 35 L. J. Ex. 198; L. R. 1 Ex. 331; 13 L. T. 795; 14 W. R. 868 (Ex. Ch.). Principle applied, *Benington v. Metropolitan Board of Works*, 1886, 54 L. T. 837 (Ch. D.). Referred to, *Wright v. Wallasey Local Board*, [1887] E. R. A.; 56 L. J. Q.B. 259; 18 Q.B. D. 783 (Q.B. D.). Referred to, *Kerford v. Seacombe, Hoylake and Desside Railway* [1888] E. R. A.; 57 L. J. Ch. 270; 58 L. T. 445; 36 W. R. 431 (Ch. D.). Distinguished, *In re Willis*, [1912] E. R. A.; 81 L. J. Ch. 8; [1911] 2 Ch. 563; 105 L. T. 295 (Ch. D.).

Lands Clauses Act, s. 92—House—Meaning of the word.

COMPULSORY PURCHASE.—*A. occupied a house and six acres of land on the west side of a road, and bought six acres more on the east side, which he required for the convenience of his family. A railway company took part of the land on the east side:—Held, that they were not bound, under section 92 of the Lands Clauses Act, to take the whole property.*

This was a motion for an injunction to restrain the Midland Railway Company from taking any of the land of the plaintiff, near the Edgware-road, without also taking the whole of the house and grounds occupied by him there.

The question for argument was whether all this land could be held to be included under the word "house," in the 92nd section of the Lands Clauses Act.

The plaintiff resided in a large house on the west side of the road from London to Edgware, with a garden, and about six acres of meadow land adjoining. He had a large family, and kept several horses and cows. For the support of this establishment he had purchased about six acres of land on the east side of the road, and opposite to his own house. Upon this land, and adjoining the road, there were three houses. Two of them were let to tenants, and the third was used by the plaintiff for some outdoor servants to dwell in. The rest of this land consisted of pasture. The piece of land required by the company was a strip which divided the pasture into two parts.

The plaintiff had resided in the house for about twenty years, and in order to show that all the land was necessary to the enjoyment of the house, evidence was given that the possession of the land was a great pecuniary loss to him.

Rolt, Q.C., and Nalder, for the plaintiff.—The words "house" must include whatever is necessary for the enjoyment of the house: *Fergusson v. The London, Brighton, and South Coast Railway Company* (11 W. R. 1088); *Grosvenor v. The Hampstead Junction Railway Company* (1 De G. & J. 446); *Pulling v. The London, Chatham and Dover Railway Company* (12 W. R. 969; 33 Beav. 644). But even if it does not, all the land in question would pass under a conveyance of the house: 1 Inst. 5, b, 56, b; *Shepherd's Touchstone*, 12, 94. An extended meaning is given to the word for criminal purposes: 1 Hale's Pleas of the Crown, 558; *Reg. v. Great Northern Railway Company* (12 W. R. 602; 14 C. B. N.S. 25). And in the case of manufactories: *Spackman v. The Great Western Railway Company* (1 Jur. N.S. 790); *Hewson v. London and South-Western Railway Company* (8 W. R. 467).

W. M. James, Q.C., and Speed, for the defendant company, were not called upon.

Wood, V.C., said that he was not at liberty to go beyond the authorities, and although in *Fergusson v. The London, Brighton, and South Coast Railway*, there was an indication in the judgment of Knight Bruce, L.J., of a more extended view of the meaning of the word "house," there had been no decision

to that effect. His Honour could not, therefore, extend the view of Turner, L.J., who said that "house" must mean whatever would pass by a conveyance of the house or a devise of a house in a will. Trying it by this test, the land on the east side of Edgware-road could not be held to be part of the house. The house in question was capable of accommodating a large family, and the plaintiff's family was large. He kept a large number of horses and cows, and for their accommodation he had acquired land on the opposite side of the road, employing a cottage upon it as a house for outdoor servants; but he had already six acres on the same side of the road as his house, and his Honour was asked to hold that the word "house" would include not only the garden and curtilage, but six acres on each side of the road. If he held this he would be bound to hold that if a man in town, finding his house too small, hired another on the opposite side of the street for some outdoor servants, that would be part of his house. It would be still more unreasonable to make the word extend to all that a man chose to connect with the enjoyment of his house, and to hold that, because a man kept a large number of horses and cows, all the pasture which was necessary for them, or for the support of the dairy, was a part of the house. The land in question was land which the plaintiff had taken for the convenience of his family, outside of his house and curtilage. There was a class of cases in which the word, as applied to manufactories, had received a very large construction, but these could not have supported the plaintiff's contention unless it had been held that the pasture necessary for the support of the horses used in the manufactory would pass under the word. He would not be justified, in the present state of the authorities, in granting the injunction.

From this order the plaintiff appealed.

Feb. 8.—*Rolt, Q.C.*, and *Nalder*, for the plaintiff, cited the authorities above mentioned, and also *Doe v. Collins* (2 T. R. 498).

W. M. James, Q.C., and *Speed*, for the company.

Rolt, Q.C., in reply.

Feb. 10.—*TURNER, L.J.*, said that the appellant's case had been most ably argued, but the argument had failed to satisfy him that the Vice-Chancellor's decision was wrong. The appeal must be dismissed, and he should have dismissed it with costs, as he entertained no doubt upon the question, but as his learned brother felt some doubt, the costs would be costs in the cause.

KNIGHT BRUCE, L.J., said that he thought the question one of considerable doubt, and he should have preferred reserving the point to the hearing of the cause. He agreed that the costs should be made costs in the cause.

[IN THE COURT OF QUEEN'S BENCH.]

Feb. 1, 1866.

CHAMBERS v. REID.

14 W. R. 370; 13 L. T. 703.

See Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

Metropolitan Management Act, 18 & 19 Vict. c. 120, s. 88—Vestry—Inspector—Inspector ordering work—Contractor executing order—Bonâ fide,

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belief that inspector had authority—Notice of action—25 & 26 Vict. c. 102, s. 106.

LONDON PRACTICE.—By the directions of an officer of the vestry board, defendant, in the honest belief that such officer was authorised by the board to give such directions, erected an urinal on the wall of the plaintiff, such a work being a thing within the powers of the vestry board to erect under the 88th section of the 18 & 19 Vict. c. 120. The officer had no express orders from the board to erect this particular work, but the parish afterwards paid the expenses of it.

Held, in an action of trespass, that defendant, as he acted *bonâ fide* under the direction of an officer of the board, in the erection of works which the board was empowered to order by virtue of the 88th section of the 18 & 19 Vict. c. 120, was a person within the meaning of the 106th section of 25 & 26 Vict. c. 102, entitled to notice of action.

Held also, that the words in section 106 of the 25 & 26 Vict. c. 102, "their, or any of their directions," are not to be limited to the "board or vestry," but to be extended to the words following, "clerk, surveyor, contractor, officer," &c.

The declaration was in trespass for erecting an urinal against the wall of the plaintiff. Plea, not guilty by statute 25 & 26 Vict. c. 102, s. 106. The action was tried at Croydon in August last, before the Common Serjeant, when a verdict was entered for the defendant. It appeared that an inspector of nuisances of the vestry board of St. Mary, Lambeth, ordered defendant to erect an urinal against the wall of the plaintiff. The inspector had no order from the board, but the parish afterwards paid the expenses of the work.

A rule was subsequently obtained calling upon the defendant to show cause why there should not be a new trial on the ground of misdirection.

Patchett now showed cause and cited *Newton v. Ellis* (5 E. & B. 115).

Houston in support of the rule.

BLACKBURN, J.—In this case we were, at first, in some difficulty as to whether the board had power, under the 18 & 19 Vict. c. 120, to order the erection of an urinal. It is clear from the 88th section of the 18 & 19 Vict. c. 120, that the board had power to do what the defendant in this case actually did. That being established, the question turns upon the 106th section of the 25 & 26 Vict. c. 102. [His Lordship then read the section.] The question is, was defendant a person entitled to notice of action within the meaning of that section. I think that where the thing done is lawful under the Act, and the person doing it does it *bonâ fide* under the orders of an officer of the board, and the person honestly believes that the officer is authorised by the board, such a person is entitled to notice of action under this section. Now, by the 88th section of the first Act, there is no doubt that the board could have erected an urinal, and in this case their inspector ordered defendant to erect one. Defendant under that order did erect one. It is sufficient that defendant believed that the inspector was acting under the authority of the board. The section 106 is worded in a vague way, and it is quite possible to put a different construction upon it. But I think that the true meaning of the section is that where any person is acting under the direction of a person appointed and authorised by the board, such person is entitled to notice of action. It would be absurd if a contractor's servant were not entitled to notice of action for honestly doing what was intended to be done under the Act, when he is acting under the direction of his master, the contractor, who would in that case be entitled to notice of action? Here defendant is a person who is acting *bonâ fide* under the direction of an inspector, whom he honestly believes to be authorised by the board.

MELLOR, J.—I am of the same opinion. For the reasons given, I think

the defendant, being a person acting under the direction of the inspector, an officer of the board, is entitled to notice of action under the 106th section. Although there was no express order from the board to erect this particular urinal, yet the inspector had probably a general authority. It must be taken that defendant believed that the inspector was acting under the authority of the board, and that defendant acted *bonâ fide*. If there was any doubt about the *bonâ fides* that should have gone to the jury. Here it must be taken that defendant acted *bonâ fide*. The rule, therefore, must be discharged.

SHEE, J.—I had some difficulty upon the construction of the section during the course of the argument. But I agree now with the rest of the Court in thinking that the words in section 106, “or person whomsoever acting under their, or any of their, directions,” are not to be limited to the board or vestry, but are to be extended to the words following, “clerk, surveyor, contractor, officer.” Here the defendant acted under the direction of one of the persons there mentioned. Defendant, therefore, is a person entitled to notice of action.

Rule discharged.

[PRIVY COUNCIL.]

Feb. 1, 1866.

ROLFE AND BAILEY v. FLOWER, SALTING, & CO.*

14 W. R. 377; L. R. 1 P.C. 27; 14 L. T. 144. For the report of *Bank of Australasia v. Flower*, see [1866] E. R. A. 1189.

Victoria—Insolvency—Joint debt—Change of partners—Transfer of liability—Evidence.

PARTNERSHIP.—*Where new partners, who do not bring in any fresh capital, are taken into an existing firm, very slight circumstances will be sufficient to fix the new partnership with a liability to pay the debts of the original firm.*

This was an appeal from a judgment of the Supreme Court of Victoria, in a matter of insolvency of a firm of William Rutledge & Co., merchants, carrying on business in Belfast, in that colony, by which the respondents, Messrs. Flower, Salting, & Co., were admitted to prove against the estate of the insolvents for a debt of 53,587*l.* 10*s.* 10*d.*

This case was argued with the case of the Bank of Australasia against the same defendants. The facts in each were the same, and both cases related to the same debt, but a separate judgment was delivered in each case.

The judgment appealed from was pronounced on an application by the appellants to expunge the proof of the debt of the respondents, on the ground that it was not a joint debt of all the partners in the existing firm of William Rutledge & Co., but a separate debt of a former partnership, carried on under the same name, but of which two only of the present partners, William Rutledge and Horace Flower, were members.

Their opposition involved the consideration of two questions—1. Whether the insolvent firm of William Rutledge & Co. had assumed the liability to pay the debt; and, 2. Whether Flower, Salting, & Co. had agreed to accept the insolvent firm as their debtors, and to discharge the old partnership from its liability.

* Present—Lord Chelmsford, Sir John Taylor Coleridge, Sir James W. Colvile and Sir Edward Vaughan Williams.

The firm of W. Rutledge & Co., which originally consisted of William Rutledge and Horace Flower only, was, in April, 1859, formed into a new firm by the addition of two new partners, David Talbot and Francis Forster. At that time the firm were indebted to the respondents' three firms in sums amounting in the whole to 113,710*l.* 10*s.* 7*d.*

Before the partnership deed was executed, a balance-sheet was drawn up, principally by Talbot and Forster, showing the liabilities and assets of the firm on the 30th June, 1858. Amongst the liabilities the before-mentioned debts to the respondents' firm were inserted. In an affidavit made by William Rutledge in the insolvency proceedings, he stated that this balance-sheet was the one on the basis of which Talbot and Forster entered the firm.

Neither Talbot nor Forster brought any capital into the partnership.

The new firm of Rutledge & Co., consisting of four partners, and, after the death of Talbot, of the three others, continued to trade down to the time of the sequestration, in June, 1862. On the establishment of the new partnership no alteration was made in the mode of carrying on the business; the accounts were continued in the old books as if no change had taken place, and the existing liabilities were discharged or diminished, either from the assets of the old firm, or from the funds of the new, indiscriminately. No provision was expressly made in the partnership deed for the new firm assuming the debts of the old, nor for the assets of the old firm becoming the property of the new.

Sir R. Palmer, A.G., Hobhouse, Q.C., and Wickens, appeared for the appellants.

Sir H. Cairns, Q.C., Mellish, Q.C., Pearson, and Salting, for the respondents.

LORD CHELMSFORD delivered judgment.—In arguing the question as to the assumption of the liabilities of the old firm by the new, some reliance was placed upon probabilities. On one side it was said to be most improbable that Talbot and Forster should have agreed to undertake liabilities to the large amount of 162,000*l.*, which at any moment might occasion their ruin. On the other, it was argued that nothing was more likely than that two persons who had been clerks in the house, and who were to contribute no capital, should eagerly avail themselves of the opportunity of becoming partners upon any terms, however hazardous, in a concern which the state of the accounts showed to be, on the whole, a flourishing one. The question, however, is not to be decided upon probabilities, but upon evidence, although much evidence is not required to establish the assumption by the new firm of the debts of the old. Lord Thurlow, in *Ex parte Jackson* (1 Ves. Jun. 132), said—"If one man having debts, takes another into partnership with him, a very little matter respecting these debts will make both liable." And Lord Eldon in *Ex parte Peele* (6 Ves. 604), thought that "slight circumstances" might be sufficient to prove an agreement to undertake such a liability. The evidence in this case, however, appears not to be slight, but cogent, to fix the liabilities of the old firm upon the new. Not only was there a continuance of the former dealings of the old firm upon precisely the same footing and with the same books as before, but the liabilities of the old firm were regularly inserted in the balance-sheets of the new, and the assets of the old firm credited as belonging to the new, without any distinction between them. Large sums of money also were paid out of the general assets of the firm in reduction of the debt of Flower, Salting, & Co., and the interest upon their debt was regularly charged in the annual balance-sheets of the partnership.

It was said by the appellants that all that was done in payment of the debts of the old firm was in the discharge of a duty assumed by the new firm as agents of the old to receive their assets and discharge their liabilities. But the course of the partnership transactions scarcely admits of this argument; for, if it were merely a case of agency, it might have been expected that these

assets and liabilities would have been kept separate and distinct from the partnership business, instead of being blended and intermingled with it. [His Lordship here stated the evidence which had convinced the Committee of the liability of the new firm for the debts of the old one.]

Under these circumstances, therefore, there seems to be no reasonable doubt that the insolvent partnership, at the time of its formation, assumed the debts and liabilities of the former firm of W. Rutledge & Co., including the debt due to Flower, Salting, & Co., and the only remaining question to be considered is whether Flower, Salting, & Co., being aware of this arrangement, consented to accept the liability of the new firm, and to discharge their original debtors. Upon this question, as upon that of the agreement of the partners *inter se*, it was said by Lord Eldon, in *Ex parte Williams* (Buck, 16), "A very little will do to make out an assent by the creditors to the agreement." This case is different from many of the cases mentioned in the course of the argument, where there had been a change in a firm of which a person trading with it had notice, and went on dealing with the new firm, and afterwards sought to make the old firm liable, and a question arose whether, by his conduct, he had not discharged the old firm and adopted the liability of the new. Here the creditors of the old firm, knowing of the change of partnership, and that the new partners had taken over all the assets, and had agreed to be subject to all the liabilities of the former firm, not only continued their dealings with the new firm upon the same footing as with the old, and received payment of a portion of their debt out of the blended assets of the old and new firms, but themselves proved that from the time when they understood that the new partners took over all the assets and became subject to all the liabilities of the preceding firm, they thenceforth treated the partners in that firm as their debtors in respect of the debt owing to them at the time of the creation of that firm, or of so much thereof as for the time being remained due. If the respondents had, under these circumstances, endeavoured to enforce the payment of their debt from the partners of the old firm of W. Rutledge & Co., there would have been ample evidence to satisfy a jury that they had discharged the old firm and had accepted the new one as their debtor.

Their Lordships, therefore, affirmed the judgment of the Supreme Court, being of opinion that the respondents were entitled to prove against the estate of the insolvent firm of W. Rutledge & Co., for the amount still owing to them of the debt originally due from the former firm.

Judgment affirmed.

ROMILLY, M.R., Feb. 14, 1866.

TIMOTHY v. HINDLEY.

14 W. R. 382.

Bankrupt's assignee—Right to an account—Costs.

PARTNERSHIP.—*The usual rule as to costs in partnership suits applies also to a suit for winding up the affairs of a partnership which had been dissolved before the filing of the bill.*

This cause came on for further consideration. The bill was filed by the assignee of a bankrupt against a late partner of the bankrupt, and the person, who, on the dissolution of the partnership previously to the bankruptcy, had been, by a deed poll executed, made assignee of the partnership assets, for the purpose of realizing them for the benefit of the partnership. The question now for consideration was as to the costs of the suit.



Hobhouse, Q.C., and *J. T. Humphrey*, for the plaintiff.—The plaintiff had a right to an account. The assignee appointed for the purpose of realizing the partnership assets, left the business to be managed by the late partner of the bankrupt, who was in the position of trustee and agent for the purposes of such realization. The defendants made payments on account of the partnership matters, after an account had repeatedly been requested; and the accounts rendered on the suit were partly made up from such payments. The defendants did not render their accounts within a reasonable time: *Collyer v. Dudley* (T. & R. 421). No costs were asked against the defendants, but they ought to pay their own costs.

Baggallay, Q.C., and *A. Thomson*, for the defendants.—The plaintiff filed this bill on an unfounded representation by the bankrupt. At the hearing it was admitted that strictly the plaintiff was entitled to an account. The question of costs was reserved—the plaintiff had been informed that the defendants were in fact creditors of the bankrupt's estate. If, after this, he went on to take the account, he did so at his peril. This was not an ordinary partnership suit. Here the partnership had been already dissolved—where a substantial balance was found in favour of either party in taking on account the party in whose favour the balance was found was entitled to his costs: *Hawkins v. Parsons* (10 W. R. 377); *May v. Biggenden* (24 Beav. 207); *Remnant v. Hood* (27 Beav. 74; 7 W. R. 606); *Harmer v. Priestly* (16 Beav. 569; 1 W. R. 343).

Hobhouse, Q.C., in reply.—The items brought in since the bill filed had the effect of making a balance due from the bankrupt to the defendants. The defendant was bound to give an account, and the plaintiff had made frequent applications, but been unable to obtain one, it was in fact refused. There was no estate of the bankrupt to pay costs with, and a trustee, who was seeking no more than he was entitled, was never made to pay costs out of his own pocket. Here the defendants had claimed a much larger balance than had been found due, and had therefore virtually failed. The plaintiff had endeavoured to avoid litigation, but could get no account without it.

LORD ROMILLY, M.R.—I must follow the usual rule. No costs will be given on either side.

Wood, V.C., Feb. 8, 1865.

TANGYE v. STOTT.

14 W. R. 386.

Motion for new trial—Misdirection—Patent.

The summing up of Mr. Justice Patteson in Jones v. Pearce has not been impeached by the House of Lords in the Househill Company v. Neilson.

This was a motion for a new trial. In December last a trial had taken place before his Honour and a special jury, for the purpose of determining the validity of the patent, the subject of the suit, and also the question of infringement. The jury found for the plaintiffs on all the issues.

The plaintiffs were the sole assignees of the patent, which was the invention of one Weston. The defendant James Stott alleged want of novelty in the invention.

Willcock, Q.C., *Daniel, Q.C.*, and *J. L. Bird*, for James Stott, supported the motion on the following grounds:—1. That the judge had improperly rejected evidence of want of novelty. 2. That he had improperly described,

as disreputable, the affidavit sworn in the cause by a witness, who at the trial was cross-examined. 3. That the judge had misdirected the jury in point of law. 4. That the judge omitted to direct the jury as to the particulars of similarity or difference between the alleged invention of Weston and the alleged prior invention. 5. That the verdict was against evidence. They cited—*Stead v. Williams* (7 M. & G. 840; 2 Web. 126); *Lang v. Gisborne* (31 Beav. 135; 10 W. R. 638); *Gamble v. Kurtz* (3 C. B. 425); *Stead v. Anderson* (4 C. B. 806); *Carpenter v. Smith* (9 M. & W. 300; 1 Webst. 530, 540); *The Househill Company v. Neilson* (1 Webst. 708; 9 Cl. & Fin. 788).

Druce, for John Stott, the other defendant, took no part in the argument.

Grove, Q.C., Giffard, Q.C., T. Aston, and W. N. Lawson, for the plaintiff, were not called upon.

Wood, V.C., could not put the parties to the expense of a new trial. He felt that his refusal could not give rise to any failure of justice. With respect to the alleged misdirection to the jury he must remark that in his summing up he had adopted the expressions of the late Mr. Justice Patteson in *Jones v. Pearce* (1 Webst. 124), in his statement of the law, and he, the Vice-Chancellor, must confess that, until he had had the case in the House of Lords (*The Househill Company v. Neilson*) mentioned to him, he had thought that the words used in that statement were plain enough. His Honour then referred at some length to the remarks of counsel, and of Baron Alderson, in *Carpenter v. Smith*, on Mr. Justice Patteson's words, and to the judgments delivered in the case of *The Househill Company v. Neilson*, and went on to say that, in the present case, the facts were stronger in favour of the plaintiff than those in the case before Mr. Justice Patteson, and that the alleged prior invention was a mere experiment, which had been carried on for some time, but was eventually discarded. He considered that it was impossible any misconception could arise from the summing up; that the House of Lords' case did not decide that the ruling of Mr. Justice Patteson was wrong, and, therefore that he was not wrong in following it. With respect to the evidence, he was perfectly satisfied with the verdict of the jury. His Honour refused the motion.

Feb. 12.—The suit now came on for hearing.

Willcock, Q.C., Daniel, Q.C., and J. L. Bird, for the defendant.

The plaintiffs' counsel were not heard.

Wood, V.C., said he must grant the injunction prayed. The Court always did so except where a motion for a new trial was pending. The injunction must be in the terms of the first paragraph of the prayer of the bill, and there must be a decree for delivery up of the pulleys made in infringement of the patent as prayed for by the third paragraph. The plaintiffs must have their costs.

Wood, V.C., Feb. 10, 1866.

HADLEY v. ROBINS.

14 W. R. 387; 14 L. T. 100.

Sale by order of the Court—Conditions of sale.

VENDOR AND PURCHASER.—Where conditions of sale incorrectly state the effect of the trusts of a reversionary interest, the purchaser of that interest is not bound to accept the title.

This was a summons adjourned into Court for the purpose of determining whether a purchaser was bound to accept the title to a sum of stock under the following circumstances. In the month of June, 1865, a sale was advertised of "a life interest in the dividends arising from a sum of 5,000*l.* New 3*l.* per Cent. Bank Annuities, now standing in the name of the Accountant-General of the Court of Chancery in trust in a suit of *Williams v. Williams*; and also the reversion of the said capital sum of 5,000*l.* Stock as within mentioned, which will be sold by auction, pursuant to an order made in the above cause of *Hadley v. Robins*, and with the approbation of his Honour, Vice-Chancellor Sir William Page Wood, the judge to whose court this cause is attached." The seventh of the conditions of sale accompanying this description was (so far as is necessary to be stated) as follows:—

"The interests now to be sold as above described are derived under the will of the late Mr. Thomas Edward Williams, who bequeathed the sum of stock in question upon trusts, which (in the events which have happened) were, in effect, as follows:—The dividends to his daughter, Mrs. Maria Ann Hardwick, for her life, after her death one moiety of the capital to such of her children as shall survive her, provided (if sons) they attain twenty-one, or (if daughters) they attain that age or marry; and, in default of such children, that moiety to pass to the testator's residuary legatees."

The trusts of the will of Mr. Williams, so far as they related to this reversionary interest, were as follows:—

"As to the sum of 500*l.* 3½ per cent. Consolidated Bank Annuities, part thereof, in case my said daughter shall be living at the decease of my said wife upon trust to pay the dividends interest and annual produce thereof into the proper hands of my said daughter for and during the term of her natural life free from the debts, control, and interference of any husband with whom she may intermarry. And I direct that the receipt of my said daughter and her receipt alone shall be a sufficient discharge to my said executors and trustees, and the trustees and trustee for the time being of this my will for the said dividends, interest, and annual produce of the said sum of 5,000*l.* Consolidated Bank Annuities. And from and after the decease of my said daughter, upon trust to pay, assign, and transfer one moiety of the said sum of 5,000*l.* Consolidated Bank Annuities, unto and equally between all and every the children and child of my said daughter, living at her decease, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall live to attain that age, or marry under that age, equally to be divided between such children, if more than one, as tenants in common, their respective executors, administrators, or assigns. And as to the other or remaining moiety of the said sum of 5,000*l.* Consolidated Bank Annuities, and the dividends, interest, and annual produce thereof, from and after the decease of my said daughter, upon trust to pay, assign, and transfer the same unto and equally between all and every my sons who shall be living at the decease of my said daughter. But in case my said daughter shall die in the lifetime of my said wife without issue, then upon trust to pay, assign, and transfer the whole of the said sum of 5,000*l.* Consolidated Bank Annuities unto and equally between all and every my sons who shall be living at the decease of my said wife. But in case all my said sons shall die in the lifetime of my said daughter, then upon trust to pay, assign, and transfer the whole of the said sum of 5,000*l.* Consolidated Bank Annuities unto my said daughter, or to such person or persons as she shall direct or appoint; yet so, nevertheless, that the said sum of 5,000*l.* Consolidated Bank Annuities shall be for the sole and separate use of my said daughter, and shall not be subject to the debts, control, or engagements of any husband with whom she may intermarry." The purchasers, on perusing the abstract furnished by the vendors, made the following requisition amongst others.

"The 7th condition of sale does not state accurately the effect of Mr. Williams's will, inasmuch as the 5,000*l.* stock is in case all the testator's sons

should die in the lifetime of his daughter, given to her or her appointee, and not to his sons as residuary legatees."

Daniel, Q.C., and *Harrison Dalton*, for the purchasers, contended that the construction of the trusts of the will, set forth in the 7th condition, was erroneous, and that they had a right to rescind the contract.

Willcock, Q.C., *contra*.

Wood, V.C., held that the purchasers must be discharged from their contract, and that they must have their costs.

[IN THE COMMON PLEAS.]

Feb. 10, 1866.

WALTON v. THE LONDON, BRIGHTON, AND SOUTH-COAST RAILWAY COMPANY.

14 W. R. 395; H. & R. 424.

Contributory negligence—Leaving horse and cart unattended.

NEGLIGENCE.—*The plaintiff's horse and cart were standing at his shop-door unattended, and close behind them were drawn up the defendant's horse and cart, also unattended. The defendants' cart came into collision with the plaintiff's cart, and the plaintiff's horse broke through his shop window:—Held, that there was evidence of contributory negligence on the part of the plaintiff, which the judge was bound to leave to the jury.*

1. In this action, tried by jury in the county court at Croydon, the plaintiff sought to recover compensation in damages from the defendants under the circumstances hereinafter detailed.

2. The plaintiff is a grocer carrying on business at a corner house in Park-street, Croydon, which is a private street leading out of High-street. The house has a plate glass window, consisting of three large panes, facing into Park-street on the off-side.

3. On the afternoon of the 15th of August last a horse and cart, belonging to the defendants was drawn up opposite his shop for the purpose of loading goods, the head of the horse being about opposite to the centre of the shop window.

4. The defendants' servant having occasion to go to the shop on business, drew up a horse and van of the defendants', containing about two tons weight of goods, on the near side of Park-street, two or three feet in the rear of the plaintiff's horse and cart, and went into the shop.

5. No person on behalf of the plaintiff was watching his horse and cart, but his foreman proved that he was opposite the side window of the shop at the time of the accident, and that if the plaintiff's horse had backed he must have seen it. No person on behalf of the defendants was watching their horse and van.

6. It was proved that the plaintiff's horse was a young horse, about four years old, and quiet; and that the defendants' was a quiet old horse, which had long been accustomed to the sort of work it was employed on at the time of the accident.

7. No person was called who actually saw the circumstances leading to the accident, but it was proved that the plaintiff's horse smashed and came through the shop window, and injured himself as well as the plaintiff's cart and goods.

8. The evidence as to the cause of the accident, which was given by the plaintiff's foreman, who was standing at the window, inside the shop, was, that the plaintiff's cart did not back, and that on hearing a crash he ran out, and found that it had not done so, and that he could not get the horse extricated until the defendants' carter had released his horse, which had advanced to the front of the plaintiff's cart.

9. It was proved by the plaintiff that the off-wheel of his cart was chained at the time of the accident, and that the chain was taken off after the accident had happened; but counter evidence was given on the part of the defendants, and it was proved that the hind part of the plaintiff's cart was injured on the near-side, and that the off-shaft of the defendant's van was injured.

10. It was sworn to on the part of the defendants, that their van could not have moved forward, for no skidding of the van was observable on the ground, which it was supposed would have appeared had the van moved forward, but it was proved that the kerb for a space of two feet was scratched on the near side of the street where the defendants' van stood.

11. The plaintiff sustained injury to the amount of 35*l.*

12. The counsel for the defendants, in addressing the jury, contended that the plaintiff had been guilty of contributory negligence and was not entitled to recover, and that he had contributed to the accident by allowing his horse to remain in the street unattended. He also requested the opinion of the learned judge who was trying the cause on the law relative to contributory negligence, and the learned judge told him that, in his opinion, he had put forward an extreme view of the law. The learned judge then stated that a person could not recover damages if, but for his own negligence or that of the person who represents him, the accident would not have happened, though there was negligence on the part of the defendant; and that negligence or misconduct, on the part of the plaintiff, does not prevent him recovering damages in cases where the negligence or misconduct has not been an immediate co-operative cause of the injury complained of.

13. The learned judge, in summing up, stated to the jury that the first question for them to determine was, whether the defendants' van occasioned the accident by running into plaintiff's cart, and whether the same was brought about by the negligence of the defendant's servant; and that a question might have arisen, under some circumstances, as to whether there was contributory negligence on the part of the plaintiff. He said that he had no hesitation in ruling, on the authority of Addison on Torts, that negligence on the part of a plaintiff will not disentitle him to recover damages, unless, but for that negligence, the accident could not have happened, nor if the defendant could, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. He further stated that the plaintiff was, therefore, entitled to damages if the van ran into the cart; and that, in the present case, there was no evidence of contributory negligence on the part of the plaintiff; and that it was occasioned by the negligence of the servant in leaving the van, there could be no doubt whatever; and the only remaining question was whether the defendants' van did run into the plaintiff's cart, the evidence as to which was conflicting. The learned judge then reviewed the evidence given on either side, stating that it appeared to him not to be very material whether the off wheel of the plaintiff's cart was chained or not. The jury returned a verdict for the plaintiff, with 35*l.* damages, and judgment was accordingly given. The question for the opinion of the Court is whether the learned judge was right in so directing the jury.

Hannen, for the defendants.—The judge should not have found, as a matter of law, that there was no evidence of contributory negligence, but should have left the question to the jury. Suppose the damage had been done to the window of some person other than the plaintiff, could the plaintiff, in answer to an action by such person, say that his cart being unattended was no evidence of negligence? *Illidge v. Goodwin* (5 C. & P. 190); *Tuff v. Warman* (5 W. R.

685, 2 C. B. N.S. 740; affirmed in error, 6 W. R. 693; 5 C. B. N.S. 573).
[Stopped by the Court.]

Hopwood, for the plaintiff, contended that the learned judge did not lay it down as a matter of law that there was no evidence of contributory negligence; the whole summing up must be taken together, and then it would be seen that the judge was only expressing an opinion on the evidence. To entitle the defendants to succeed, the negligence of the plaintiff must be the proximate cause, or *causa causans* of the accident. See per Lord Campbell in *Dowell v. The General Steam Navigation Company* (3 W. R. 492, 5 El. & Bl. 195).

Hannen was not called on to reply.

WILLES, J.—I am of opinion that this case must be sent for a new trial, but I desire to say nothing as to what would have been the result if the proper question had been left to the jury, because the expression of an opinion on that might perhaps prejudice the fair trial of the cause. There must, however, be a new trial, because the judge took on him to decide a question of fact, in favour of the plaintiff, which should have been left to the jury, who were the only proper tribunal to dispose of it. It is very important that, in cases which frequently occur, both in the superior and in the county courts, one general rule should be observed, and not one rule in Westminster Hall and another elsewhere; and especially is that the case, in questions of collision, where the matter to be determined is one so peculiarly for the consideration of the jury. It has often been discussed what is the proper direction to the jury in these cases. Now if there is no evidence of negligence on the part of the plaintiff, the only question is if there was negligence on the part of the defendant. If there is evidence of negligence on the part of the plaintiff, then the question is, did it cause or proximately or directly contribute to the accident. It is obvious that that is a question which may be put in such a form as to perplex a jury, and the operation of causes is a very difficult subject to deal with. Accordingly, in *Tuff v. Warman*, the direction I gave to the jury in the case of a collision between two ships was objected to. I am far from saying that the objection was unreasonable; on the contrary, I think it was very reasonably made, because I made use of the words "directly contributed" instead of "proximately contributed" to the accident. My ruling was, however, adhered to in the Common Pleas; there was an appeal from that decision, and, after very great consideration for some time, the Court of Exchequer Chamber finally sustained and affirmed the ruling, on the ground that, taking the whole of the summing-up together, the effect of it was as stated in their judgment in its opening sentences, and that the jury could not have been misled by the use of the word "directly." In all these cases, where there is evidence of negligence on the part of the plaintiff, the summing-up should be in the words of Wightman, J., in that case. First, then, was there evidence of negligence on the part of the plaintiff? Secondly, was it such negligence as is there defined by the Court of Exchequer Chamber? (1) There was the same sort of evidence of negligence on each side. It was proved that the plaintiff's cart was drawn by a young horse, which was quiet; the defendant's van by an old quiet horse, used to the work; and therefore I do not say there was the same degree of negligence. Both were left in the street with no one to take care of them, and the judge left it to the jury that there was undoubted evidence of negligence on the part of the defendants, whether or not there was any evidence of negligence on the part of the plaintiff; and on that evidence the jury determined. But, in finding negligence on the part of the defendants, there was involved this, that there was also evidence of negligence on the part of the plaintiff. (2.) If there was evidence of negligence on the part of the plaintiff, was it a direct cause of the accident? What was the proper question to be left to the jury? It appears to us that the proper question for the jury in this, and indeed in all other cases of the like kind, is, whether the damage was occasioned

entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened" (per Wightman, J., in *Tuff v. Warman*). Nothing can be more clear than that, or more calculated to inform the jury of the question left for their province. Was, then, the summing up here substantially in compliance with the law so laid down. I think not, because the judge told the jury there was no evidence of contributory negligence on the part of the plaintiff. It is said that he was only expressing a strong opinion on the evidence, and if that were so there would, of course, be no new trial. But he told them that the first question for them to determine was whether the defendants' van occasioned the accident by running into the plaintiff's cart, and whether that was brought about by the negligence of the defendants' servant, leaving out the important word in *Tuff v. Warman*, "entirely" brought about or occasioned; and then he told them that the question of contributory negligence might have arisen under some circumstances, but that he ruled that the plaintiff might recover, unless, but for his negligence, the accident could (or rather would) not have happened, or unless the defendant could not, by the exercise of care on his part, have avoided the consequences of the plaintiff's neglect. With the law so laid down it is impossible to quarrel. But he further stated that the plaintiff was entitled to damages if the van ran into the cart, and that there was no evidence of the contributory negligence on the part of the plaintiff. He therefore took upon himself to decide if there was evidence of negligence on the part of the plaintiff, and did not leave to the jury whether there was such negligence as that, but for it, the misfortune would not have happened. It follows that the summing up was not substantially in accordance with *Tuff v. Warman*, and we are bound to grant a new trial. The question of costs remains, and we wish to say that the defendants should have the costs of this appeal in the event of their succeeding on the new trial. In the other event there will be no costs of the appeal on either side.

KEATING, J.—I am of the same opinion. We should not look too closely at the summing-up of the judge, but I cannot read his statement without seeing that it substantially withdrew from the jury the question whether there was such contributory negligence on the part of the plaintiff as that without it the accident would not have happened. It is clear that he did withdraw the question, and did so advisedly. It appears to me that there clearly was evidence of such contributory negligence on the part of the plaintiff. I cannot say what effect it might have had, or will hereafter have, on the jury, but I cannot for a moment doubt that there was such evidence to go to them.

MONTAGUE SMITH, J.—I have only heard the argument for the plaintiff, but I agree with the rest of the Court.

Judgment for the defendants.

[PROBATE.]

Feb. 20, 1866.

In the goods of W. O. BRADLEY (deceased).

14 W. R. 409.

Grant of administration to creditor passing over next of kin—Administration suit in chancery pending—Statute 20 & 21 Vict. c. 77—Practice.

WILL.—Where the estate of deceased was insolvent and the subject of a

suit for administration in chancery, but which was suspended by the death of administratrix, and could not be proceeded with without the appointment of an administrator by this Court; and it appeared that the children of deceased were all minors except one, and he was in New Zealand, and the solicitors for the family had intimated that none of the children, or any one on their behalf, would take out administration,

The Court, on an application to grant administration, under the 13th section of the Probate Act, to a creditor who had proved his debt in the administration suit, declined to grant administration until the children should be cited, and the particulars of the debt, as well as of the estate of deceased, brought before the Court by affidavit.

This was an application by a creditor of the estate of the deceased for letters of administration to be granted to him, under the 73rd section of the Probate Act, 1857 (20 & 21 Vict. c. 77).

The deceased, William Orton Bradley, died on the 3rd of August, 1860, leaving a will, dated 29th August, 1855, by which he appointed his wife, Susannah Bradley, his sole executrix, and universal legatee in trust, and residuary legatee (beneficially) for life, and on her death substituted their children as residuary legatees; but in case there should be no child living at her death, then he substituted her his residuary legatee absolutely.

Susannah Bradley died in the testator's lifetime, and he himself died a widower, without having revoked or altered his will, and leaving six children, all minors. He died on the 3rd of August, 1860, and on the 30th of October in the same year letters of administration with the will annexed of the personal estate and effects of the deceased were granted, at the Durham District Registry, to Mary Bradley, the grandmother, and one of the next of kin of the minors, for their use, and until one of them should attain twenty-one years. Mary Bradley died on the 3rd of July, 1865, and thereby the letters of administration expired, and on the 13th of August following the eldest child attained his majority, but did not apply for a grant of administration. He then resided, and still resides, in New Zealand.

About six months after the grant of letters of administration to Mary Bradley, an uncle of the minors, Richard Holland Bradley, acting as the next friend of one of them, caused a summons to issue out of Chancery, calling on the administratrix to shew cause why an order for the administration of the personal estate of the deceased should not be made, and an order for the administration was made accordingly, and the proceedings under it were pending at the time of Mary Bradley's death, but by that event they were suspended, and according to the practice of the Court of Chancery no further steps can be taken till an administrator is appointed. The estate is insolvent, and the present applicant proved his debt in the administration suit above-mentioned. Under these circumstances

A. F. Jackson moved the Court to grant letters of administration of the estate of deceased to the applicant under the 73rd section of the Probate Act, which provides, *inter alia*, that where it shall appear to the Court to be necessary or convenient, by reason of the insolvency of the estate of the deceased, or for any other reason, it shall be lawful for the Court to appoint some other person as administrator of the personal estate, than the person who, if the Act had not passed, would have been entitled to a grant of administration of the personal estate. He read affidavits shewing that the eldest and second sons of deceased are permanent residents in New Zealand and Calcutta, respectively, and that the third child, a daughter nineteen years of age, also resides in New Zealand. It was also shewn that the other three children aged fourteen, twelve, and ten respectively, are, the two former in the Royal Asylum of St. Ann's Society, Brixton, and the latter at Bancroft's school, Mile-end-road, London. Counsel read a clause in the affidavit of the applicant, stating his belief that it was not the intention of any child of the deceased,

or any other person on their behalf, to take out administration of his estate, and that his reason for that belief was information to that effect received from Messrs. Reiroux & Bromehead, the solicitors for the uncle in the administration suit and the confidential advisers of the family. The case, therefore, would come under the 73rd section of the Act 20 & 21 Vict. c. 77.

SIR J. P. WILDE.—The application cannot be granted on these facts. I cannot act on that clause of the applicant's affidavit that he believes it is not the intention of any child of the deceased, or any other person on their behalf, to apply for a grant of administration. There must be something more definite than this brought before the Court. On any future application, the eldest son and other children should be cited, and all particulars of the creditor's claim and of the extent of the estate of deceased must be sworn to.

Application refused.

[DIVORCE AND MATRIMONIAL.]

Feb. 20, 1866.

RYVES v. THE ATTORNEY-GENERAL.

14 W. R. 409.

Petition under Legitimacy Declaration Act—Postponement of trial—Grounds for—Affidavit that further information is likely to be obtained.

HUSBAND AND WIFE.—Where, on an application for the postponement of a trial by the Attorney-General, his affidavit stated that certain documents already in his possession were likely to lead, on inquiry, to further information,

The Court granted the application on this ground.

This was a petition under the Legitimacy Declaration Act to establish the marriage of Henry Frederick, Duke of Cumberland, with Olive Wilmot, in 1767, and that the Princess Olive of Cumberland, mother of the petitioner, was the issue of such marriage. In 1859 the petitioner filed a petition in the Court praying for a declaration of the marriage of the said Olive, her mother, with Mr. John De Serres, her father, and that the petitioner was the issue of that union.

That petition came on for hearing in 1861, when a decree was made as prayed.

The present petition was filed on the 4th August, 1865, the Attorney-General having had the required previous notice. The Attorney-General, by way of answer, merely left the petitioner to prove her case; to which the petitioner replied in like form on 7th September, 1865. On the 7th November following, the petitioner applied for leave to have the cause set down for trial by special jury (see 14 W. R. 17), which application was granted, the Attorney-General being ordered to amend his pleadings by adding a formal traverse so as to raise the issue for the jury. This was done on the 23rd November, and the petitioner replied on the 25th November. On the 27th January, 1866, the Court fixed the 28th February for the trial.

Bourke, for the Attorney-General now moved for an adjournment of the case until the next sitting of the Court. Though affidavits had been filed on the part of the Attorney-General, he submitted that the mere application of the Crown was a sufficient reason for granting an adjournment. He cited

Jessop v. Jessop (9 W. R. 640; 30 L. J. P. & M. 194). The Judge-Ordinary in that case observed: "The Court of Queen's Bench held, some years ago, that faith was to be placed in the statements of the Attorney-General. When Sir C. Wetherell was Attorney-General, he applied, on behalf of the Crown, for a trial at bar, Lord Tenterden, C.J., asked—'On what ground?' The reply was—'On the ground that the Attorney-General asks it;' and the application was granted." [The JUDGE-ORDINARY.—There are many cases in the Exchequer where the prerogative was carried as high as anywhere, but it is very questionable whether they go the length of saying that a trial should be adjourned on the unsupported application of the Attorney-General. But that question need not be raised, and I need not decide it, as you have an affidavit in Court.] He then read the affidavit of Rowcliffe, solicitor to the Attorney-General. It stated that he had been in constant communication with the Solicitor to the Treasury ever since the 25th November last, and that several hundred documents, bearing upon the case, had been got together at the end of January, which it was impossible to digest in time for trial; and that the Attorney-General advised that facts affirmative and negative, with reference to several persons and events, from the year 1767 downwards, should be obtained, and that it was necessary for this purpose that the trial should be adjourned.

J. W. Smith, Dr. (D. M. Thomas with him), for the petitioner.—This application is unnecessary, because the affidavit upon the other side does not state when the documents were found, but only that they were not got together till the end of January. It does not state that they are material and necessary to be produced on the part of the respondent, or even that there is any intention to adduce them. Nor is there any statement of the nature of the documents, so as to enable the Court to form any opinion as to whether they might be necessary. The affidavits of the petitioner, and of her attorney, explain that the documents stated to be in the hands of the Solicitor of the Treasury are petitions to the Crown by the petitioner and her mother, accompanied by copies of certain certificates and other documents on which she relied, and it was thus that the many hundred documents sworn to by Rowcliffe were made up. [The JUDGE-ORDINARY.—You have sufficiently explained that. Turn your attention to the next paragraph of the affidavit.] The next paragraph merely shews that evidence about the pedigree is thought necessary by the respondents; but it was their duty to have got this before now. The petition was filed in August, the replication in September, and the amended issue was only delayed until the 25th November by the *laches* of the Attorney-General. A much longer time is given to the Attorney-General in this case than a defendant would have in trespass or ejectment involving the same points and much longer documentary evidence. Moreover, the Attorney-General had one month's notice before petition, and this application is made only a week before the day fixed for trial, and the Attorney-General cannot be entitled to any indulgence.

WILDE, J.O.—Assuming that the proceedings in 1861 called the attention of the Attorney-General to the first step in the pedigree, and that he had some general notion as to the nature of the claim before this application, as indeed he and the public are likely to have had, I am, nevertheless, bound to grant this application for delay in a case of this public importance. It is desirable that when the cause is tried it should be tried once for all. I feel that I cannot disregard that clause in the affidavit of the Attorney-General where he states that it is extremely desirable that certain evidence should be obtained, and that if this delay is granted it is likely that certain documents already in his possession will lead to the obtaining of such evidence. I quite concur that such evidence is very desirable, and although it has been strongly urged that the delay sought for is a hardship to the petitioners, yet the Court cannot lose sight of the fact that although the petitioner obtained a decree

in 1861 to the effect that her father and mother were duly married and that she was the issue of that marriage, yet she has done nothing for a period of over four years. [*Smith, Dr.*—That can be explained.] It is unnecessary, as I ground my decision on the clause of the Attorney-General's affidavit already adverted to. I consider that I am bound to grant the application.

Application granted.

[ADMIRALTY.]

Nov. 7, Dec. 5, 1865.

THE "BAHIA."

14 W. R. 411; L. R. 1 A. & E. 15; 11 Jur. N.S. 1008.

Costs of detaining a witness.

SHIPPING.—*The expenses of detaining a witness not allowed when it cannot be shewn that such detention was necessary to ensure his attendance to give evidence, nor where his detention was for some other purpose, such as to watch the proceedings in the suit, &c.*

This case was originally one of damage to goods, and this was a motion on the part of the defendants to review the registrar's taxation of a single item in the defendants' bill of costs.

Brett, Q.C., and *V. Lushington*, for the defendants.

E. C. Clarkson, for the plaintiffs.

Dec. 5.—*DR. LUSHINGTON.*—In this case I have to consider the validity of an objection taken by the defendants to the taxation of a single item in their proctor's bill of costs. The bill contained a claim of 467l. 10s. for the detention and hotel expenses of a witness for twenty-one and a-quarter months—the twenty-one and a-quarter months being calculated from the 14th March, 1863, the date of the institution of the cause, to the 20th December, 1864, one week after the delivery of the judgment. The witness was the master of the *Bahia*, Captain Dugas; he was never, in fact, called, but the defendants maintained that he was, nevertheless, properly detained as a necessary witness, and that the charge of 467l. 10s. was a reasonable charge for such detention. The registrar, however, disallowed the claim altogether; but finding that the master had attended in court at the hearing, to give evidence if necessary, thought it fair to allow for the expense of such attendance at the same rate as would be usual in the case of a witness of the same position reasonably brought to London from Ramsgate and attending the court for two or three days, or as would have been allowed to the master himself if he had come up for examination before an examiner. It is against this decision that the defendants now appeal. The practice at common law, in circumstances like those of the present case, seems to be well settled. If a party entitled to his costs claims costs for the detention of a witness, a strict scrutiny is made to ascertain that the witness is a necessary witness, and was detained because his detention was the necessary means of securing his attendance. If it appears that, though a witness, he was really detained for another purpose (as, for instance, to watch the proceedings), his expenses will not be allowed. Still, if it be proved that the witness's attendance was required, and that his detention was necessary to secure it, the expenses of his detention will be recoverable as part of the costs in the suit—*Mount v. Larkins* (8 Bing.

195), *Berry v. Pratt* (1 B. & C. 276), *Howes v. Barber* (18 Q.B. 588), *Dowdell v. Australian Royal Mail Steam Navigation Company* (2 W. R. 554; 3 El. & Bl. 902). The first question is, therefore, Was the master a necessary witness? The master was not, in the event, called on to give evidence at all, and the cause did not turn, as it happened, upon any issue of fact. Still, this was a suit against the vessel in respect of the detention of the cargo. In such a case, the master can hardly fail to be a necessary witness; and the counsel for the defendants, it appears, so considered him, and I do not understand that this was questioned by the registrar. It may, therefore, be assumed by the Court. The next point is, was it necessary to detain the master to secure his evidence? The Registrar, I apprehend, was of opinion that the cause of the master's detention was not that he should give evidence in this court. The master was, indeed, detained at Ramsgate during the whole continuance of the cause in this court, from first to last; but then the beginning of the period of his detention was not coincident with the beginning of the cause, nor the end with the end. His detention began on the arrival of the vessel, several weeks before her arrest, and lasted many months after the delivery of the judgment. The Registrar was also of opinion that there were reasons for holding the French litigation to have been the cause of the master's detention. The vessel itself was at Ramsgate, and it was greatly to the interest of her owner that she should remain there, for the master had, on the 2nd February, 1863, executed a deed of abandonment of her; but by the French law this was not complete until a proper certificate had been given of the unnavigability of the vessel. The underwriters, however, disputed the abandonment, wanted to remove the vessel to Dunkirk, and, in consequence, the Consul-General of France had prohibited the Vice-Consul from giving the certificate. Until, therefore, the question as to the validity of abandonment was concluded by the decree of the Court of Cassation—not delivered until March 22nd, 1864—it was still an open question whether the vessel remained the property of her original owner, or had passed to the underwriters, and, consequently, whether Captain Dugas, as being in the service of the owner, was still master of her. The Registrar thought that, under these circumstances, it would be natural—and I agree—that the master should remain with the vessel, watching the progress of affairs, and that, if the abandonment was declared invalid, he should resume command; and this is what he actually did. He never ceased to be master; he never did leave the vessel; and, finally, he navigated her from Ramsgate to her original port of destination, Dunkirk. Such seem to have been the reasons on which the Registrar acted; and, certainly, they are entitled to great weight. But, on the other hand, what was there in the French litigation with the underwriters which rendered necessary the master's presence at Ramsgate? The place of that litigation was not at Ramsgate, nor in England, but in France. Again, the vessel was out of the control of the master, if not immediately upon the execution by him of the deed of abandonment, at all events after the vessel was placed under arrest by this Court. The Master was free to leave the vessel. He was a seafaring man, and his home was in France. What was there to prevent his leaving these shores, and, in the regular course of his profession, taking charge of another vessel to distant seas? How could his evidence be secured unless he was expressly detained for the purpose of giving it? I may add to these considerations the fact that Mr. Weber has distinctly deposed that he was detained, and detained solely in order to give evidence. If so detained, it makes no matter that, during his detention, he came up to town from time to time to give instructions to the proctor; although, if his detention had been only for the purpose of enabling him to conduct the cause, the mere fact that he also gave evidence would certainly be no ground for applying for the expenses of his detention. For these reasons I cannot agree with the Registrar, who disallowed the Master's claim altogether. I think, upon the whole, that it was necessary to detain him in order to secure his evidence,

and that his being also occupied in the concerns of the ship does not entirely destroy the claim.

There remains, therefore, the question of *quantum*. I consider this claim exorbitant. It is at the rate of 22*l.* per month, the master's wages on board ship being, exclusive of provisions, only 6*l.* per month. I think the equity of the case is to disallow all claim for wages, as the master was engaged in the affairs of the ship, but to make a moderate allowance for subsistence. The period of detention claimed for is too long. In July, 1864, when the case was ripe for hearing, the defendants, to suit their own convenience, had the hearing put off till the November Term. I consider that the master cannot claim for detention for this interval. Upon the whole, I shall allow the defendants a sum which I think adequate to meet the necessary expenses of the master's maintenance, from the arrest of the vessel on March 13, 1863, to July, 1864, when the defendants applied to have the cause put off. I fix this sum at 1*l.* per week. I can give no costs, the claim which was made being exorbitant.

ROMILLY, M.R., Feb. 9, 1866.

In re SIMMOND'S ESTATE. MORGAN v. MIDDLEMISS.

14 W. R. 414.

Will—Construction—Costs.

WILL.—*A residuary legatee has a right to institute a suit where the estate is considerable, and it is uncertain whether there will be a residue or not.*

This cause came on for further consideration.

The testator by his will left a legacy of 500*l.* to his wife. By a codicil to his will he directed that in case his widow should require a larger principal sum than he had left her by his will, his trustees should pay her a sum of money up to, and not exceeding, 300*l.*, "making altogether 1,000*l.* I have given her by this my will."

The question in the suit was whether the wife took 500*l.* or 300*l.* under the codicil, on which

Pearson, for the widow, cited *Milner v. Milner* (1 Ves. 106), and *Jordan v. Fortescue* (10 Beav. 259). On the question of costs he contended that the plaintiff, who was only a possible residuary legatee, in the event of his surviving the testator's widow, was not entitled to his costs, especially as, if the widow took 500*l.* under the codicil, there would, in fact, be no residue—*Otley v. Gilbey* (8 Beav. 602).

Southgate, Q.C., and *Everitt*, for the plaintiff.

LORD ROMILLY, M.R.—The plaintiff is entitled to his costs. He had a clear right to institute a suit for the administration of the testator's estate, which was considerable. Moreover, here there is a surplus, as I must hold that the widow only takes 300*l.* under the codicil; to hold otherwise would be to change a 3 into a 5.

ROMILLY, M.R., March 10, 1866.

BINGHAM v. KING.

14 W. R. 414.

Mortgage—Sale under power—Fund in court—Petition for payment by puisne mortgagees—Foreclosure suit.

MORTGAGE.—A first mortgagee sold under a power, and, after deducting his debt, &c., paid the balance into court. On the petition by a puisne mortgagee to have his debt, interest, and costs paid to him out of the fund, the order was made without an account being directed.

In a suit for the administration of an intestate's estate, part of which was subject to a mortgage, the mortgagee, who was a party to the suit, sold the mortgaged property under a power of sale contained in the mortgage deed; and after deducting from the proceeds of the sale the amount due for principal, interest, and costs, paid the balance into court.

Subsequently to the death of the intestate, and before the sale in question, his heir-at-law and sole next-of-kin, who had taken out administration to his estate, further charged the mortgaged property with two *puisne* mortgages in favour of persons who were not parties to the suit.

This was a petition by the *puisne* mortgagees for payment out of the fund in court of their respective debts, interest, and costs, the respective amounts of which were verified by affidavit.

The petitioners alleged that, at the time when they advanced the money on their securities, they were informed that their mortgagor was the intestate's heir-at-law and administrator; and that they had no notice of any debts of the intestate then owing; and submitted that their securities, were as to the real estate, prior to such debts, if any.

Jessel, Q.C., and Burt, for the petitioners.

A. G. Marten, for the other creditors of the intestate, opposed the petition, contending that it was a petition in the nature of a foreclosure suit, and that the only order that ought to be made on it should be to direct the usual mortgage account to be taken; and that, at all events, the costs ought to be subject to taxation.

LORD ROMILLY, M.R.—In this case the amount of debt and interest due has been verified by the affidavit of the petitioner, and the respondent has not disputed the amount. Moreover, the property has been sold under the power in the first mortgage deed, and the fund paid into court, which distinguishes this case from that of a foreclosure suit. The order must be made, but not be acted upon for a fortnight, to give the other creditors of the intestate time to contest the account, if so advised. The costs are of course subject to taxation.

KINDERSLEY, V.C., Feb. 17, 19, 1866.

Re PORTSMOUTH, PORTSEA, AND GOSPORT BANK.
HORSEY'S CASE. HELBY'S CASE. STOKES'S CASE.

14 W. R. 417; L. R. 2 Eq. 167; 14 L. T. 47.

Joint-stock company—Winding-up—Contributory—Liability notwithstanding transfer—Balance-sheet—Statute of Limitations.

COMPANY.—It was provided by the deed of settlement of a joint-stock

company that whenever shares should be forfeited or properly transferred to a new holder, the transferrer should be exonerated from previous liability in respect of such shares, provided, nevertheless, that nothing in the clause contained should extend to release him from his proportion of loss sustained by the company up to the transfer. Also that the directors should, half-yearly, at meetings, produce a balance-sheet accompanied by a report. The directors never furnished any balance-sheet, but did produce reports, which were false. The company was ordered to be wound up. One shareholder had transferred his shares five years before the winding-up order; another nine years, and another twenty-three years before such order.

Held, that the clause of exoneration did not release these shareholders, but that he whose transfer was dated twenty-three years before the date of the winding-up was entitled to be absolved by the general operation of the Statute of Limitations. Also that the liability of those who were liable was limited to the time previous to their transfers. Also that the obligation on the directors to produce a balance-sheet was imperative, but as to the report optional. Costs out of the estate.

This was an adjourned summons, the object being to put Mr. Horsey, Mr. Helby, and Mr. Stokes upon the list of contributories in the winding-up of this company, which was formed on 5th April, 1839, with a deed of settlement of that date.

Samuel Horsey was the holder of five shares, by deed of transfer, signed by two directors, and dated 1st October, 1839, which he transferred to C. Price, in February, 1842. William Helby was the holder of five shares, by a deed of transfer of the first-mentioned date, which he transferred to Joseph Blake, in August, 1859; and William Stokes was the holder of fifteen shares, by a deed of transfer also of the first-mentioned date, which he transferred to the company in February, 1856, having received dividends on them in the meantime.

The clauses of the deed of settlement more immediately bearing upon the question at issue were the 26th, 37th, and the 48th. The 26th was as follows:—"Whenever, by any means whatsoever, any shares shall have become forfeited, or shall be duly and validly transferred to a new holder, then, and in such case, and not before, the responsibility of the previous holder as a member of the company in respect of such shares shall, so far as the law will in that behalf allow, cease and determine, and such previous holder shall be exonerated and released from all subsequent claim and demand, obligation, and liability in respect of the same shares, and from all future observance and performance of the covenants, conditions, and agreements contained in the deed of settlement in respect of the same shares: provided, nevertheless, that nothing in this clause contained shall extend, or be construed to extend, to release the previous holder of the shares so transferred as aforesaid from his proportion of loss (if any) sustained by the company up to the period or his ceasing to be such holder as aforesaid." The 37th clause provided that each shareholder should be entitled to and interested in the profits, and be subject and liable to the losses, of the company in proportion to his shares. The 48th was as follows:—"Provided that at every general meeting in February and August, the directors shall produce a balance-sheet or general summary of the accounts of the company for the half-year, respectively ending on the 30th June and 31st December next preceding such general meeting, and such further statement or report upon the present condition and probable future progress of the affairs of the company as the directors shall deem expedient and proper for the interests of the company to be made public. And every such balance-sheet or general summary of accounts shall be binding and conclusive on all the shareholders, their executors, administrators, and assigns, at law or in equity, unless some error shall be discovered therein and made known in writing to the directors before

the next general meeting, and in that case such error so notified shall be rectified."

On the 31st March, 1865, the bank stopped payment, and the losses were stated at 80,000*l.* The directors never produced any balance-sheets at the half-yearly meetings, but did produce reports, in which they stated that the company was in a very flourishing condition, and that not only were they in a situation to reserve a large fund, but could pay a 10*l.* per cent. dividend. Evidence was adduced to shew what losses the company had sustained at the different dates above-mentioned.

De Gez, Q.C., and *Horton Smith*, for the official liquidator, contended that, under the 26th clause of the deed, all the present parties were clearly still liable for their share of the losses of the company, and it was sworn that there had been such, and that was sufficient. It was true that balance-sheets had not been submitted to the meetings, but the reports were acquiesced in, and had therefore become binding, even if not so by the operation of the 48th section. The Statute of Limitations did not apply to this case; but, even if it did, there was a clear liability in the cases of Mr. Helby and Mr. Horsey, inasmuch as the debts were specially debts, being contracted under a deed of covenant under seal.

Glasse, Q.C., and *Druce*, for the alleged contributories, argued that the language of the 26th clause was inconsistent with itself, and therefore it was inoperative. The directors had entirely ignored the 48th clause; and the so-called reports being entirely fabrications, could not be binding on the shareholders. Moreover, there was no sufficient proof of loss, and the *onus* of shewing that there had been such loss, and to what extent, rested on the official liquidator in the present instance. The debt was a simple contract one, and, therefore, except in one case, barred by the statute, supposing the party to be otherwise liable, which he was not. The words in the 26th clause—"As far as the law will in that case allow"—referred to the responsibility remaining under the Act of 7 Geo. 4, c. 46, enabling a creditor to get a *sci. fa.*, and the latter clauses could not suspend that liability. The winding up order was invalid.

De Gez, Q.C., in reply.

Authorities cited:—*Cape's Executors* (1 W. R. 85; 2 D. M. G. 562), *Sutton's case* (3 De G. & Sm. 362); *Saunderson's case* (3 H. L. Cas. 698); *Holmes' case* (2 D. M. G. 113); *Bourne v. Hope National Life, &c. Co.*, (13 W. R. 770); *Hunt's case* (3 Beav. 831); *Robinson's Executors* (5 W. R. 126; 6 D. M. G. 572); *Derry v. Earl Winchelsea* (1 Cox. 318); *Ex parte Harding, Re Williams* (23 L. J. Bkcy. 326); *Tatham v. Wilkins* (2 Hare, 357).

KINDERSLEY, V.C.—With respect to Mr. Helby, the question is whether, he having five years previously to the winding-up transferred his shares to another person, he is liable to contribute in respect of them, not for the purpose of being liable to all the losses, but in respect of his proportion of losses accrued previously to the date of his transfer. It was suggested that the winding-up order was invalid, but it appears to me that, even if it were so, I cannot look at that now, although, if I could, I think there is no ground to shew that it was invalid.

The question is—what is the effect of the 26th clause of the deed of settlement of the bank, which was formed many years ago. This is a most unfortunate clause, which, at the time, used to be inserted in these deeds, purporting to make a transferror of shares still liable in respect of losses accrued prior to the time of the transfer. It is a most unfortunate clause, because, assuming that that is the effect of it, the result would be that it would be utterly impossible to work out the machinery to make it effectual in discovering what each shareholder is liable for during his holding without striking a balance-sheet—for ascertaining the exact condition of the company

at the hour of every transfer, even of a single share. But still there is the clause, and it must be construed according to the fair interpretation of the language. [His Honour read the clause.] If the clause had stopped at the words "in respect of the same shares," I should have thought that the proper interpretation was that the transferror was to be exonerated from all responsibility and liability not only in respect of losses incurred subsequent to, but before the transfer. I think that would be the legitimate meaning, although, no doubt, the language is ambiguous, and without what follows the intention would appear to be an absolute and unqualified exoneration from liability future and past. But that interpretation of that portion is precluded by what immediately follows. His Honour read the remainder of the clause commencing "Provided nevertheless, &c." It appears to me impossible to avoid the conclusion that whatever ambiguity there is in the prior part of the clause, this portion absolutely precludes me from taking that view of it, and I must hold that the effect is that notwithstanding the absurdity and inconvenience of it no other interpretation can be put upon it, but that it was the intention that the transferror should still, not only as between himself and the transferee, but as between himself and the rest of the shareholders, remain liable for any loss which had accrued up to the time of the transfer. This clause is almost *verbatim* the same as that which occurred in the case of the *North of England Bank, Holmes' case* (*supra*), before Lord St. Leonards, and in *Saunderson's* and *Dodson's cases* before Lord Justice Knight-Bruce, when Vice-Chancellor; upon those cases, and the language used by Lord St. Leonards, I do not see how I can come to any other conclusion than that he considered the effect was to leave the transferror still liable to the losses prior to the time of the transfer, and the transferee liable for those losses only which have occurred subsequently; although that case was the converse of this. I must therefore come to the same conclusion here, and hold that Mr. Helby remains liable on the deed for any loss prior to the transfer.

Then comes this question—There is another clause which provides that half-yearly meetings shall be held, at which there shall be produced by the directors a balance-sheet or summary of the accounts of the company for the past half-year, accompanied by such a report as the directors think fit. This was for the benefit of the company, it was imperative to produce the balance-sheet, optional to produce the report. As is common with these companies, the directors did not, in any single year, produce the balance-sheet, but made a report, the substance being that there was a considerable profit, enabling them to reserve a fund and pay a 10l. per cent. dividend; and the question is—is that report to be considered a substitute for the balance-sheet, and binding on the shareholders, because the clause provides that the balance-sheet shall be so binding. It appears to me that that cannot be. The object was that the directors should produce a balance-sheet in order to shew the assets, their value, and the liabilities, because it is only on that sort of statement that you can draw a rational conclusion of what is the profit. It is imperative; and if the directors had done so, the unfortunate 26th clause would have been disarmed of much of its mischief, because the shareholders would have known the condition of the company, and have had an opportunity of investigating the affairs and pointing out the errors; and the clause would have been comparatively innocuous. Then comes the question, not having done that, can it be contended by the shareholders that the report made by the directors, which was utterly false, was binding on them? It appears to me they cannot. The effect is, with respect to Mr. Helby, that he must be put on the list of contributors, with the modification of limited liability; so expressed as to render him liable for such loss only as accrued during the time he held his shares. The case of Mr. Stokes stands precisely on the same footing, except so far as he can avail himself of the Statute of Limitations. Mr. Helby's transfer took place within six years of the winding-up, but Mr. Stokes was within nine years—when did the liability accrue? It was

contended that the statute did not apply; and, therefore, if the thing occurred fifty or one hundred years ago, there would still be the liability. It appears to me that the statutes ought to apply—not the statute of James, but the statutes generally; and if a man has agreed, as in the present case every shareholder did, that he would be liable for all losses up to the time of the transfer, his liability exists from the time when he makes such transfer. True, their liability was not ascertained, because no steps were taken to enforce it. Of course that was the fault of the directors, and they had no right to say, "We will not take steps for forty years, and then proceed, and you shall have no relief under the statute." The sole question is, "what statute?" That depends on whether the debt is on simple contract or speciality. It appears to me that it is by speciality, and that six years are not sufficient to bar the right; it requires twenty years, and therefore Mr. Stokes is also liable; but, Mr. Horsey, having transferred his shares twenty-three years before the winding-up, is not liable.

Costs out of the estate.

Wood, V.C., Jan. 18, 1866.

SIMS v. THE ESTATE COMPANY (LIMITED).

14 W. R. 419; 14 L. T. 55.

The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122) was repealed by the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.).

Statute 18 & 19 Vict. c. 122—"Metropolitan Building Act, 1855"—Party wall—Injunction—Jurisdiction.

LONDON.—*The defendants gave notice, under the statute 18 & 19 Vict. c. 122, s. 85, to the plaintiffs that they intended to pull down and rebuild a wall of the plaintiffs, which they described in the notice as a party wall. The wall was not a party wall, but an external wall, and the notice was therefore invalid. The defendants were frequently applied to by the plaintiffs to withdraw the notice, but they refused to do so, though they said they did not intend to act upon it:—Held, that the plaintiffs were justified in filing a bill to restrain the defendants from proceeding on the notice.*

The statute in question does not oust the powers of this Court in a case which is not within the provisions of the Act at all.

This was a motion that the defendants might be restrained by injunction from pulling down, removing, cutting, or otherwise injuring the wall standing on the north side of the offices of the plaintiffs, situate No. 3, Bartholomew-lane, in the city of London.

The plaintiffs were tenants of the said offices, under a lease for a term of years which would expire on the 24th June, 1872, and carried on there the business of stockbrokers.

The defendants had lately purchased the building and premises known as the Auction Mart, situate in Bartholomew-lane, and adjoining the plaintiffs' said premises, and the defendants had also obtained a long lease of the plaintiffs' said premises subject to the plaintiffs' said lease. The defendants had pulled down the Auction Mart and upon the site thereof had erected and nearly finished a new building.

Negotiations had taken place between the plaintiffs and the defendants for the purchase by the defendants of the plaintiffs' interest in the said premises, the defendants stating that they desired possession thereof, because

their architect wanted the space for carrying up the staircase of the new building. These negotiations came to an end because the parties could not agree upon a price.

On the 10th October, 1865, the defendants served on the plaintiffs a notice which was headed "Metropolitan Buildings Act, 1855, 18 & 19 Vict. c. 122, s. 85 (Party Structures)," and was in the form prescribed by that statute. The notice stated that the defendants intended, after the lapse of three months from the date thereof, to exercise the right given to them by that statute, by taking down and re-building of increased height and thickness the party-wall separating No. 3, Bartholomew-lane, from the said new building of the defendants. The notice then stated as follows:—"Time within which consent to the above is to be expressed, or after which dissent will be inferred, fourteen days from the delivery hereof." The notice then named a surveyor on behalf of the defendants. On the back of the notice were some printed instructions, one of which was as follows:—"The time for consent and the naming of a surveyor are embodied in this notice, as thereby the requisite proceedings will be cleared and shortened."

The plaintiffs had, on the 5th October, 1865, made certain proposals to the defendants respecting the purchase of their term by the defendants; and, on the 17th October, 1865, the secretary of the defendants wrote to the plaintiffs to the effect that the directors had resolved that the plaintiffs' terms be not accepted, and that Mr. Grüning (the defendants' architect) be instructed to proceed with the staircase as originally proposed.

On receipt of the said notice the plaintiffs instructed their surveyor to survey the said wall (called in the said notice a party-wall), and he stated that the wall was an external wall and not a party-wall, so that the notice served by the defendants was of no avail. It appeared that, in fact, this was so, there having been a space of six or eight inches between No. 3, Bartholomew-lane and the Auction Mart, and that the defendants had been in error in treating the wall as a party-wall.

Various communications then took place between the parties, the plaintiffs endeavouring to induce the defendants to withdraw their notice, and ultimately, on the 3rd January, 1866, the clerk of the plaintiffs' solicitor had an interview with Mr. Goslett, the managing director of the defendants, and asked him to withdraw the notice, and said that if it were not withdrawn, a bill would be filed by the plaintiffs. Mr. Goslett then told him that the defendants had no intention whatever of interfering with the wall, but that it was wholly unnecessary to withdraw the notice, because the three months mentioned in it would expire in a day or two, and that as the defendants could not then pull down the wall and rebuild it, the notice would fall to the ground. And he also said that the defendants would not interfere with the wall without giving the plaintiffs due notice. This was the account of what Mr. Goslett said, given by his own affidavit. In addition to this account, the said clerk of the plaintiffs' solicitor swore that Mr. Goslett also said that he should object to withdraw the notice, because, if it should expire, and the defendants should still wish to interfere with the wall, they would then have to give a fresh notice, which they would be unable to do were they to withdraw the first notice, as by such withdrawal they would have given up all right to interfere with the said wall.

The bill stated that the defendants had already cut into and made holes in the said wall, and had inserted the ends of scaffolding poles therein; but Mr. Grüning in his affidavit stated that, in consequence of the depth of the excavations for the foundations of the defendants' new wall, it was necessary to support the said wall of the plaintiffs', or it would probably have given way, and that, for this purpose, timber shores and struts had been placed against and inserted in the plaintiffs' said wall, but that it had not been, and was not intended to be, otherwise interfered with.

The plaintiffs filed their bill on the 6th January, 1866. On the

9th January the defendants' solicitors, on their behalf, offered to withdraw the notice, but the plaintiffs refused to accede to this unless their costs were paid. This the defendants declined to do. It was agreed to treat the present motion as the hearing of the cause, and the principal question was whether, under the circumstances, the bill ought to have been filed.

Giffard, Q.C., and *Shebbeare*, for the plaintiffs.—The defendants ought to have given a written withdrawal of the notice. The notice could, by the provisions of the statute, be acted upon at once on the expiration of the three months. The defendants distinctly refused to withdraw the notice, and from their evidence it is clear that they had a reason for their refusal. Under these circumstances the plaintiffs had no alternative but to file their bill and the defendants ought to pay the costs. They referred to 18 & 19 Vict. c. 122, ss. 85 (cl. 1, 6, 7, 8, 9), 86.

Rolt, Q.C., and *Wickens*, for the defendants.—From the fact that the defendants were making a separate external wall to their new buildings, it was clearly impossible that they could have any intention of acting on their notice. The defendants' acts showed that they had no such intention, and therefore there was no such threatening or intending on the part of the defendants as would induce this Court to interfere.

Then, as to the provisions of the statute. No notice had been given to the plaintiffs to appoint a surveyor, and nothing could be done till after that. The defendants were bound by the Act to give the plaintiffs notice to appoint a surveyor. But if the notice which was actually given is to be taken as a notice to the plaintiffs to appoint a surveyor, then, the plaintiffs having made default in appointing, the defendants had power to appoint a surveyor for them. The two would then have to appoint an umpire, and after that, proceed to an arbitration. It was clear that all this could not be done without ample notice to the parties. In any view of the case, the plaintiffs would have had ample time to come here before anything could have been done by the defendants.

The notice being from the first invalid, a refusal to withdraw it is no ground for the Court's interference. But really there was no refusal to withdraw the notice, the letter of the 17th October showing that the defendants had given up the plans which would have required an interference with the wall.

At any rate, this Court has no jurisdiction, the Legislature having created a special tribunal to determine the question with which this Court will only interfere on the ground of fraud: *London and North-Western Railway Company v. Smith* (1 M. & G. 216). [*Wood, V.C.*—The only question is whether the plaintiffs must not have had ten days' notice before the defendants could take any proceedings under the notice.]

Giffard, Q.C., in reply.—The only construction the plaintiffs could put on the letter of the 17th October was, that the defendants meant to proceed upon their notice. The defendants cannot, after their notice, be heard to say that the wall is not a party-wall.

The notice was then handed up to his Honour.

Wood, V.C., said that by the printed instructions on the back, notice to appoint a surveyor was actually given as part of the original notice. The notice was a distinct threat to treat the plaintiffs' wall as a party-wall. The defendants at the same time named their own surveyor, and at the back of the notice the plaintiffs were told they must appoint their surveyor within the time limited by the Act. The 6th, 7th, and 9th rules of the 85th section applied to this state of circumstances. The time required by the 9th rule had elapsed, and the defendants' position was this:—They were armed with powers to name a surveyor on behalf of the plaintiffs, the two surveyors could at once appoint a third, and then the three or any two of them would have had power to order the wall to be pulled down at any time after the expiration

of the three months. They could call the plaintiffs before them, and, if they thought fit, order the thing to be done at once.

There was nothing in the Act to oust the jurisdiction of this Court in a case where the matter is really not within the Act at all. If the Act had said peremptorily that these gentlemen and no one else should decide whether the wall was a party-structure within the meaning of the Act, that would have been a different matter. There was no doubt the plaintiffs would have a right to come to this Court if a threat were clearly made and not withdrawn; and the notice was as distinct a threat as if the defendants had come with men armed with pickaxes to pull down the wall. The only question then was, whether the threat had been withdrawn. It appeared that the defendants had deliberately refused to withdraw the notice, and the reason they gave was an odd one. They said—"The three months will have expired in a few days." They said—"We do not intend to act on the notice, but we will wait till the end of the three months. We will give you notice if we mean to do anything, but we will keep ourselves armed with our statutory powers." This verbal promise was not one which the plaintiffs were bound to rely upon. The plaintiffs were entitled to file their bill when they saw this distinct arrangement made, which the defendants refused to withdraw. If the notice to appoint a surveyor had not been embodied in the original notice, so that ten days must have elapsed before anything could be done by the defendants, the plaintiffs' application might have been thought somewhat hasty; but that was very different from what really happened. The defendants had pertinaciously refused to withdraw their notice, though there had been request after request to them to do so, and under these circumstances the plaintiffs were entitled to file their bill, and were not bound to accept a mere verbal promise not to act upon the notice.

This motion being treated as the hearing of the cause, the proper order would be to stay all further proceedings except the taxation of costs, and that the defendants pay the costs of the suit.

WOOD, V.C., Jan. 26, 27, 1866.

HENSLEY v. WILLS.

14 W. R. 422; 14 L. T. 162.

Will—Construction—Joint tenancy—Tenancy in common—Heirs.

*WILL.—J., by his will, gave to his daughters, N. and S., the interest of 2,000*l.* Consols, to be paid to them in equal shares for and during the term of their natural lives. By a codicil thereto the testator declared it to be his will that after the decease of his said daughters, N. or S., the property, for which they were to receive during their lives the interest, which was thereby to be for their sole and separate use, independent of any connections they might form, the said stock should become the joint property of the lawful heirs of his four children in equal shares:—Held, that each of the daughters, N. and S., took the income of a moiety of 2,000*l.* for her life, and that on the death of one, her moiety went over at once to the heirs of the children of the testator.*

The share of the heirs of the surviving daughter was carried to a separate account for such person as should be her heir at her death.

This was a motion for decree.

John Mills made his will, dated 7th July, 1814, and thereby (*inter alia*) gave to his daughter Nancy Mills and to his daughter Sarah Mills 2,000*l.* Consols

—viz., to each of them 1,000*l.* Stock, the same as he had before given to his daughter Lydia, and his son John, on their settling in life. And he likewise gave to his said daughters Nancy and Sarah Mills the interest of 2,000*l.* Consols, to be paid to them in equal shares, for and during the term of their natural lives, if he should die possessed of such stock; and, if he should not, then he willed that it might be purchased with the other property he died possessed of, and the said 2,000*l.* Consols to be placed in the joint names of his executors therein named, to be paid to them by equal half-yearly payments.

The said testator made a codicil to his said will, which was as follows:—
“It is likewise my will that, after the decease of my said daughters Nancy or Sarah Mills, the property for which they are to receive, during their lives, the interest, which is hereby to be for their sole and separate use, independent of any connections they may form, the said stock shall become the joint property of the lawful heirs of my said children and executors, in equal proportions, viz. —one fourth part to the heirs of my daughter Nancy Mills, one other fourth part to the heirs of my daughter Lydia Hensley, one other fourth part to the heirs of my son John Mills, and one other fourth part to the heirs of my daughter Sarah Mills.”

The defendant Sarah Wills was the same person as the daughter Sarah Mills, she having intermarried with one Wills. She was, however, a widow when the bill was filed, and she was the surviving executrix of the testator. John Mills, the son, died in the year 1837, leaving his said three sisters his co-heiresses and next-of-kin. Nancy Mills died in 1862 unmarried. The plaintiff was the eldest child of Thomas Hensley the younger, who was the eldest son of the testator's said daughter Lydia Hensley. Lydia Hensley and her husband, and Thomas Hensley the younger, were both dead. The other defendants to the suit were Emma Hensley, the plaintiff's mother, and John Walton, the trustee of a settlement made by her and the plaintiff.

The said sum of 2,000*l.* consols was standing in the sole name of the defendant Sarah Wills, and she had, since the death of Nancy Mills, applied the whole of the dividends thereon to her own use and claimed to be entitled to them for her life. The plaintiff on the contrary, alleged that Sarah Wills was not, under the will, entitled to more than a moiety of those dividends for her life.

The bill asked a declaration accordingly, and that the 2,000*l.* might be brought into Court.

Giffard, Q.C., and *Ramadge*, for the plaintiff.—It is clearly settled now that the words *heirs* is to have its strict meaning, even when applied to personality, if there be nothing in the will to show that it is used in a different sense: *De Beauvoir v. De Beauvoir* (3 H. L. Cas. 524); *Hamilton v. Mills* (29 Beav. 193). The gift of the 2,000*l.* to Nancy and Sarah was a gift to them as tenants in common. The gift over by the codicil makes no difference, the word “or” cannot be construed “and,” unless no meaning can otherwise be given to it: *Willes v. Douglas* (10 Beav. 47); *Turner v. Whittaker* (23 Beav. 196; 4 W. R. 689).

C. H. Russell (Rolt, Q.C., with him), for the defendant Sarah Wills, did not dispute the construction sought to be put on the word “heirs,” but he contended that the income of the whole 2,000*l.* survived to her for life. The words of the gift create a joint tenancy, not a tenancy in common. Even the words “equally divided” are not enough to create a tenancy in common: *M'Dermott v. Wallace* (5 Beav. 142). In *Moffatt v. Burnie* (18 Beav. 211; 2 W. R. 83), a gift to husband and wife for their lives was held to be for their joint lives and the life of the survivor. In *Smith v. Oakes* (14 Sim. 122) “during their joint and natural lives” was held to mean “during their joint lives and the life of the survivor.” The words “share and share alike” will not create a tenancy in common where the context shows that a joint tenancy was meant: *Armstrong v. Eldridge* (3 Bro. C.C. 215). In the present case the gift over by the codicil is to take place on a single event, and



the fund must go over as a whole. *Willes v. Douglas* turned entirely on the explanatory context.

Wood, V.C., said that the case had been very ably argued by Mr. Russell. The cases cited, however, turned upon there being a clear indication of an intention that the whole fund should go over at once. It might have been so here if the gift over had been to the heirs of these two ladies only. But the force of that observation was taken away, because the gift over was also to the heirs of the son John, and the heirs of the daughter Lydia, whose deaths the testator could not possibly contemplate as to occur at the periods of the deaths of either Nancy or Sarah. The difficulty caused by the use of the word "or" in the codicil was not got over by the cases cited. There is nothing here to show that the whole income was intended to continue to the one sister after the death of the other. There is no doubt they were to take it for their joint lives in equal shares, and the words creating a separate use, shewed that the testator contemplated a distinct interest for each daughter. On the whole will, the intent to be gathered out of the cloud of words used appeared to be that, on the death of one of the two daughters, her moiety of the 2,000*l.* was to go over to the persons answering the description of heirs of each of the four children. The share of the heirs of Sarah Wills must be carried to a separate account for such person as shall be her heir at her death.

[IN THE QUEEN'S BENCH.]

Nov. 25, 1866.

MAINWARING v. CHEESE.

14 W. R. 423.

Cooke, Q.C., and *Cleave*, shewed cause against a rule which had been obtained to set aside the verdict and enter a nonsuit.

Grey, Q.C., and *G. Browne*, *contra*.

Indebitatus count for the purchase-money of an estate.

Plea.—Never indebted.

At the trial, at the Hereford Spring Assizes, 1865, it appeared that as long ago as 1859 the estate had been sold by the plaintiff to the defendant, and that the deed or conveyance had been duly executed, but as the purchase-money was not paid, the vendor's solicitor retained the deed, and the vendor remained in receipt of the rents and profits. The deed contained the usual recital of the payment of the purchase-money, but did not contain any actual release in terms. Matters remained in this state until the action was brought, as the money was never, in fact, paid.

At the trial it was objected—first, that the plaintiff was estopped from denying the recital in the deed; secondly, that the deed was delivered as an escrow; thirdly, that the deed, containing an acknowledgment, the same being under seal, was equivalent to a release, and the signature of the deed at the same moment that it conveyed the estate, also released the legal right to sue for the purchase-money.

The learned Judge reserved the point, but left the case to the jury, who found, according to the facts, that the purchase-money was never paid, and a verdict was entered for the plaintiff.

In Easter Term a rule was accordingly obtained, and cause was now shown against it. The plaintiff's counsel objected to the first point, that the estoppel should have been pleaded; but

The Court made the rule absolute on the third ground, without going into the first or second objections, or calling on the defendant's counsel.

[IN THE COMMON PLEAS.]

Feb. 12, 1866.

BROOKS v. JENNINGS.

14 W. R. 440; H. & R. 414; L. R. 1 C.P. 476; 14 L. T. 19; 12 Jur. N.S. 341.

Bankruptcy Act, 1861, s. 192—Composition deed—Form of plea in bar to the further maintenance—Common Law Procedure Act, 1852, s. 68—Unreasonableness—Composition payable before day of registration—Practice.

BANKRUPTCY. N.—*A composition deed, under the 192nd section of the Bankruptcy Act, 1861, is not unreasonable because the day thereby appointed for the payment of the composition occurs before the expiration of the twenty-eight days allowed by the Act for the registration of the deed, although no trustee is appointed by the deed.*

PRACTICE.—*The Common Law Procedure Act, 1852, s. 68, makes it unnecessary that pleas in bar, which raise a defence upon matters which have occurred since the action, should have any formal commencement.*

The declaration in this case was for goods sold and delivered, and for money due upon an account stated. It was dated on the 4th December, 1865.

The plea, which was dated 19th December, 1865, set out a composition deed made the 14th November, 1865, on which the defendant relied as a bar to the action, and which, so far as is material to the present case, was in the following terms:—

“ This indenture, made the 14th day of November, 1865, between the several persons whose names are subscribed, and seals affixed, in the schedule hereunder written (being respectively either individually or in co-partnership with the creditors of J. C. Jennings, on behalf of themselves and all and every other the creditors of the said J. C. Jennings of the first part, and the said J. C. Jennings, hereinafter called “ the said debtor,” of the second part: whereas the said debtor is indebted to the said several persons, parties hereto of the first part, in the several sums of money set opposite to their respective names in the said schedule hereunder written, and is also indebted to certain other persons in divers sums of money, and, being unable to discharge the same in full, has agreed to pay a composition of two shillings in the pound, such payment or composition to be made and paid to all and every the creditors of the said debtor, whether executing this deed or not, on the 21st day of November, inst., and to be in full discharge of all and every the debts of the said debtor, due and owing at the time of the execution of these presents. Now this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the payment by the said debtor to the said several creditors of such composition as aforesaid, they, the said several persons, parties hereto of the first part, for themselves and their several and respective partners, do hereby accept the said composition in full satisfaction and discharge of their respective debts, and do, by these presents, release and for ever quit claim unto the said debtor, his heirs, executors and administrators—all and all manner of action and actions, suit and suits, debts, &c., whatsoever, which they, the said several persons, parties hereto of the first part, and their several and respective partners now have, or at any time heretofore had, against the said debtor; and it is hereby lastly agreed and declared that these presents are intended to operate, and shall (so far as lawfully may be) operate, as a deed of composition, within the provisions of the Bankruptcy Act, 1861, and that, so soon as a majority in number representing three-fourths in value of the creditors of the said debtor shall have executed, or in writing assented to these presents, it is intended that the same shall be registered in the Court of Bankruptcy under the 192nd section of the said Act, in order that the said debtor may obtain the protection of the Court as provided by the 198th section.” Then followed a schedule of debtors with their respective

debts, &c. And the plea then went on to state that the conditions required by the Bankruptcy Act, 1861, had been complied with, and that "on the 21st November, 1865, being after action," the defendant had tendered to the plaintiff the composition due upon his debt, which the plaintiff had refused to accept. To this plea there was a demurrer. This action was commenced before the execution of the composition deed set out in the plea.

Philbrick in support of the demurrer.—1st. This defence arose since the commencement of the action, and the plea should therefore have a formal commencement, this being a plea in bar, and not to the further maintenance of the action. 2nd. The deed is unreasonable, because it provides that the composition should be paid in a week from the execution, while twenty-eight days are allowed by the statute for the registration—so that a creditor must decide either to refuse or accept the composition without knowing whether the requirements of the statute would be complied with—nor is there any trustee appointed by the deed.

Jenkins (with him *Besley*), in support of the plea.—The first objection is disposed of in *Gresty v. Gibson* (11 W. R. 284; 1 L. R. Ex. 112). 2nd. The deed is not unreasonable. A deed has been upheld under which the composition was payable at the time of the execution: *Ex parte Godden* (32 L. J. Bkcy. 37). If the composition was accepted the creditor might sue for the residue of his debt, if the deed turned out to be bad. In the case of *Dingwell v. Edwards* (12 W. R. 597; 4 B. & S. 738), Blackburn and Mellor, JJ., appear to have assumed that it was no objection to a deed that the composition was to be paid on execution.

Philbrick in reply.—In *Dingwell v. Edwards* more than one composition was to be paid, and the release was not absolute on the payment of the first composition. There was a trustee in that case, while there is none here, and the release was upon the agreement to compound.

WILLES, J.—I am of opinion that the objections to this deed are not sustainable, and that our judgment must be for the defendant. The first objection is that the plea shows a defence which arose after the action, and that it has no formal commencement, but only sets forth the facts. That is only a formal objection; if the plea was embarrassing the plaintiff would be allowed to correct it on application to a judge at chambers; but no such objection arises here. This objection is answered by section 68 of the Common Law Procedure Act, 1852, which was intended to meet cases like the present. The case of *Owen v. Waters* (2 M. & W. 91), decided that in an action on a bill of exchange it was not necessary to aver in the declaration that the time for the payment of the bill had elapsed "before the commencement of the suit." It was afterwards held that in pleas matters of defence, which had arisen since action brought, should be stated to have arisen after the commencement of the suit. That rule was in accordance with precision; but under that rule pleas might be open to objection which were in substance good. These objections were removed by section 68 of the Common Law Procedure Act, 1852, which enacts that the plea is to be pleaded according to the fact, without any formal commencement or conclusion. This put pleas on the same footing as declarations. It would be a formal commencement if the plea was pleaded to the further maintenance of the action. The plea is therefore good on this point. Then it is contended that the deed is no answer to the action as being illusory, because the debtor is to be released if the composition is tendered on a certain day, but this is not so; for the recital describing the debts amounts to a covenant to pay on the part of the debtor, and the description of the plaintiff as creditor would be sufficient to enable him to sue. Besides this the deed provides that the debt is not gone unless the composition is paid. Another objection to the deed is that the day for payment of the composition occurs within the period limited by law for the registration of the deed. That, however, is no hardship, for the creditor may either refuse the composition until the deed is found to be binding; and in that

case he would not be deprived of his right to sue if the deed turned out to be bad; or he may accept the composition of two shillings, but at the same time insist on being paid the remaining eighteen shillings, whereby he would not be treated as an assenting creditor.

KEATING, J.—The want of a formal commencement is no objection to this plea. It is pleaded according to the Common Law Procedure Act. The plaintiff could not be embarrassed by it as to the nature of the defence, or in deciding upon the course he should take. As to the unreasonableness of the deed, that is no ground of objection. My brother Willes has pointed out that there would be no hardship to the plaintiff if the deed turned out to be bad.

SMITH, J.—The plea is good. Since the Common Law Procedure Act a formal commencement is unnecessary and the plea forms a good answer to the action: *Ex parte Castleton* (10 W. R. 851; 31 L. J. N.S. Bkey. 71). Mr. Philbrick says that it is unreasonable because the day appointed for the payment of the composition occurs before the twenty-eighth day which is appointed by the Act as the limit of the time within which the deed may be registered. But it must be observed that it may be registered at any time within the twenty-eight days; that is only the maximum period. *Ex parte Godden* is in favour of the defendant. There Mr. Commissioner Holroyd says "there is this further point in the case that in this deed there is not, as in *Walter v. Adcock*, a covenant to pay *in futuro*, but an engagement to pay the amount of the composition down at once." That is an authority to show that the provisions of the present deed are reasonable.

Judgment for the defendant.

STUART, V.C., Feb. 27, 1866.

CLARK v. CLARK.

14 W. R. 449; 14 L. T. 98.

Practice.

HUSBAND AND WIFE.—*The Court will make a payment of money out of court to a married woman entitled thereto, notwithstanding that she is misdescribed in the petition, where the husband gives his consent.*

On petition in this suit certain trust funds were ordered to be transferred to the petitioners after providing for payment of 500*l.* to a respondent, the plaintiff in the suit of *Maddison v. Chapman*.

The Registrar refused to draw up the order for payment, the petitioner being a married woman (but not so described in the petition), except upon her examination and consent in court.

Villiers having mentioned the matter,

STUART, V.C., on the husband's consenting, directed the order to be made for payment to the wife on her separate receipt.

Wood, V.C., Feb. 12, 13, 14, 1866.

TATE v. WILLIAMSON.

14 W. R. 449; L. R. 1 Eq. 528; 14 L. T. 163: affirmed 15 W. R. 321; L. R. 2 Ch. 55; 15 L. T. 549 (L. C.).

Purchase by a person in a fiduciary relation to the vendor.

FRAUD AND MISREPRESENTATION.—*A person undertaking to advise another, who is in pecuniary difficulties, on the arrangement of his affairs, and the best means of settling with his creditors, places himself in a fiduciary position with respect to that person; and the doctrines of the Court of Equity, which relate to purchases by a trustee from his cestui que trust, apply to a purchase made by the person advising from the person advised. A sale under such circumstances set aside after the death of the vendor at the suit of his heir-at-law, who never acquiesced in the transaction.*

This was a motion for decree.

The original bill was filed so far back as February 8th, 1862. The plaintiff was William James Tate, the father, heir-at-law, and personal representative, of William Clowes Tate, deceased, who died in the year 1860, at the age of twenty-three, intestate, and without having been married; and the defendants were Robert Williamson the younger, and Hugh Henshall Williamson.

The object of the bill was to set aside a sale of real estate, made by the intestate to the defendant Robert Williamson, on the following grounds:—1st, that at the time when the sale was made, the defendant Robert Williamson stood in a fiduciary position towards the intestate; 2ndly, that on the treaty for the sale the defendant Robert Williamson, taking advantage of the youth and inexperience of the intestate, and of the fact that he was without proper professional advice, misrepresented and concealed various facts which had an important bearing on the value of the property; and, 3rdly, that the price given was a grossly inadequate one.

The material facts were as follows:—

William Clowes Tate, the only son of the plaintiff by his first wife, Eliza Tate, was born July 6th, 1836. On the death of his mother, which took place October 5th, 1837, he became entitled to an equitable estate in fee in an undivided moiety of a certain estate, situate in the parish of Norton-le-Moors, in the county of Stafford, which consisted partly of freehold and partly of copyhold lands, with the coal-mines thereunder, and was usually known as the "Whitfield Estate." The entirety of this estate, which produced a surface rental of about 440*l.* per annum, was vested in the defendant Hugh Henshall Williamson (who was great-uncle by marriage to the intestate) John Rothwell and Richard Ecroyd Payne, in fee, as joint tenants and trustees for the persons beneficially interested therein. It was, however, in fact, managed by the defendant Hugh Henshall Williamson alone, he being the only trustee resident in the neighbourhood of the estate, and being fully conversant with the superintendence of both coal-mining and farming operations.

During the minority of the intestate, a certain portion of the rents and profits of his moiety of the Whitfield Estate was paid for his education and maintenance, and the remainder was accumulated for his benefit, according to the trusts of the instrument under which he had become entitled to such moiety. He resided at Manchester with his father, the plaintiff, until the nineteenth year of his age, when he proceeded to the university of Oxford, in order to complete his education. On the 5th July, 1857, while he was still resident at the University, he attained his majority; and shortly after that date—that is to say, in August, 1857—the trustees assigned to him the accumulations of the rents during his minority, conveyed and released to him the freehold, and covenanted to surrender to him the copyhold, portion of the said moiety. The other undivided moiety, however, of the Whitfield estate being still subject

to trusts in favour of certain persons, some of whom were infants, the entirety of the said estate continued as before to be managed by the defendant H. H. Williamson, who received the rents thereof, and transmitted a moiety of them to the intestate.

The personal habits of the intestate at Oxford were of an idle and extravagant kind, and had involved him in debt before he reached his majority. It was alleged, though not conclusively proved, that the whole, or, at any rate, much the larger portion of the accumulations which he received in August, 1857, and which amounted to about 2,200*l.*, was, immediately on his receipt thereof, applied by him in liquidating some of the debts which he had thus contracted; and it was shown that, on two several occasions, viz., in November, 1857, and April, 1858, he raised two several sums of 500*l.* for the purpose of paying debts. These two several sums were raised on his moiety of the Whitfield estate by way of mortgage and further charge in favour of the said R. E. Payne, with the knowledge of the defendant H. H. Williamson, who was well aware of the habits and consequent difficulties of the young man, and had himself shortly before given him, as a present, a like sum of 500*l.*, to be applied in the like manner.

The intestate continued at Oxford until June, 1859, when he finally left the university. Before that time he had become estranged from the plaintiff, his father, and so did not return to his former home, but went to reside in lodgings at Plymouth.

Previously to this time, that is to say, in or about November, 1858, the defendant H. H. Williamson, being obliged to leave Staffordshire, on account of ill health, associated the defendant R. Williamson with himself in the receipt of the rents and profits of the Whitfield estate. This step was communicated to the intestate by the defendant H. H. Williamson in a letter, dated November 16th, 1858, in which he said, "I am obliged to go to a warmer climate, but my nephew, Mr. Robert Williamson junior, will receive the rents, and, after paying Mr. Payne, will hand you an account, and enclose you the balance." The defendant R. Williamson accordingly acted in the receipt of the rents from November, 1858, until the return of the defendant H. H. Williamson to Staffordshire, which took place in or about May, 1859. After the return of the defendant H. H. Williamson both defendants acted in the receipt of the rents, the accounts of such rents being kept principally by the defendant R. Williamson, though it was the practice to enter them in the account-book in the name of the defendant H. H. Williamson alone.

In or about the end of July, 1859, the intestate being still in difficulties, and being much pressed for payment by his creditors, wrote to the defendant, H. H. Williamson, to ask him for advice on his affairs. The defendant H. H. Williamson answered the intestate's letter by a letter dated the 30th July, 1859, in which he invited the intestate to come and see him at his house, and to bring a list of his debts with him; the intestate did not accept this invitation, but ordered a certain Oxford agent named Holloway, to send a list of his debts by post to the defendant H. H. Williamson. Mr. Holloway accordingly sent a list of alleged debts, amounting in the whole to about 1,000*l.*, to the defendant, H. H. Williamson, some time before the 26th August, 1859.

On the said 26th August, 1859, the defendant R. Williamson, who up to that time was personally unknown to the intestate, entered, with the privity and consent of the defendant H. H. Williamson, into direct communication with the intestate by sending him a letter, of which the following is the material part:—

"W. C. Tate, Esq.—Dear sir,—I have before me a letter from a Mr. Holloway addressed to my uncle, and who, I am sorry to say, is not sufficiently well to attend to business matters. The letter contains a list of debts owing, and forms a very heavy amount, which Mr. Holloway expects to be paid immediately. I will meet you in the course of a few days in London, upon having a couple of days' notice, and after hearing your views on the

subject will talk over the matter and see in what way it can be arranged. Although quite a stranger to you personally I know your name in a business point of view, having received the Whitfield rents for your joint account with Mrs. K., and therefore write to you on the subject."

The intestate acceded to a proposition for a meeting between himself and the defendant R. Williamson, contained in the above letter, and interviews in consequence took place between them in London on the 5th, 6th, and 14th September following. At the first of such interviews the defendant R. Williamson informed the intestate that his uncle, the defendant H. H. Williamson, had commissioned him to endeavour to compromise the Oxford debts for 500*l.* or thereabouts, which sum his said uncle was willing to advance for that purpose. The intestate positively refused to allow any negotiation for an abatement to be attempted, saying that if he did not pay his debts in full his character would be injured. According to the defendant R. Williamson, the intestate then declared his intention of selling his moiety of the Whitfield estate, adding that he had been offered 6,000*l.* for it. Upon this the defendant R. Williamson, who admitted in his answer that he had, previously to his going up to London to see the intestate, formed a desire to become the purchaser of the intestate's moiety of the Whitfield estate, should it ever come into the market, said that he would purchase it himself if the intestate would sell it for 7,000*l.*, and allow the purchase money to be paid in instalments. The intestate acceded to these terms, and it was arranged that an agreement for sale and purchase should forthwith be drawn up by Messrs. Clowes & Hickley.

The defendant R. Williamson returned home on or soon after the 6th September; and, on the 10th September, wrote a letter to the intestate advising him to consult with his father, or, at any rate, with Mr. Payne, who, it will be recollected, was one of the trustees of the Whitfield estate, and who was a solicitor, or with some other solicitor, before finally selling his property; offering to break off the agreement in case the intestate should be advised not to sell it, or should be able to obtain a higher price. No answer seems to have been given to this letter, but, on the 14th September, an interview took place between the intestate and the defendant R. Williamson, at the office of Messrs. Clowes and Hickley, and in the presence of Mr. Wedlake, then the managing clerk of that firm. The agreement had by that time been drawn up by Mr. Wedlake, acting on the instructions of the defendant R. Williamson; but Mr. Wedlake, on hearing that the intestate had not consulted with his father, nor Mr. Payne, nor any other solicitor, on the business, refused to allow him to sign the prepared agreement. The intestate said that no consideration would induce him to go to his father, but that he had no objection to consult Mr. Payne; whereupon it was agreed that he and the defendant R. Williamson should go together to Mr. Payne, who lived at Leeds, and take the agreement with them, for the purpose of submitting it to him for his consideration. The intestate accordingly wrote a letter to Mr. Payne, which letter was subsequently lost. It appeared, however, to have simply asked whether Mr. Payne was at home or not. Mr. Payne was not at home, and word to that effect was sent to the intestate. As soon as Mr. Payne had returned home the defendant R. Williamson wrote to him asking for an interview with him on business, but not stating the nature of the business. The 5th of October was appointed by Mr. Payne as the date when he could grant the request for an interview. On that day the defendant R. Williamson and the intestate met at Mr. Payne's office, in Leeds, and submitted the agreement to him for his perusal. Mr. Payne was not consulted as to the sufficiency of the price, or the time or manner of payment, but was merely asked for his opinion on the form of the agreement, and with respect to the title of the estate, with which he was acquainted. A few unimportant alterations having been made by Mr. Payne, the agreement was re-copied, as altered, and signed by both parties there and then.

While these negotiations were pending, the defendant R. Williamson had, on or about September 10th, procured a valuation to be made by a mineral agent

named Cope, of the coal mines under the Whitfield estate. Mr. Cope estimated the value of such mines at 20,000*l*. That valuation had, it appeared, since been lost. The defendant R. Williamson never communicated the fact of this valuation having been made to the intestate.

Shortly after the execution of the agreement the intestate and the defendant R. Williamson left Leeds; the intestate going back to Plymouth, and the defendant R. Williamson returning to Staffordshire. A conveyance of the intestate's moiety was then prepared and engrossed; and on the 4th April, 1860, the defendant R. Williamson took the engrossment to Plymouth, where it was executed by the intestate, in the presence of a solicitor, who was called into the intestate's lodgings, but who was consulted only as to the mere formalities of execution. On the 9th April a surrender was made by the defendant H. H. Williamson, and R. E. Payne, as the surviving trustees of the Whitfield estate (the other trustee having died in 1859), and by the intestate, of the copyhold portion of the intestate's moiety, to the use of the defendant R. Williamson. The intestate did not live to receive all the instalments of the purchase-money. He died on the 11th May, 1860.

From the time at which the intestate left Oxford until his death his habits of idleness and dissipation seem to have been continually developing and growing more confirmed. The immediate cause of his death was *delirium tremens*; and it was alleged that, during the whole period covered by the negociation for the sale and purchase of his property, his mind was in such a weak condition, the result of excessive drinking, that he was incapable of giving due attention to business matters. He was, moreover, very despondent about his affairs, and had an unduly exaggerated idea as to the extent of his liabilities, and the difficulty he should find in extricating himself from them.

It appeared from the evidence that all the money paid by the defendant R. Williamson, towards payment of the purchase-money for the intestate's moiety of the Whitfield estate, was advanced by the defendant H. H. Williamson to the defendant R. Williamson, for the express purpose of purchasing the property. In consequence of this fact being known to the plaintiff, the defendant H. H. Williamson was treated in the original bill as the purchaser of the property, or, at any rate, as having an interest in it to the extent of the sums so advanced towards payment. The defendant H. H. Williamson however, disclaimed all interest in the property, and in his answer to the re-amended bill, stated that the money so advanced by him to the defendant R. Williamson was given as an absolute gift; that, soon after one of the aforesaid interviews between the intestate and the defendant R. Williamson, in London, the defendant R. Williamson had communicated to him his intention of purchasing the intestate's moiety of the Whitfield estate; and that thereupon he, the defendant H. H. Williamson, had offered to make him a present of whatever money should be requisite for the purchase thereof.

Much evidence was gone into with the object of connecting the purchase by the defendant R. Williamson of the property, with an arrangement which, about the time of the completion of the purchase, was made between the defendant H. H. Williamson and the agent of Lord Sidmouth, with respect to the working of the mines under an estate of Lord Sidmouth, adjoining the Whitfield estate, in conjunction with the mines under the Whitfield estate. And it was contended that even if the defendant H. H. Williamson had no personal interest in the moiety of the Whitfield estate purchased by the defendant R. Williamson from the intestate, yet the interests of the two defendants might be considered as identical, since their relative position to each other was more like that of father and son than what it really was, that of uncle and nephew.

With respect to the actual value of the Whitfield estate, much conflicting evidence was offered by the parties to the cause. Some of the plaintiff's witnesses valued the whole estate and the minerals thereunder nearly as high as 75,000*l*.; while the opinion of experts who valued the whole estate with the mines at less than half that sum, was offered in evidence by the defendants.

The plaintiff's witnesses, too, considered that the whole estate could easily be so divided into moieties that each moiety would be of the value of half the value of the entirety; while the defendant's witnesses were of opinion that no such division into moieties could possibly be made.

It was also shown that the mines under the Whitfield estate had been worked, though with indifferent success, during some portion of the intestate's minority; and that such working had been discontinued about the year 1844. Since that time, however, the facilities for distributing the coals under the Whitfield estate have been so materially increased by the construction of a new railway, that the working of the mines at present would undoubtedly bring in a large profit.

It should be stated that the defendant R. Williamson is a man of mature age, and that he has for many years been the proprietor of land and mines in the county of Stafford.

Some time since the death of the intestate, the defendant R. Williamson offered an instalment of the purchase-money to the plaintiff, as his legal personal representative, but the plaintiff refused to take it.

W. M. James, Q.C., and Little, for the plaintiff.

Giffard, Q.C., and Kay, for the defendant H. H. Williamson, disclaimed all interest in the estate, and contended that the defendant H. H. Williamson, having been charged with scheming and combining with the other defendant, which charge had not been substantiated, was entitled to have his costs paid by the plaintiff.

*Rolt, Q.C., and Bristowe, for the defendant R. Williamson, denied that his having been employed by the defendant H. H. Williamson, to receive the rents of the Whitfield estate, placed him generally, or for the purposes of the suit, in a fiduciary position towards the intestate. The defendant R. Williamson had not, as agent, acquired any knowledge of the value of the estate, his agency having been strictly limited to receiving the rents and attending the rent dinners. They referred to Dart. Ven. & Pur. pp. 21, 22, and to *Rossiter v. Walsh* (4 Dr. & W. 485).*

No reply was called for.

Wood, V.C.—This case is one of a very painful character, and, as is not unusual in this class of suits, the whole matter has been brought forward in a state of considerable exaggeration on the part of the plaintiff. Persons, however, who allow themselves to be mixed up with the transactions of this sort have only themselves to blame, if, in the investigations which necessarily attend the subsequent impeachment of their transactions, imputations are made which in the end fail to be established. Upon the broad, well-settled, and most sacred principle which guides the action of this Court in its dealings with purchases made by persons standing in a fiduciary relation to the seller, it is impossible to sustain the present transaction. That principle may be stated in these few words: whenever there exists between two persons confidence, of whatever character and of whatever amount, for the Court will not define the exact character or the exact amount which is necessary to enable it to interpose, the Court will not sustain a purchase by the person trusted and confided in from the person trusting and confiding in him, unless it is shown that there was, on the treaty for the purchase, the fullest and fairest explanation and communication of every particular which rested in the breast of the person trusted or confided in. The present case might have been reduced to this one point—The young man, William Clowes Tate, being in great pecuniary difficulties, or rather in pecuniary difficulties which he considered to be great, wrote to the defendant H. H. Williamson, in whom he naturally placed the very greatest confidence, for his advice. The defendant H. H. Williamson, who is a gentleman of advanced age, and who was at the time suffering from ill health, and unable to attend to business, requested his nephew, the defendant R. Williamson,

to act for him in the matter. The defendant R. Williamson accordingly took upon himself to advise the young man with reference to the arrangement of his affairs. He went to see him for that purpose, and, at his first interview with him, proposals were made for the purchase of the young man's property by his adviser. It is important to know what was the intestate's object in wishing to sell his property. Clearly he was under the impression that that was the only, or at least, the best, means in his power of raising money wherewith to pay his debts, and so get rid of his difficulties. Having made an offer for the purchase of the intestate's property at 7,000*l.*, the defendant R. Williamson's next step is to go secretly to a mineral agent and procure a valuation from him of the coal under the estate of which the intestate owned a moiety. The agent valued such coal at 20,000*l.* Now, making all due allowance for the probable difference in value between the coal under the whole estate and the coal under the two moieties of it, when they might come to be divided, it is certain that the defendant R. Williamson, soon after he had made his first proposals for the purchase of the intestate's property, was in possession of the knowledge that what he had offered for it was not so much as the value of the mines under it. Yet he says nothing of all this to the young man.

Much has been said at the bar about the advice which, during the negotiations for the purchase, the defendant R. Williamson gave the testator to consult his father or Mr. Payne, who was a solicitor, or some other solicitor. It should be observed, however, that the defendant R. Williamson never once advised the young man to consult a mineral agent. The conduct of the defendant R. Williamson, in himself consulting such an agent, has been declared to have been most natural, and what any sensible person would do after making an offer for land in a mineral district. That is quite true; but is it not equally natural for the vendor of such land to have the minerals valued previous to his selling it? Surely it is. Yet the defendant R. Williamson never even hinted to the young man, whom he had undertaken to advise, that such would be the natural and proper course of a sensible person in the young man's place.

Now let us look at the position of the intestate. He was a young man, just twenty-three years of age, and in possession of a landed property, which, even without counting the minerals under it, would have sufficed to maintain him decently and respectably. He had gone to Oxford when in his nineteenth year, and while there had entered upon a course of extravagance and recklessness. Before he had left the university he had become estranged from his father, whether in consequence of his own improvidence or for other reasons I do not stop to inquire. On attaining his majority, and while he was still at the university, he had spent, in paying debts incurred there, the sum of 1,500*l.*; 1,000*l.* of which he had raised by mortgaging his property, and the remaining 500*l.* he had received as a present from his great-uncle, the defendant H. H. Williamson. Soon afterwards, and when he was leaving Oxford, being again in difficulties, and being, as I have said, estranged from his father, he had naturally turned to this kind relative, the defendant H. H. Williamson, for advice. [His Honour then went through the facts relating to the interview between the intestate and the defendant R. Williamson in London.] At the first interview between the young man and his adviser, who up to that time had had no personal knowledge of each other, the former made an observation which would at once shew to a man of experience, like the other, how utterly deficient he was in knowledge of business and of the world. That observation was, that if any negotiations were undertaken to obtain an abatement from his Oxford debts, his character would be injured. Could anything be more absurd than this? A young man, who had already paid away 1,500*l.* in satisfying the claims of Oxford tradesmen, thinks his character will be injured if any attempt is made to compound another set of similar debts amounting to 1,000*l.* It is important to bear in mind that the

defendant R. Williamson admits that, before he went up to see the intestate, he had formed a wish to become the purchaser of this property, should it ever come into the market, an event which he naturally thought not an improbable one. That being so, when the intestate says, "I am in great and pressing difficulties; I must have money at once; I shall sell my share of Whitfield;" the defendant R. Williamson doesn't say what any unbiassed person would have said—viz., that such a course was quite uncalled for; he doesn't remind the young man that the property being worth at least 7,000*l.*, and the only charge on it being a mortgage for 1,000*l.*, nothing would be easier than to raise more than sufficient money on it with which to pay in full all his alleged debts. The defendant R. Williamson confesses his position to have been such that he was unable to give unbiassed advice, and, that being the case, he had no right to undertake the duty of advising the young man at all. [His Honour then went through the transactions subsequent to the first interview, and commented on the fact that the mineral agent employed by the defendant R. Williamson had every opportunity of informing himself as to the nature and condition of the mines, in consequence of the defendant R. Williamson's uncle, the other defendant, being in possession of the estate as managing trustee.]

With respect to the letter written to the intestate by the defendant R. Williamson, on the 10th September, it may be asked, why did the defendant R. Williamson advise the intestate to consult with his father? It was not, I think, as was suggested at the bar, because he thought and believed that the intestate would not go to his father. I hope, and I see no reason to doubt, that the defendant R. Williamson was desirous, as he says in that letter that he was, to bring about a reconciliation between the young man and his father. The view I take of it is, that the defendant R. Williamson, knowing the doctrine of this Court on purchases like the one which he was then negotiating, wished to lessen the responsibility which he would otherwise incur. "If I can put him into independent hands," he thought, "I shall not be bound to disclose this valuation of the coal mines which I have had made; but if he is thrown on me altogether I shall have to tell him of it." Whether, if he had succeeded in sending the intestate to some independent adviser, this Court would on that account have held him absolved from the duty of making the valuation known or not, I will not say. I think it would not. Then, again, notice the expression in the same letter of the 10th September, that, in case the young man should wish it, he, the defendant R. Williamson, would break off the agreement; and couple that expression with the fact that there was no binding agreement at that time, and with the knowledge which the defendant R. Williamson possessed of the notions which the young man had about his character and honour. He impresses upon the young man's mind that there was an agreement, but that, plainly as an act of kindness on his part, he would not insist upon his rights, if the intestate should repent of his having entered into the contract.

With respect to the defendant H. H. Williamson, who now disclaims all interest in the purchased property, at the time the bill was filed it was by no means clear that he was not interested in it, and no blame can be attached to the plaintiff for having charged him with combining with the other defendant. As the matter now stands, however, it is clear that the defendant H. H. Williamson was informed, soon after the proposals for sale and purchase, of such proposals, and also of the valuation of the coal mines made for the defendant R. Williamson. It was the plain duty of the defendant H. H. Williamson, under the circumstances, to have at once communicated the fact of the valuation to the intestate. Instead of that, he says nothing about it, but actually advances the purchase-money for the property as a gift to the defendant R. Williamson. The defendant H. H. Williamson has shown himself to be a man of a most kind disposition towards his relatives, but in this instance he has consulted the interests of one of them at the expense of

those of another. Though the bill, therefore, must be dismissed against him, it must be dismissed without costs. The sale must be set aside upon the usual terms. The plaintiff's costs must, of course, be paid by the defendant R. Williamson; and, as the form of the accounts to be taken will be upon the basis of a settled account, the decree will direct the payment by him of "the costs of the suit."

Wood, V.C., Feb. 15, 1866.

DAVENPORT v. MOSS.

14 W. R. 453; 14 L. T. 133.

Executors—Receiver—Assets.

EXECUTOR AND ADMINISTRATOR.—*The retainer of his debt by an executor as against a receiver appointed by the Court is improper.*

In this case the plaintiff had been appointed receiver of the estate of one Levi, the testator in the cause. The receiver was interested in the estate as mortgagee of the annuity mentioned below. The testator, by his will, had given an annuity to his daughter Mrs. Moss, who was one of his executors. She had received money from her co-executors for payment to the receiver, but, instead of doing so, had retained it on account of her annuity. Her co-executors had had notice of her assignment of her annuity to the mortgagee. There was another suit of *Levi v. Moss* pending, which affected the testator's estate.

Giffard, Q.C., and *Daly*, moved to have the money so retained by Mrs. Moss paid to the receiver by the executors.

Hardy, for Messrs. Saunders, the co-executors of Mrs. Moss, resisted the demand, on the ground that it was sought in effect to make them personally liable.

Caldecott for Mrs. Moss.

Wood, V.C., said that Mrs. Moss's conduct in retaining a sum remitted to her by her co-executors, for the purpose of being paid into court, to answer the annuity left to her, but which she had mortgaged, was highly improper. With regard to her co-executors, the notice which they had received of her assignment of her annuity, ought to have precluded them from paying any portion of it to her. Considering that the Court did not know the state of the assets, the order to be made would be (without prejudice to any application by any of the persons interested in the other suit of *Levi v. Moss*), that the defendants Messrs. Saunders, as executors of the testator, should, out of any assets now in their or any of their hands, or which might thereafter come to their or any of their hands, on account of income of the testator's estate, pay to the plaintiff, as receiver, the arrears and growing payments of the annuity given by the will of the testator to Rebecca Moss. Mrs. Moss must not have her costs of the motion. The mortgagee to add his costs to his debt. There would be no order as to the costs of the co-executors.

Wood, V.C., Feb. 15, 16, 1866.

THE PENINSULAR, WEST INDIAN, AND SOUTHERN BANK
(LIMITED) v. DARTHEZ.

14 W. R. 454.

Injunction to restrain proceedings at law—Delay—Answer.

Where a defendant has not, within a reasonable time, put in his answer to a bill charging fraud against him, he cannot resist an injunction to restrain him from proceeding in his action at law.

This was a motion for an injunction to restrain proceedings in an action at law on certain bills of exchange, and to obtain a commission to examine witnesses abroad. The bills in question had been drawn on the bank by the defendant Guilhou, and accepted by them. Guilhou having indorsed them (by procuration) to Darthez, Darthez presented them on maturity, and, on the bank refusing payment, brought his action. The bank alleged that the bills had been accepted by them on the faith of Guilhou's agreement with them to furnish the requisite funds for payment on their arriving at maturity, and also to indemnify them, but that Guilhou had not done so. The plaintiffs also charged that Darthez never gave any consideration for the indorsement, and that he was aware of the agreement between the bank and Guilhou; also that he was not a *bonâ fide* holder of the bills, but, in fact, the nominee or agent of Guilhou. The bill had been filed a month ago, but no answer had been put in.

An *interim* order had been granted to stay proceedings in the action.

Daniel, Q.C., and Cottrell, in support of the motion.

Willcock, Q.C., and Roxburgh, for the defendant Darthez.

In the course of the arguments a discussion arose as to whether the bank was or was not being wound up in compliance with the provisions of the Companies' Act. His Honour, however, intimated his opinion that the whole question was whether the defendant ought to have the money before putting in his answer.

Wood, V.C.—The official liquidator must make an affidavit as to the assets in his hands, and undertake not to part with them without the order of the Court. This was an attempt to introduce a practice of forcing on a motion for injunction, and then displacing the *primâ facie* case made by the bill by means of cross-examination, without putting in an answer. The old rule was that on filing a bill an injunction was granted at once to restrain an action at law; but the new Act had modified this practice by enacting that there should be no injunction simply for want of an answer. Under the old practice bills had been constantly filed for the mere purpose of causing delay. In such cases no answer was required, and therefore none needed to be put in. This was different from a case where an action was to be tried, and the defendant relied on his chance of breaking down the plaintiff's case on cross-examination. Assuming that there is no winding-up proved, he must order that the motion do stand over till the answer has been put in. Under the circumstances he must assume against Darthez that the allegations of the bill are correct, and they show grounds for the interference of a court of equity. He must therefore extend the *interim* order for a fortnight, the plaintiffs undertaking to be accountable for damages. The motion for the commission must also stand over.

Wood, V.C., Feb. 17, 19, 1866.

WOODS v. SOWERBY.

14 W. R. 454.

Practice—Creditors' suit.

EXECUTOR AND ADMINISTRATOR.—*Where there is a clear debt the Court will not consider the interest of the debtor's estate in considering what steps should be taken for enforcing it, at least if there be any conflict of interest between the debtor and creditor.*

This was an adjourned summons.

Alfred and Robert Hyde, both deceased, brothers and co-partners, were defendants in the suit of *Woods v. Hyde*, a suit for specific performance of a contract to purchase a freehold cotton-mill for 25,000*l.* A decree for the plaintiff was made in that suit. Before payment of the purchase-money both the Hydes died, each of them having appointed the same gentleman as one of his trustees and executors. This gentleman had been a co-partner with the brothers in their business, and is still a member of the firm to which they belonged.

The present bill was filed against both sets of executors, asking for specific performance of the contract. The answer to this bill was, in effect, "no assets." The bill was turned into a creditor's bill, and accounts of the estates of both the testators were ordered to be taken. From these accounts it appeared that the only debt due from the testator's estates was the above-mentioned debt of 25,000*l.*; that Robert Hyde's assets amounted to between 25,000*l.* and 26,000*l.*, of which 24,000*l.* was due to his estate from the said firm; and that Alfred Hyde's assets amounted to about 40,000*l.*, of which about 20,000*l.* was due from the same firm on promissory notes given by the said firm, with the understanding that the money should not be required until May, 1871. The executors of both testators said that it was impossible to realise assets at the present time sufficient to enable them to pay the whole of the purchase-money for the mill; and that with respect to the promissory notes, it would be improper and undesirable to send them into the market to be discounted at what would necessarily be a ruinous rate.

The plaintiff, who is an infant, is entitled to the whole of the purchase-money for the mill, subject to the payment thereof to her father, of the sum 10,000*l.*, secured on the mill by way of mortgage. And by the trusts of the will under which the plaintiff claims, her portion of the purchase-money, if paid into court, would forthwith have to be invested in the purchase or on the security of real estate.

The plaintiff took out a summons for leave to take such steps as might be necessary to get in the estates of the testators, Alfred and Robert Hyde.

Role, Q.C., and *Bury*, for the plaintiff, said that the object of the executors was to delay payment of the purchase money as long as possible, the money being more profitably employed in the business of the firm than it would be if applied in satisfying the debt due to the plaintiff. The personal estate of the testators must be got in and exhausted before the plaintiff could proceed against the realty.

E. K. Karlake and *W. W. Karlake*, for the defendants, offered immediate payment of the 10,000*l.* due to the plaintiff's father; and asked the Court to allow the 15,000*l.* to remain on the security of the property, such security being, as they said, ample, and of the very kind pointed out by the will. The defendants would execute a proper legal mortgage, and would pay interest at 5*l.* per cent. If the Court were to accede to this proposal the Court would be saved the trouble of finding good real security on which to invest the infant

ward's money; the infant's estate would be benefited by the high rate of interest which would be paid, and the convenience of the defendants, who were engaged in cotton spinning, a business just recovering from a recent and great depression would be best consulted.

Wood, V.C., said that it was not for a debtor to consider what was best for his creditor. The debtor's duty was to pay the debt, and there his duty ended. In the present case his Honour had to consult the interests of the plaintiff, those of the debtors would be cared for only to the extent which might be necessary to avoid any risk of affecting the safe and speedy satisfaction of the debt. The plaintiff's father should be appointed receiver, of course without salary, to get in the outstanding assets of both testators, under the direction of the judge at chambers. In consequence of the receiver having a charge on the estate to the extent of 10,000*l.* no security would be required of him. His Honour would not undertake to say what course should be taken with respect to the payment of the purchase-money, as he was unwilling to prejudge questions which would come before him in chambers. Costs of the summons to be costs in the cause.

[ADMIRALTY.]

Jan. 30, 31, Feb. 26, 1866.

"THE ALEXANDRA."

14 W. R. 466; 14 L. T. 742.

SHIPPING.—*Damage to goods—Burden of proof.*

This was an action brought by the plaintiffs as the owners and assignees of two bills of lading, dated respectively the 3rd of September, 1863, signed by the master of the foreign steamship *Alexandra*, and given for 92 casks of butter shipped in Copenhagen, and which were therein undertaken to be carried in the *Alexandra* from Copenhagen to Hull, and there delivered in good order and condition (the dangers and accidents of the seas excepted). On the arrival of the *Alexandra* at the port of Hull, nearly the whole of the plaintiffs' butter was found to be wasted and spoilt, and mixed with bran. The plaintiffs alleged that the damage was occasioned by the negligence of the defendants, and more particularly by their having improperly stowed the plaintiffs' butter in juxta-position with a quantity of bran near the engine-room of the steamer, so that the heat of the engine-room caused the liquifaction of the butter; and that the improper stowage caused the bran to mix with it.

The defendants denied that the damage was occasioned by their negligence, or by improper stowage; and, on the other hand, alleged that the cargo of the *Alexandra* had been properly stowed, but that, after leaving Copenhagen, the *Alexandra* met with heavy gales of wind which caused her to roll and labour heavily, and caused her cargo to shift, and the butter casks to break, and that the damage complained of was thereby occasioned; so that, by the terms of the bills of lading, the defendants were absolved from liability.

The hearing of the cause occupied the Court two days (30th and 31st of January), and the evidence was of a conflicting character.

Dr. Deane, Q.C., and V. Lushington, for the plaintiffs.

Brett, Q.C., and E. C. Clarkson, for the defendants.

Feb. 13.—*Dr. LUSHINGTON* (having reviewed the evidence and recapitu-

lated the facts) said—There is, undoubtedly, a serious conflict of evidence, and that, too, amongst witnesses apparently entitled to the confidence of the Court. All the Court can do, under such circumstances, is impartially to weigh that evidence, and say which, under all the circumstances, ought to preponderate. The plaintiffs are bound to establish their own case affirmatively, to the extent of proving that their goods, on arrival at the port of discharge, are in a damaged condition. This proved, the onus then falls on the defendants of proving that the original stowage was good, and that perils of the seas subsequently occurring created the damage. I think the evidence shows that the original stowage was done in the ordinary form, and with the usual precautions; that the butter became mixed with the bran, not from heat, but by the displacement and shaking up of the cargo, and that this displacement may fairly be attributed to the storm to which the vessel was undoubtedly exposed on her voyage to Christiansand; in short, that the damage arose from perils of the seas excepted in the bills of lading. I must pronounce in favour of the defendants, and dismiss the suit with costs.

[ADMIRALTY.]

Feb. 6, 1866.

THE CARGO *ex* "VENUS."

14 W. R. 466; L. R. 1 A. & E. 50; 12 Jur. N.S. 379.

Salvage.

SHIPPING.—*An appraisement made by the marshal is conclusive as to the value of the property salvaged.*

This was a salvage suit instituted on behalf of the respective masters, owners, and crews of the luggers *Enterprise*, *Eclipse*, *Unity*, *Secret*, *Alert*, and *Ocean*, of the cutter *Fear Not*, and of the life-boat *Friend of all Nations*, against the cargo lately laden on board the brig *Venus*, to obtain a reward for services rendered off the Tongue light-ship on the 10th November last.

Dr. Deane, *Q.C.*, and *E. C. Clarkson*, for the plaintiffs.

V. Lushington for the defendants.

The facts in this case were not denied by the defendants, the argument being as to the value upon which the salvage was to be rewarded.

On the 18th December the plaintiff's proctor filed commission with inventory and appraisement of the cargo annexed, the value certified by the appraisers appointed by the marshal being 1,906*l.* 7*s.* 6*d.*

On the 1st March an affidavit was filed on the part of the defendants, the owners, stating that the cargo had been sold and realized 1,295*l.*, less about 350*l.* for sundry expenses.

Deane, *Q.C.*, and *Clarkson*, for the plaintiffs, submitted that the appraisement by the marshal ought to be held to be conclusive as to the value.

V. Lushington, for the defendants, contended that the trust test of value was the sum actually realized in the sale of the cargo.

Dr. LUSHINGTON.—Nothing in my opinion, unless under very extraordinary circumstances, would be so imprudent on the part of the Court as to allow an appraisement made by the authority of the Court to be departed from. An appraisement made by the authority of this Court is made with great care and impartiality, and must be deemed conclusive, unless it is objected to at the time it is brought in. I shall adhere to the appraised value, and I award the plaintiffs one-third of that value with costs.

[ADMIRALTY.]

March 6, 1866.

"THE HOPE."

14 W. R. 467.

Salvage—Appeal—Cinque Ports.

SHIPPING.—*The value stated by the owners of salvaged property in proceedings before commissioners is not conclusive upon the salvor, even though assented to at the time.*

This was a motion on an appeal from an award of salvage made by the Commissioners of the Cinque Ports at Ramsgate. The owners of the property salvaged had, in the proceeding before the commissioners, asserted that the value of the cargo salvaged amounted to 2,000*l.* only. The salvors not having any information on the point had tacitly consented to such value, but they had, subsequently to the award being made, discovered that the cargo had been declared at the Custom House to be of the value of 8,900*l.*

The appellants now moved the Court to direct the defendants to prove the value of the vessel, as also the quality, quantity, description, and value of the cargo.

Brett, Q.C., and *E. C. Clarkson*, for the appellants.

Deane, Q.C., for the respondents.

The Court granted the motion with costs.

ROMILLY, M.R., Feb. 28, March 13, 1866.

EARL HOWE *v.* THE EARL OF LICHFIELD.

14 W. R. 468; L. R. 1 Eq. 641; 14 L. T. 122.

Equitable conversion—Legacy and succession duty.

VENDOR AND PURCHASER.—*A certificate from the Inland Revenue Office that no further duty is payable, is all that a purchaser is entitled to under the Succession Duty Act.*

This was a suit for specific performance of a contract to purchase realty.

The Hon. Robert Curzon, by his will dated October 3, 1862, devised his real property (part of which was on mortgage to the plaintiff, Earl Howe, and another), on trust by mortgage or by sale to raise a sum of 20,000*l.* for portions, and 12,500*l.* due from the testator on the said mortgage, and subject thereto in trust for Mr. Curzon, his son.

The testator died in May, 1863. The trustees, on the 14th October, 1863, put up the Hagley estate for auction in fifteen lots, and the defendant was declared the purchaser of lots 2 and 15.

On the 25th March, 1864, the defendant entered into possession of the property so purchased by him.

On the 15th July, 1864, the mortgages being paid off with the concurrence of the trustees, re-conveyed the mortgaged property to the plaintiff, Mr. Curzon, and thereupon the defendant sent a requisition, stating that "as Mr. Curzon is now to be treated as vendor by virtue of his beneficial

interest under his father's will, it must be proved by the usual evidence that succession duty was paid."

The plaintiff's solicitors replied that as the devise in trust for sale was absolute, legacy duty, and not succession duty, was payable, and had been paid.

This was the only question in the suit, the defendant asserting that he was willing to complete the purchase, but that he ought not to be forced to take a title without being satisfied that the proper duty had been paid upon the succession. On the question being referred by the plaintiff to the Office of Inland Revenue, Mr. Trevor replied that "all duty in respect of the land sold had been properly paid;" but the defendants required a more definite answer, and refused to complete till that was obtained.

Selwyn, Q.C., and *G. O. Morgan*, for the plaintiff.—There was an absolute trust for sale, and therefore legacy duty was payable, and has been paid; but if not, we have offered to indemnify the defendant against any claim in respect of succession duty.

Hobhouse, Q.C., and *Cecil Russell*, for the defendant.—We purchased not under the directions contained in the will, but direct from Mr. Curzon, therefore succession duty was payable, and we ought to have a proper certificate that it has been paid, so that our title may be made a marketable one, and they cited *Hobson v. Neale* (17 Beav. 178).

March 13.—*LORD ROMILLY, M.R.*—In my opinion the defendant has been ill-advised, and must submit to a decree. When a certificate had been obtained from the Inland Revenue Office that no more duty was payable, the defendant was not entitled to obtain any more exact or formal certificate as to whether succession or legacy duty was properly payable. I consider, however, that under the circumstances legacy duty, and not succession duty, was payable. The fact that after the reconveyance from the mortgagees Mr. Curzon became the proper person to complete the contract, by conveying the legal estate, did not alter the character of the original contract, or disturb the equitable conversion. The trustees were the true contractors, and in their hands the property was converted into personalty, under the power of sale. No new contract was substituted for the original one, though the son of the testator became, after two years, the proper party to convey the legal estate.

The defendant must pay the costs of the suit.

KINDERSLEY, V.C., Feb. 20, 21, 1866.

WILKINSON v. EYKYN.

14 W. R. 470; 14 L. T. 158.

Partnership—Pledging the assets.

PARTNERSHIP.—*W.* and *L.* being solicitors in partnership, *L.*, on behalf of the firm, purchased shares in an association, and paid for them by a cheque drawn on behalf of the firm although they were registered in his name alone. *L.* transferred the shares to *W.*, and the partnership was dissolved. *W.* then applied to Messrs. *E.*, brokers, who purchased the shares and had them in their hands, to hand them over, but they claimed a lien on them, on the ground that *L.*, against whom Messrs. *E.* had recovered judgment, had requested them to accept 100*l.* as part, and hold the shares for a week for the rest. *W.* then filed a bill for delivery of the shares, to restrain Messrs. *E.*

from parting with them, and the association from registering, and for damages and costs:—Held, that W. was entitled to delivery of the shares, subject to the right of Messrs. L. to have the benefit whatever interest E. had in them.

This bill was filed for an injunction to restrain the defendants, who were sharebrokers, from handing over certain shares in the Imperial Mercantile Credit Association to any one but the plaintiff, and the association from registering any one as the holder of such shares, or paying dividends to any one but the plaintiff. It also prayed for delivery of the shares by Messrs. Eykyn to the plaintiff, and that they might pay damages and costs.

The plaintiff and A. W. D. Leather were in partnership as solicitors previously to December, 1864. In March previous the defendant Eykyn's firm (Messrs. Eykyn & Cuvelje) bought for the partners, as it was alleged, fifty shares in the Imperial Mercantile Credit Association (Limited), twenty-five of which were sold in April, and Leather paid for the remainder by a check, on behalf of the partnership, for 345*l.* 7*s.* 6*d.*, and the shares were registered in the name of Leather alone. On the 16th of December, 1864, the partnership of Wilkinson and Leather was dissolved, and Leather, as the bill alleged, was a considerable debtor to the firm; and the shares were transferred to the plaintiff by Leather, first in blank and then regularly. On the plaintiff sending to Messrs. Eykyn for the certificates of the shares, they, by their solicitor, claimed to hold them for a private debt due from Leather, and a correspondence took place; and on the 30th of December the plaintiff gave the company notice in writing that the shares were the property of the partnership, and requested to know the numbers of the shares, which were furnished. On the 5th of January, 1865, the plaintiff wrote to Mr. Taylor, Messrs. Eykyn's solicitor, saying he should file a bill, which was done on the 20th of March. The bill charged knowledge by Messrs. Eykyn that the transaction was a partnership one, and that they had represented to Leather that it was the common practice to register in one name of a firm; and the plaintiff insisted that Messrs. Eykyn had no claim upon the shares, and prayed as above. Mr. Eykyn (the substantial defendant, Cuvelje having only subsequently become a partner,) by his answer alleged an agreement by Leather for the lien, and that he claimed the absolute right in the shares; he denied that he had represented that it was a common practice to register in one name of a firm, and asserted that the plaintiff had been told by Leather of the pledge of the shares. Since the filing of the bill Leather had become bankrupt.

It appeared, on the evidence, that Messrs. Eykyn had recovered judgment against Leather in an action of debt, and that he had proposed, through his solicitor, to pay them 100*l.* in part thereof, and had asked them to hold the shares for a week for the balance.

Glasse, Q.C., and Charles Walker, for the plaintiff.—On the question of the right of a partner to pledge the property of the partnership for a private debt of his own, cited *Young v. Keighly* (15 Ves. 557); *Allen v. Kilbre* (4 Madd. 464).

Baily, Q.C., and Surrage, for the defendant Eykyn.

Glasse, Q.C., in reply.

KINDERSLEY, V.C. (after stating the facts), said that he considered that the shares in question had been purchased with monies belonging to the partnership, and in the name of the firm, and that the fact that the transaction had been conducted by one partner (Mr. Leather) made no difference. Mr. Eykyn was aware of this fact, and the evidence did not go to show that there was any special authority given by Mr. Leather to him (Eykyn) to retain possession of the shares, so as to give a lien upon them for a personal debt due from Leather to Eykyn. The only thing that appeared was that judgment

had been recovered in an action of debt by Eykyn against Leather, and that Leather, after such judgment, by his solicitor, proposed that Eykyn should take 100*l.* in part payment, and hold the shares for a week in respect of what was further due. Leather gave an equitable assignment of his interest in the shares of Eykyn, nothing more; and, having so done, he transferred them to the plaintiff. Then came the dissolution of the partnership, and the plaintiff (Leather being bankrupt) was a sort of continuing partner, and had a right as such to have the shares delivered up to him to be realized for the benefit of the partnership. Subject to this, Eykyn had a right to have the benefit of whatever interest Leather had in the shares (if any), which was paramount to the plaintiff's right by transfer. There must be a decree with costs, with a declaration that the certificates should be handed over to the plaintiff, Messrs. Eykyn being entitled to such right (if any) as Leather had in the shares, in priority of the plaintiff's right under the transfer. The company were entitled to their costs.

KINDERSLEY, V.C., Feb. 22, 1866.

Re BAGOT'S SETTLED ESTATES.

14 W. R. 471; 14 L. T. 159.

Railway company—Costs—Suits in another court authorising purchase—Jurisdiction.

· **COMPULSORY PURCHASE.**—*Railway purchase-money standing to a devisee's account in Vice-Chancellor Kindersley's court was sought to be applied to make up the purchase-money for the purchase authorised in a suit at the Rolls, and the costs of the investment and of the petition were asked against the company in proportion to the sum asked to be paid out. Although the company submitted to pay a portion of the costs of conveyance:—Held, that they were only liable to pay the costs of the application. All that the Court could do was to order payment to the vendor.*

This petition prayed the application of 1,013*l.* Consols towards making up a sum of 6,200*l.*, proposed to be laid out in the purchase of land, and asked the costs against the company.

The facts were these:—The London and North-Western Railway Company had purchased a portion of the Bagot settled estates, and paid into court 900*l.*, now represented by the 1,013*l.* Consols, and standing in court to the account of the devisees under the will of the Rev. Robert Bagot. Two suits were instituted in the Rolls Court, viz., *Bagot v. Bagot* and *Legge v. Legge*, and a purchase being contemplated for 6,200*l.*, as above, and authorised by the Court in those suits, it was proposed that the 1,013*l.* should be applied in part payment of that sum. The petition stated these facts, and prayed that the 1,013*l.* might be so applied and paid to the vendors on certificate of the chief clerk of the execution of the conveyance; and further, that the company might be ordered to pay the costs of the investment and of such petition, in proportion to the amount of the fund in court now sought to be taken out.

F. Kelly, in support of the petition, at the request of the Court, stated the position of the proceedings at the Rolls, and urged that the company were liable to pay to the same extent as though the application were for the 1,013*l.* to be laid out by this branch of the Court, and in this matter. He also contended that the petitioner was entitled, to some extent, to ask a proportion of the costs of the conveyance.

Benson Blundell, for the company, resisted the right of the petitioners, on the ground that however correct the proceedings in such suits might be, they were not proceedings within the meaning of the Lands Clauses Act, under which such sum was paid in, and under which only it could be taken out; submitting, however, that if it were so asked, the amount should be transferred from the present account into those suits; and submitting, also, to pay a proportion of the costs of the conveyance, and those of this application.

Authorities on the point:—*Haynes v. Barton* (14 W. R. 257); *Brown v. Fenwick* (14 W. R. 257); *Re Lathropp's Charity* (14 W. R. 326).

KINDERSLEY, V.C.—I consider that the utmost order that can be asked is the payment over of the amount entitled in this matter to the vendor in the suit in the Rolls Court, upon his being duly certified as such vendor, and on his having executed the conveyance. But I cannot make any order as to part payment of the costs of the conveyance; I can only give the costs of this application.

KINDERSLEY, V.C., Feb. 24, 26, 1866.

Re SAMPSON. LESITER v. CAMM.

14 W. R. 472; 14 L. T. 97.

Practice—Administration summons—Parties—Married woman—Real and personal estate.

EXECUTOR AND ADMINISTRATOR.—A married woman, who was pecuniary legatee to her separate use under a will, took out an administration summons against one out of two trustees by her mother and next friend, without making her husband a party. It was alleged that the other trustee had disclaimed, but there was nothing but information to prove it; and, admitting that her husband was alive six months since, she stated that she was inclined to believe he was dead. On adjourned summons to take a decree in the husband's absence, summons dismissed with costs.

This was an adjourned summons on the question whether, on an administration summons in chambers, taken out by Susannah Lesiter, suing as plaintiff by Mary Fielding, her mother and next friend, and described as the wife of Charles Lesiter, the said Charles Lesiter was a necessary party.

The summons was taken out to administer the estate of William Woodall Sampson, Susannah Lesiter being his great-niece, and a pecuniary legatee under his will; and it was originally sought to administer both his real and personal estate, but the chief clerk struck out the words "the real and," and confined it to the personalty. The defendant was executor, and the suit being instituted without previous notice to him, he took that objection in chambers; but it was overruled by the chief clerk. The defendant's solicitor then objected that, the plaintiff being a married woman, her husband ought to be made a defendant. In answer to this the plaintiff, by her affidavit, swore that she believed her husband was dead. Time was asked to answer this affidavit, but was refused. It was insisted by the defendant that the husband was, in fact, alive, although living separate, and only in July last legal proceedings were taken to compel him to support her. The property being vested in two trustees, the defendant, the executor, and William Rooth, it was then insisted that Rooth was a necessary party, unless evidence of his disclaimer were forthcoming. No proof of such disclaimer having been given, the chief clerk confined the summons to the personal estate, as above. This

was opposed, on the ground that the objection taken was an objection for want of parties, and could not be cured in that stage of the suit; but this was overruled by the chief clerk.

The plaintiff swore that the defendant threatened to sell the property: that she had been told that William Rooth had declined to act: that her husband did not reside with her at Dunnington, in Yorkshire, where she and her four children were, but at Auston, two miles distant, and that she saw or heard from him daily until six months ago, when he left Auston: that an execution was out against him for 200*l.*: that for two years previously he had been in very ill health, and was of very intemperate habits: that since he had left Auston she had never seen or heard of him, although she had used considerable exertions to do so: and that from his state of health and habits, she was inclined to believe that he was dead. The defendant swore that he believed that Lesiter was alive, but keeping out of the way to avoid process.

Lindley appeared in support of the summons, and contended that, even supposing the husband were living, he had no interest; but there was every reason to suppose that he was dead. The plaintiff was entitled to her separate use.

Roberts, contra.—The husband was a necessary party, and there was no proof of his death nor of the disclaimer of Mr. Booth. The summons must be dismissed with costs.

Authorities cited:—*Johnston v. Kirkwood* (4 Dr. & W. 379); *Daniell's Ch. Prac.* 91, 98, 118, 160, 197, 199.

KINDERSLEY, V.C., said, that having a discretionary power upon an application of this nature, he thought he ought to refuse what was asked, there being at present no sufficient proof that the husband could not be made a party. He was certainly alive six months ago, and in an adjoining village to that in which the wife was residing,—although, if that were the only difficulty, the case might be ordered to stand over for further evidence. There was, however, a difficulty in making the husband a party at all; for, on an administration summons, as a general rule, the executor or trustee only was made a party; yet in this case, no doubt, *prima facie*, the husband must be a party to the suit. In the case of an administration summons a decree was taken at once; whereas, on a bill filed, it might be alleged that the husband was out of the jurisdiction, and the fact might be then proved. Here realty and personalty were blended together, and no doubt it was inconvenient that one should be administered without the other. As to Mr. Rooth, in the absence of proof, it must be assumed that he had not disclaimed. This was a case in which an administration summons was a very inconvenient course. The summons must be dismissed with costs.

KINDERSLEY, V.C., March 2, 1866.

Re FINCH'S ESTATE.

14 W. R. 472; 14 L. T. 394.

Practice—Corporation—Costs of remaindermen.

COMPULSORY PURCHASE.—*In a petition for the investment in Consols of a fund paid into court under the Lands Clauses Act, and payment of the dividends to the person for the time being entitled thereto, it is necessary and sufficient that the tenant of the immediate freehold should appear.*

Therefore where the land was subject to a lease for ninety-nine years, if

the lessee should so long live, it was—Held, that the company must pay the costs both of the lessee and the trustees in whom the freehold was vested, but not of any of the parties entitled in remainder.

This was a petition for the investment of 11,500*l.* paid into court by the Corporation of the City of London, under the provisions of the Lands Clauses Act as representing the purchase-money for certain hereditaments taken by them for the purposes of the Holborn Valley Improvement Act. The only question was—What costs were properly chargeable against the corporation.

The facts were peculiar:—Robert Finch, by his will, dated 19th August, 1858, devised certain freeholds and leaseholds to four trustees (all now deceased) upon trust to pay the income to Maria Finch his wife (also dead) for life, and then upon trust during the life of the petitioner (who was an alien) to retain the rents and profits, and to pay them to him for his own use and benefit. And after certain other limitations (which had all failed) there was in ultimate gift of the freeholds and leaseholds to such son of William Macdonald (one of the trustees) as should attain twenty-five, with a name and arms clause; and the testator appointed Thomas Webster his executor.

The testator died in September, 1830, his wife died in March, 1839.

The will afterwards became the subject of a suit, to which the Attorney-General was made a party as representing the Crown, on an allegation that there was no heir at law of the testator in existence, and that it was questionable whether the ultimate gift was or not void for remoteness, and whether in that case the trustees would or not be entitled to hold the lands discharged of the trust.

In the year 1845 the Vice-Chancellor of England declared that the question of remoteness could not be decided during the petitioner's life. This decision is reported under the name of *Burney v. Macdonald* (15 Sim. 6). The cause had since totally abated by the death of the plaintiffs.

In October, 1845, the petitioner obtained letters of denization, and thereupon the trustees, by deed dated in December, 1846, conveyed the freeholds to him for ninety-nine years, if he should so long live, at a pepper-corn rent.

The land having been taken by agreement with the acting trustees, the devisees in trust of the last surviving trustee, and the money paid into Court, this petition was presented for investment in Consols, and payment of dividends to the petitioner for his life. The said acting trustees, the eldest son of William Macdonald, and the Attorney-General, had been served with the petition and appeared.

Faber, for the petitioner, stated the facts, and submitted that, under the circumstances, all the respondents were necessary parties to appear on this application, and that the corporation ought to pay their costs: *The Duke of Cleveland's Harte Estate* (8 W. R. 336; 1 Dr. & Sm. 46).

E. F. Smith, Q.C., for the trustees, asked for their costs. On the death of the petitioner, the question raised in *Burgess v. Wheate* (1 Eden, 177), would arise, and therefore the trustees had a personal interest in the fund.

Dickinson, for William Macdonald, submitted that he must have his costs either from the City or the petitioner, and declined to enter into the question which was the party liable.

A. E. Miller, for the City of London.—[KINDERSLEY, V.C.—I am of opinion that you are not bound to pay the costs of the son of Mr. Macdonald, or of the Attorney-General. I will hear you as to the trustees' costs.] This is a mere petition for an *interim* investment in Consols, no one but the petitioner is interested in the order, as no one could be heard to oppose the investment. In all the cases where trustees have had their costs the petition has been for investment in land, and even in that case there ought

to be only one set of costs in such a case as this: *Ex parte Staples* (1 D. M. G. 295).

Wickens for the Attorney-General.

W. M. James, Q.C., as *amicus curiæ*, said that V.C. Wood, in every case where a man's property was taken, whatever his interest was, was of opinion that the company taking the land must pay all the costs.

Faber in reply.

KINDERSLEY, V.C.—The question in these cases always is, whether the Court has before it all parties interested in the fund. The general rule is that the tenant for life, and he alone, should appear, and the Act of Parliament authorises him to deal with the company on behalf of all parties. But where there is a leaseholder, the tenant for life is not competent to act for him, but he must be settled with separately. If this lease had been made after the notice to treat it would have been different, but as the case stands, I think the Corporation must pay the costs of the trustees, who are, in fact, the tenants of the immediate freehold of this land.

STUART, V.C., March 7, 1866.

In re HUTCHINSON'S TRUSTS.

14 W. R. 473; 14 L. T. 129; 12 Jur. N.S. 244.

SETTLED LAND.—*Leases and Settled Estates Act—Mining lease—General power of leasing mines.*

This was a petition by the assignee of the interest of a tenant for life in freehold lands, the life-interest in the surface of which had been conveyed to another person, for leave to grant a mining lease, and for a general power to grant similar leases. The application was made under the Leases and Settled Estates Act. There were several tenants for life in remainder, who refused their consent.

Prendergast, for the petitioner, referred to a precedent in 1 *Seton on Decrees*, 529, as illustrating the practice of the Court.

STUART, V.C.—But this decree refers to the consent of all parties. Here all parties do not consent, and the Court is obliged to be doubly cautious in the exercise of its discretion. I certainly have power under the Act to give a general power of leasing, but I cannot do so without the consent of all parties. You may take an order for this particular lease, which can be settled in chambers.

Markham Law, for four tenants for life in remainder, asked for a receiver.

STUART, V.C.—I have no power to grant you a receiver on this petition.

Haynes, for the tenants *pur autre ne* of the surface, objected to the form of lease to be taken.

STUART, V.C.—That can be arranged in chambers.

[PRIVY COUNCIL.]

Feb. 1, 1866.

FORBES v. AMEEROONISSA BEGUM AND OTHERS.*

14 W. R. 481.

Mortgage — Foreclosure — Bye-bil-wufa — Production of accounts by mortgagee.

INDIA.—*Regulation XVII. of 1806 first introduced a modification of the rights given to the holder of a bye-bil-wufa by the strict terms of the contract. The 7th section gives the mortgagor a right of redemption within one year after an application by the mortgagee to the Zillah Court under the 8th section. After such an application the mortgagor must either pay or tender the sum lent, or the balance due if any part of the principal has been discharged, and if the mortgagee has not been in possession, any interest that may be due, or he must make a deposit pursuant to section 2 of Regulation I. of 1798. The general effect of these regulations is that if anything be due on the mortgage, and the mortgagor make no deposit or an insufficient one, the right of redemption is gone at the expiration of the year of grace; but even then the title of the mortgagee is not complete, for he must bring a suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession, and in that suit the mortgagor may contest the validity of the conditional sale, or the regularity of the proceedings taken under the regulation in order to make it absolute, or he may prove that nothing is due, or that the deposit is sufficient to cover what is due; but the issue, in so far as the right of redemption is concerned, will be whether anything remained due to the mortgagee at the end of the year of grace, and if so, whether the necessary deposit had been then made. If that is found against the mortgagor, the right of redemption is gone.*

It is not always necessary for a mortgagee who has been in possession to produce his accounts on taking proceedings to foreclose. This necessity arises, first, when the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account; secondly, when he has deposited all that he admits or alleges to be due; thirdly, when he pleads and undertakes to prove that the whole of the principal and interest has been liquidated by the usufruct of the property.

This was an appeal from a decree of the Court of Sudder Dewanny Adawlut, dated the 21st of April, 1862, which affirmed a decree of the officiating civil judge of Zillah Purneah in the province of Bengal, dated the 29th of March, 1859.

The question in this case was whether certain proceedings taken by the appellant for the purpose of foreclosing a mortgage had been effectual. The Zillah judge had dismissed his suit, and that decree had been confirmed by that of the Sudder Dewanny Adawlut.

On the 13th of March, 1850, Shah Ally Reza, the late husband of the present respondent, executed an instrument which, upon the face of it, purported to be an absolute bill of sale to the appellant of the talook and lands therein described, in consideration of the sum of 39,500rs. On the same day the appellant executed to Shah Ally Reza an ikrah or agreement, importing that on payment of the sum of 39,500rs., with interest at 12 per cent. per annum, on the 13th March, 1851, the sale should be void, but that in the event of the seller not paying the principal and interest according to his engagement, the ikrah was to be null and void, and the purchaser (the appellant) was to become the absolute proprietor of the property. The effect

* Present—Lord Chelmsford, Sir J. T. Coleridge, Sir J. W. Colvile, Sir E. V. Williams, and Sir Lawrence Peel.

of these two instruments was simply to secure the repayment of the sums lent by the appellant to Shah Ally Reza with interest on the day named, by means of that kind of mortgage which is known in India as *bye-bil-wufa*, or conditional sale.

The transaction between the parties, however, included something more. On the 12th of March, the day before the date of the bill of sale, Shah Ally Reza had granted a lease of the mortgaged premises for three years, ostensibly to Mr. Alexander Demetrius Forbes, the son of the appellant, and had taken the corresponding *Kabooleut* from him. The latter showed that the lessee had bound himself, after paying the Government revenue and other charges on the lands, to pay to the lessor, by way of rent, for the Bengali year 1258, the sum of 2,000rs.; for the year 1259, 2,332rs. 9a. 6p.; and for the year 1260, 2,399rs. 2a. 6p. And it appeared on the face of the *ikrah* that Shah Ally Reza had given an order to the lessee to pay by instalments out of this rent to the appellant the sum of 2,101rs., in part satisfaction of 4,740rs., which would become due on the 13th of March, 1851, for one year's interest on the 39,500rs.

It had been proved, and was not now disputed, that the grant of this beneficial lease was what is called in India a *Benamtee* transaction; that though taken in the name of his son it was really a lease to the appellant, who, under colour of it, obtained possession of the mortgaged premises. On the 5th April, 1851, the time fixed for the repayment of the mortgage money having expired, the appellant commenced the proceedings which must be taken in order to foreclose a mortgage of this kind and make the conditional sale absolute. And the question on this appeal was whether these proceedings had been effectual.

On the 31st of August, 1852, the Principal *Sudder Ameen* of the *Zillah*, in whose court the proceedings had been had, made an order which, after stating all that had taken place, including the claims of certain third parties, concluded thus:—"Forasmuch as the term of one year has expired from the date of the issue of notice, and the mortgagor has not deposited the amount of the mortgage, and the plea of the before-mentioned third parties is not cognizable in this miscellaneous case, therefore considering that Regulation XVII. of 1806 has been complied with, it is ordered that this suit be decided, and that the papers of the case be forwarded to the judge's court."

Upon this, on the 28th of January, 1853, the appellant commenced this suit in order to complete his title under the foreclosure. Treating, however, the lease to his son as a subsisting lease to that person, and himself as out of possession, he asked to have possession decreed to him, together with mesne profits from the 13th of March, 1851, calculated upon the rent reserved by the lease.

The answer of Shah Ally Reza alleged, by way of defence, that the appellant, before filing his petition for foreclosure in the *Zillah Court*, had not made the demand required by law; and, after stating the circumstances under which the lease was granted, insisted that by virtue thereof the appellant had fraudulently held possession of the mortgaged property in his son's name; and, in order to show what was the value of this possession, the answer contains a passage which, after stating the gross revenue of the various portions of the mortgaged property, amounting in all to 9,601rs. 7a. 2p., and the charges thereon amounting in all to 3,921rs. 9a. 4p., proceeds thus:—"There remains 5,666rs. 13a. 10p., as annual profit. Out of this amount, deducting 4,740rs. as interest due on the principal, the remaining sum of 926rs. 13a. 10p. must have been annually received by the plaintiff on account of the said amount of principal." The answer also insisted that the appellant was bound to render an account in conformity with sections 10 and 11 of Regulation XV. of 1793, and that the *bye-bil-wufa* had been vitiated by the fact of his having realized the whole of the interest, as well as a portion of the principal from the profits of the mortgaged property, and that

the appellant was bound to render an account in order that the Court might be satisfied how much was due, and from whom.

The material issues settled by the judge were:—1st. Whether the plaintiff had performed the conditions prescribed by section 8 of Regulation XVII. of 1806, and was entitled to possession. 2nd. Whether plaintiff was or was not in possession. 3rd. Whether the claim for mesne profits was correct. 4th. Whether the receipt by the plaintiff of interest on the purchase-money invalidated the bye-bil-wufa.

The cause was tried by Mr. Loch, the Civil Judge of Purneah, on the 18th December, 1854.

The principal point contested on the first issue was whether there had been a sufficient demand, and this issue was found in the plaintiff's favour. On the second and the last issues the judge found that the lease was, in fact, taken by the plaintiff, who must be taken to have been, under colour of it, in possession of the mortgaged property; but that inasmuch as it was not attempted to show that the collections realized by the plaintiff covered the principal and interest of the debt, and it was, in fact, admitted that when the notice under section 8 of Regulation XVII. of 1806 was filed, a balance was due, and that there was nothing to show that the defendant had paid any part of it, the bye-bil-wufa was not invalidated, and that the plaintiff was then absolutely entitled to the property. On the third issue he found, inconsistently with his finding on the question of possession, that the claim for mesne profits was correct. The decree was for possession with the mesne profits claimed.

The defendant Shah Ally Reza appealed to the Sudder Dewanny Adawlut. That Court, by its order dated the 22nd of January, 1857, held that the judge had been wrong in decreeing wassilât, or mesne profits; and further, that as the plaintiff had been found to have been in possession, he was bound, before he was entitled to have his conditional sale made absolute, to render accounts, and to show that the loan had not been liquidated with interest from the usufruct of the property; and it remanded the case, in order that the judge might call upon the plaintiff for his accounts, and then, with reference to the above remarks, decide the case according to the results shown by them.

The case went back, the plaintiff produced accounts in which he charged himself, not with the gross collections, but with the rents reserved by the lease. The then Acting Judge (Mr. Brodhurst) held that these accounts were insufficient, and that the proper accounts not having been produced he was precluded from deciding as to the balance due to the plaintiff, and accordingly by his decree, dated the 29th of March, 1859, dismissed the suit.

Against this decree the plaintiff appealed to the Sudder Dewanny Adawlut, but that Court, by its order of the 21st of April, 1862, dismissed the appeal with costs; refusing to remand the cause again, in order to give the appellant an opportunity of producing the proper accounts.

He afterwards applied for a review of judgment on affidavits directed to show that he had tendered the proper accounts in the Court below, but this application was also rejected with costs, on the 21st of January, 1863.

The present appeal was from the decree dismissing the suit.

Sir R. Palmer, A.G., and Melville, appeared for the appellant.

Rolt, Q.C., and Leith, for the respondent.

Sir J. COLVILLE delivered judgment.—So many points touching the regularity of those proceedings have been raised at the bar that it is desirable to state what, in their Lordships' apprehension, the law of foreclosure, as established by the regulations and the practice of the courts in Bengal is. Up to the year 1806, the rights of the holder of a bye-bil-wufa were enforceable according to the strict terms of the contract: it was necessary for the mortgagor, if he wished to save his estate from forfeiture, to tender the amount due or

to pay it into court pursuant to the provisions of Regulation I. of 1798, within the stipulated period for the repayment of the loan. Regulation XVII. of 1806 first introduced a modification of the strict rights given by the contract analogous to, though by no means identical with, that which courts of equity have long imposed on mortgagees in this country. The 7th section of the regulation extended the period within which the mortgagor might redeem to any time within one year from and after the application of the mortgagee to the Zillah Court under the following section. And that section, the 8th, provided that a mortgagee, desirous of foreclosing the mortgage and rendering the sale conclusive, should, on the expiration of the stipulated period, or at any time subsequent before the sum lent was repaid, after demanding payment from the borrower or his representatives, apply for that purpose by a written petition to the Zillah judge, who should cause the mortgagor to be furnished with a copy of the application, and notify to him that if he did not redeem the property in the manner provided by the preceding section within one year from the date of the notification, the mortgage would be finally foreclosed and the conditional sale made absolute. Hence, when these proceedings have been had, it becomes incumbent on the mortgagor to take within the year the steps towards redemption which are prescribed by the 7th section. Within that period he must either pay or tender (and the proof of such payment or tender will lie on him) the sum lent, or the balance due if any part of the principal has been discharged, and also in the case in which the mortgagee has not been put into possession of the mortgaged property, any interest that may be due; or (and this is the alternative commonly adopted) he must make a deposit pursuant to section 2 of Regulation I. of 1798. That enactment, of which the object was to relieve mortgagors seeking to redeem from the difficulties of proving a tender by enabling them to pay the proper amount into Court, thus prescribes what the deposit is to be. "When the lender has not obtained possession of the lands the deposit is to be the principal sum lent with the stipulated interest thereon; but if the lender has held possession of the land, the principal sum borrowed only need be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. In either of these cases the deposit preserves to the borrower his full right of redemption, and entitles him to immediate possession of the land if that is in the possession of the lender, subject to the adjustment of the accounts." A third case is then provided for as follows:—"If the borrower in any case shall deposit a less sum than above required, alleging that the sum deposited is the total sum due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed, and if the amount so deposited be admitted by the lender, or be established on investigation to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not however in such cases be entitled to the recovery of the lands until it be admitted or established that he has paid the full amount due from him. The 3rd section prescribes the manner in which the lender is to account in those cases in which an account shall be necessary.

The general effect of these regulations is, that if anything be due on the mortgage, and the mortgagor makes an insufficient deposit, and *a fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the circular order of the 22nd July, 1813, No. 37, and has ever since been settled law, that the functions of the judge under Regulation XVII. of 1806, section 8, are purely ministerial, and that a mortgagee, after having done all that this regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession. In that suit the

mortgagor may contest on any sufficient grounds the validity of the conditional sale, or the regularity of the proceedings taken under the regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made is sufficient to cover what is due; but the issue, in so far as the right of redemption is concerned, will be whether anything, at the end of the year of grace, remained due to the mortgagee, and if so, whether the necessary deposit had been then made. If that is found against the mortgagor the right of redemption is gone. The learned counsel for the respondent, in the course of their able argument, maintained the propriety of the dismissal of this suit upon various grounds, of which some do, and some do not, directly arise upon the decrees now under appeal. And it seems convenient to consider the latter in the first instance.

Mr. Rolt insisted that inasmuch as it had been conclusively found that the appellant was in possession of the mortgaged premises, and the plaint was, nevertheless, for possession and mesne profits, the form of the suit was of itself a sufficient ground for its dismissal. Such, however, was not the view taken in the courts below. If it be granted that this point is raised, and it is not very clearly raised by the answer, it does not appear to have been among the grounds of the respondent's appeal from Mr. Loch's decree; which, though not set out *in extenso* in the record, are noticed by the Sudder Court in its judgment of the 22nd January, 1857. The objection, if made, was certainly not treated as a valid one by the Sudder Court, which did not dismiss the suit, but remanded it for re-trial on the production of the accounts. That remand implied that the appellant might succeed. The real object of the suit is to perfect his title as absolute owner of the property; and their Lordships do not see why he should not have that relief, if he be otherwise entitled to it, because, under an erroneous view of the effect of the lease, he has asked for it by his plaint in a somewhat different form, and with something to which he is not entitled. It was also urged that the *bye-bil-wufa*, the *ikra*, the lease, and the *kabooleut* must be taken together as one transaction; that the effect of the two latter so qualified that of the two former that the mortgage must be taken to have been in its inception one for the term of three years, and that, until the expiration of the term, the appellant was not at liberty to take any step towards foreclosure. Their Lordships have to observe that this was not one of the issues in the cause, and that the point is not even raised on the pleadings, nor do they think that this defence could have been successfully raised. The respondent cannot both repudiate the obligations of the lease and claim the benefit of it. That transaction has been held, and properly held, not to effect that for which it was probably designed, viz., to save the appellant from the liabilities, whilst it gave him the advantages of a mortgagee in possession: still less can it be taken to do what it was never meant to do—viz., modify the terms of the conditional sale. It was further urged that the proceedings in the Sudder Ameen's Court, under section 8 of Regulation XVII. of 1806, were irregular, both by reason of the insufficiency of the demand, and the non-production of the accounts in the course of those proceedings. One of the issues in the cause, when it was before Mr. Loch, was whether the plaintiff had performed the conditions prescribed by the Regulations, and that issue was found in his favour. As far as appears from the printed record, the respondent did not appeal from that finding. He had undoubtedly raised in the Zillah Court the question whether there had been a sufficient demand, and the fact had been found against him. He had not taken the point that the accounts ought to have been produced in the preliminary proceedings. Their Lordships are disposed to think that upon the true construction of the Regulations, and of the Circular Order, it is not necessary either that the demand should be for the specific sum ultimately ascertained to be due, or that the accounts of a mortgagee in possession should be produced in these preliminary proceedings, in which they cannot be investigated.

The questions which really arise upon the decrees under appeal, and on which the determination of this appeal depends, are these:—1st. Whether the Sudder Court was right in requiring the appellant to produce his accounts, and in remanding the cause for re-trial on the production of those accounts by, its order of the 22nd January, 1857. 2ndly. Whether, if it were wrong in so remanding the cause, the appellant is not now bound by that decree, against which he did not appeal. 3rdly. Whether the Zillah judge and the Sudder Court were right in dismissing the suit because the appellant had not produced the proper accounts, or whether they ought to have given him further time for so doing. Their Lordships, considering the first question independently of the authority of decided cases are of opinion that, upon the true construction of these regulations, there was no necessity for calling for the production of the accounts, and consequently, that the order for the remand was wrong. The issue upon which the determination of the cause depended, and upon which even by the order of remand it was made to depend, was whether the loan had been liquidated, with interest, from the usufruct of the property. Now, not only was there no allegation on the pleadings, or issue raised in the cause, to the effect that the loan had been thus liquidated, but there was an express admission on the face of the defendant's answer that even on his mode of stating the account, the principal sum of 39,500rs. had, when the foreclosure proceedings were commenced, and when he ought to have made the requisite deposit, been reduced by no more than 927rs. It was therefore clear, upon the face of the proceedings, that the question to be tried could be answered only in one way, and that in favour of the appellant. And the order of remand can be supported only on the principle that, in all cases, it is imperative upon a mortgagee who has been in possession to produce his accounts. For this position their lordships can find no grounds in the regulations. The words of the 3rd section of Regulation I. of 1798, from which (if at all) an inflexible obligation to produce the accounts must be inferred, are, "In all instances wherein the lender on a *bye-bil-wufa* may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account, &c." Two conditions are expressed, the possession of the mortgagee, and the necessity of an account. And a comparison of this, with the preceding section, and with Regulation XVII, of 1806, shows that the necessity arises, and need only arise, first, when the mortgagor has deposited the principal leaving the question of interest to be settled on an adjustment of the account; 2ndly, when he has deposited all that he admits or alleges to be due; 3rdly, when he pleads, and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the property.

It remains to be seen whether the proposition that the mortgagee, who has been in possession, must in all cases produce his accounts, has been conclusively established by the authority of decided cases. The cases cited by the Sudder Court, in its judgment, and now relied on by the respondent, are reported in the decisions of the Sudder Dewanny Adawlut of Bengal for 1852, pp. 678 and 1063. The transactions out of which these cases arose were not mortgages by way of conditional sale, but mortgages of a different character, and governed by different rules. Neither authority, therefore, seems to touch the point now under consideration. On the other hand, in a more recent case, which is reported amongst the decisions of the same Court for 1859, at p. 492, the Court held that, there being no averment in the answers, that the plaintiff had paid himself by the usufruct of the property, the objection that the mortgagee had not produced his accounts could not be entertained on the appeal. The question, therefore, cannot be said to have been concluded against the appellant by authority; and their Lordships have already intimated their opinion that upon principle the obligation to produce the accounts should depend on the circumstances of the case and the nature of the issues raised. Upon the question whether the appellant is so bound by the order of the 22nd of January, 1857, against which he did not appeal, that he cannot impeach

the correctness of the remand, their Lordships have to observe that the order was an interlocutory one; that it did not purport to dispose of the cause; and, consequently, that upon the principle laid down by the committee in the case of *Maharajah Moheshur Sing v. The Bengal Government* (7 W. R. 322; 7 Moo. I. Ap. 283), upon which their Lordships have very recently acted in a case from Oude, the appellant is not now precluded from insisting that the remand for the production of the accounts was erroneous; or that the cause should have been decided in his favour, notwithstanding the non-production of the accounts. In truth, the learned judges of the Sudder Court, by their judgment of the 21st April, 1862, treated the latter point as still open to the appellant, although, upon grounds which appear to their Lordships to be unsatisfactory, they determined it against him.

The view which their Lordships have taken of the questions already considered renders it unnecessary to determine whether the appellant ought to have been allowed further time, or a second opportunity for the production of the accounts required from him. Their Lordships will only say, upon this point, that the affidavits filed by him on an application for a review are, when contrasted with his grounds of appeal, extremely unsatisfactory, and that he appears to have done little to entitle him to the indulgence of the Court. They are therefore not prepared to say that if the production of the accounts required had been necessary, those delivered were insufficient; or that in that case there would have been any such improper exercise of the discretion of the Court below as their Lordships would have interfered with. But they think that the error of the Court below was in the dismissal of the suit, on the assumption that the production of any accounts was necessary in a case in which there was neither plea nor proof that the usufruct had liquidated principal and interest, and no deposit had been made to cover the balance admitted to be due.

Their Lordships, on the whole case, are of opinion that this appeal should be allowed, and they will humbly recommend her Majesty to reverse the decrees appealed against, and also the order of remand of the 22nd January, 1857, and to vary the decree of the 18th December, 1854, by declaring that the appellant was entitled to the possession of the mortgaged premises as absolute owner, by virtue of the conditional sale which had been duly made absolute, but was not entitled to a decree for any mesne profits. Their Lordships think that the appellant is entitled to the costs of this appeal, and also to all costs of the suit below, up to and including the costs of the order of the 22nd January, 1857. Considering that he might have appealed against that order, and that his conduct in the subsequent proceedings in the court below has not been satisfactory, their Lordships are not disposed to recommend that he should have the costs of those proceedings against the opposite party. He will of course be entitled to a refund of the costs (if any) which have been paid by him under any of the decrees reversed.

Decree reversed.

CRANWORTH, L.C., Jan. 12, 13, 15, 16, Feb. 9, 1866.

SOUTHERN v. HARRIMAN.

14 W. R. 487.

Specific performance—Purchase of lease—Uncertainty of term.

VENDOR AND PURCHASER.—*The Court will not assume that a purchaser has agreed to purchase the vendor's interest, whatever it may be, unless the language of the agreement is clear.*

An agreement for the purchase of a lease, which does not mention the length of the term granted by the lease, is void for uncertainty, and cannot be enforced.

This was a bill for specific performance of an agreement for the purchase of a lease of a coal mine and fireclay called Whickham Pit.

George Southern was a lessee under the late Lord Ravensworth, of Whickham Pit for twenty years from the 13th of March, 1847, but no formal lease was ever executed. Lord Ravensworth and George Southern both died in March, 1855, and the plaintiffs continued to work the pit.

In April, 1860, negotiations were entered into between the plaintiffs and the defendants, which ended in an agreement of the 25th of April, 1860. The following were the material parts:—

“The terms of agreement made between Harriman & Co., and Southern Brothers, for Whickham Pit. Amount of purchase-money to be 900*l.*” payable as therein mentioned. “Southern Brothers to get the rent of coals to Lord Ravensworth reduced to fifteen shillings per ton; fireclay to four shillings per ton. The lease and agreement to be subject to Harriman & Co.’s solicitor’s approval.”

It appeared that the memorandum under which the late George Southern held, was not mentioned to the defendants when the agreement was executed. The defendants were let into possession on the 1st of May, 1860, and worked the mines.

On the 1st of October, 1862, the plaintiffs obtained a lease for twelve years from the 24th of April, 1862, from Lord Ravensworth, and shortly afterwards informed the defendants of it, and required them to complete their contract. The defendants refused to do so, and this bill was filed on the 23rd of May, 1863.

The defendants admitted the agreement, and the taking possession, but refused to perform the agreement on several grounds. The meaning of the term “Whickham Pit” was doubtful. The agreement did not state the length of term, or the amount of the rents and royalties. The plaintiffs were not in a position to perform their part of the agreement, and had been guilty of gross delay; and the defendants had given up possession in April, 1862.

The case came on to be heard before Vice-Chancellor Wood, in April, 1864, when a decree was made in favour of the plaintiffs. The case is reported, and the facts are more fully stated, in 12 W. R. 704.

From this decision the defendants appealed.

Willcock, Q.C., and *Faber*, for the plaintiffs, the respondents.

Rolt, Q.C., *Giffard, Q.C.*, and *Hardy*, for the defendants, in support of the appeal.

Willcock, Q.C., in reply.

Feb. 9.—LORD CRANWORTH, C., after stating the facts, and the decree of the Vice-Chancellor, proceeded as follows:—His Honour construed the agreement as an agreement to purchase, not the mines, or a lease of the mines, but only the estate and interest of the plaintiffs in the mines. I confess I am unable to agree with his Honour in so construing the agreement. The defendants certainly knew that what they were purchasing was a lease only, and was not the fee simple; that is apparent from the terms of the agreement, but I can discover nothing on the face of the agreement to show that they did not suppose they were to have a good and valid lease, but were to be content with a demise or assignment of the interest of the plaintiffs, whatever that interest might be. No doubt a person may, when entering into a contract of purchase, agree to accept, and be content with, whatever title the seller can give him; but such a condition cannot be imported into a contract unless the language is such as clearly to warrant it; and here I can discover nothing of the sort. The agreement is very loosely

and imperfectly worded, but the subject-matter of the intended demise, the price to be paid for it, and the rent to be reserved, sufficiently appear. The subject-matter of the demise was Whickham Pit, and what that consisted of was a matter to be shown by parol evidence. The sum to be paid was 900*l.*, to become due by certain stipulated instalments, and the mining rent was to be one and threepence per ton for coal, and fourpence per ton for fireclay. So far the agreement is sufficiently clear and definite. But the agreement is silent as to the length of the term for which the lease was to be granted. The defendants, by their answer, among other objections, insist on this as a reason why they ought not to be called on to perform the agreement. I own that I think the objection is well founded. The omission to fix the term made the whole agreement uncertain. It was therefore the duty of the Court to dismiss the bill at the hearing, unless it could discover from the pleadings and evidence then before it, circumstances enabling it to decree a specific performance in spite of the uncertainty of the agreement itself. This might be; for, though by reason of uncertainty in its terms, the Court may be unable to enforce an agreement which is wholly unperformed; yet, if the agreement has been so acted upon that the Court is able to deduce from the conduct of the parties a supplemental parol agreement partly performed, and making certain that which was previously uncertain, it may then decree specific performance of the original agreement, notwithstanding its uncertainty, qualifying and adding to it in such manner as the conduct of the parties may warrant. I have looked through the pleadings and the evidence at the hearing, but I can find nothing which shows what the term was to be for which a lease was to be granted to the defendants. According to the construction which the Vice-Chancellor put on the agreement, all difficulty on this head was removed. The defendants were, according to his Honour's construction of the agreement, to have whatever interest the plaintiffs had, and no more; and it was immaterial, therefore, whether their term was longer or shorter. But, in the view which I take of the case, there is no such limitation as to the defendants' right under the agreement, and it is therefore absolutely necessary to ascertain what length of term they were entitled to claim. Neither the agreement itself, nor the conduct of the parties, enables me to ascertain this. The evidence at the hearing showed that, at the date of the agreement, the plaintiffs were working the mines under an agreement of April, 1846, by which the late Lord Ravensworth had agreed to demise them to George Southern, deceased, father of the plaintiffs, for a term of twenty years from March, 1847. It was not however shown that this, even if it was material, was ever communicated to the defendants. They were let into possession a few days after the date of the agreement of the 25th of April, 1860, and continued in possession, as they say, up to the 30th of April, 1862, as the plaintiffs say, up to the filing of the bill. When they were in possession a great deal of correspondence passed between them and the plaintiffs, but from no part of it can I even now discover what was the term to which the defendants were to be entitled. On the 1st of October, 1862, after the defendants say they had given up possession, the plaintiffs obtained a lease to themselves from the present Lord Ravensworth, for a term of twelve years from April, 1862; and, by their bill, they offer to assign this term to the defendants, or to make to them an underlease co-extensive with it, I presume, in point of duration. But there was nothing before the Court, at the hearing, tending to show that the defendants had agreed to accept such term. The original defect, therefore, from uncertainty, remained wholly unremoved; and it was, in my opinion, the duty of the Court to dismiss the bill. The view which I have thus taken on this point of uncertainty makes it unnecessary for me to consider the other objections insisted on by the defendants. I am of opinion that the case is one on which no relief can be given, and it is therefore my duty to reverse the original decree and the subsequent order on further consideration, and to order the bill to be dismissed with costs.

[LORDS JUSTICES.]

Feb. 22, 1866.

HOPE v. CARNEGIE.

14 W. R. 489; L. R. 1 Ch. 320; 14 L. T. 117; 12 Jur. N.S. 284: affirming, [1866] E. R. A. 2682; 14 W. R. 260; 13 L. T. 624 (V.C.).

Injunction—Restraining proceedings in a foreign court—Domicil.

INJUNCTION. INTERNATIONAL LAW.—*A testator made his will in England, disposing of both real and personal estate in England and Holland. A decree was made in a common administration suit in this court for the administration of the estate. One of the legatees, not a party to the administration suit, alleging that the testator was domiciled in Holland, commenced proceedings there for the distribution of the whole of the estate, real and personal. A bill was then filed to restrain those proceedings, and an injunction for that purpose was granted in the court below, but no restraint was put upon any future proceedings in Holland with reference only to the real estate situate in that country.*

On appeal, that order was affirmed (dissentiente KNIGHT BRUCE, L.J., as to a part thereof).

Per KNIGHT BRUCE, L.J.—*The appellant ought to have liberty to continue, if she could, the suit already instituted in Holland, in respect only of the real estate situate there.*

Per TURNER, L.J.—*It lay upon the appellant to show that the proceedings in Holland were capable of being continued in respect of one class of property alone, and, that not having been shown, she ought to be restrained from continuing those proceedings.*

This was an appeal, by way of motion, from an order made by Vice-Chancellor Stuart, granting an injunction to restrain the defendant, Miss Hope, from continuing certain legal proceedings in Holland, or instituting any other proceedings there in regard to the personal property of the testator in the cause.

The facts of the case are stated 14 W. R. 260.

Swanston (Bacon, Q.C., with him), for the appellant.—The defendant ought not, at any rate, to be compelled to institute new proceedings in Holland in respect of the real estate situate there. Moreover no step was taken to obtain an injunction till six months after this bill was filed. All this time the defendant was allowed to go on with the proceedings in Holland, and there has clearly been *laches*. It is plain, from the evidence, that there is a serious question as to the domicil of the testator. This question was not raised in the suit of *Hope v. Beresford Hope*, which was a common administration suit; but the question having been first raised in the Dutch court, it should be decided there. At any rate this would be the most convenient course. The fact that no decree has been yet made in a suit in which the question of domicil is raised, distinguishes the present case from *Bunbury v. Bunbury* (1 Beav. 318).

Sir R. Palmer, A.G., Malins, Q.C., and Hemming, for the respondents.—The injunction ought to have been extended further than it was by the Vice-Chancellor, so as to prevent the defendant from instituting any future proceedings as to the real estate in Holland. The testator has clearly expressed his intention to dispose by his will of his real property wherever situate, and the certificate was made in the other suit before the proceedings in the Dutch court were commenced. The real estate in Holland is but of small value, and, according to the defendant's own showing, she would be entitled by Dutch

law to only one-fifth of three-fourths of that estate. The persons entitled to the other four-fifths acquiesce in the English proceedings. The proceedings already instituted in Holland are for the distribution of the whole moveable and immoveable property of the testator, and there is nothing to show that they can be continued with regard to the real estate alone. As to the alleged delay, nothing has been done in the Dutch proceedings, but to serve the summons on the executors, to which they have appeared and given security for costs. The case is clearly within the principle of *Bunbury v. Bunbury*. The real estate is necessarily connected with the administration of the whole property. The plaintiffs are quite willing to give such an undertaking as was given in *Bunbury v. Bunbury*, with reference to the proceedings in the Dutch court.

Swanston, in reply.—The defendant was not a party to the other suit, nor served with notice of the decree. The question of domicile would never have been raised had she not instituted the proceedings in Holland.

KNIGHT BRUCE, L.J.—My impression is that the order of the Vice-Chancellor must stand, except so far as it restrains the proceedings as to the landed property in the Netherlands. It may or may not be possible to proceed as to the landed property in the Netherlands, without proceeding as to the personal estate. That must depend on the course of law there. Whatever may be the effect of this Court's declining to prohibit proceedings as to the landed estate in the Netherlands, my impression is it ought not to be done, and that the appellant should be at liberty, if she can do so according to the law of the Netherlands, to proceed there as she may be advised as to the landed estate in the Netherlands. Subject to that, I think the order is substantially right; but as my learned Brother is of opinion that, under the special circumstances of the case, the order should stand, even as to restraining proceedings as to the landed estate in the Netherlands, the whole order will stand, although I dissent from a portion of it.

TURNER, L.J.—I think that the whole of the order must stand, so as to restrain proceedings as to the landed estate in the Netherlands; that is, I mean, to restrain proceedings in the suit instituted there, both as to the landed estate, and as to the personal estate; because, in my opinion, it rests upon the party making this motion to show that it is possible, in the suit which has been instituted in the Netherlands, to distinguish the proceedings as to the landed estate from the proceedings as to the personal estate. I go no further than that, because it is unnecessary to go further upon the present motion. If it had been shown that the landed estate in the Netherlands could be separated from the personal estate there, another and a different question would have arisen. I do not enter into that question at all, as it is not before us on the present occasion. We cannot, upon the present application, extend adversely to the appellant the order which the Vice-Chancellor has made, so as to restrain proceedings in the Netherlands altogether in respect of any part of the real estate. I am not at all sure how that question might ultimately stand if that application were brought before us, because this Court, according to my view of the case, and I have looked pretty carefully into it, must necessarily take the question as to the real estate in the Netherlands, and ascertain for itself what the law of the Netherlands is with reference to the power which the testator had to devise the estate, and with reference also to the question whether, if he had not the power to devise the whole estate, he had not at least the power to devise one-fourth of the estate; and so this suit might have to be dealt with as supplemental to the administration suit. And that brings the case very close upon the case of *Bunbury v. Bunbury*, which Lord Langdale dealt with on that principle, taking the undertaking of the party who applied to this court for its intervention to be bound by any order which this court might afterwards make,

in order to use the proceedings in a foreign court for the purpose of determining a question which this Court was compelled to determine, whether the estate did or did not pass. It appears to me that the whole matter had better be treated in this court. If the parties object to that I do not think we can alter the order adversely to them at the present time. The plaintiff's costs of the appeal will be costs in the cause, and if the defendant will agree to the same form of order as was made in *Bunbury v. Bunbury*, her costs may come out of the estate, otherwise there will be no order as to her costs.

[LORDS JUSTICES.]

March 5, 1866.

GILL v. NEWTON.

14 W. R. 490; 14 L. T. 240; 12 Jur. N.S. 220.

Mortgage—Power of sale—Notice—Subsequent deed of arrangement—Mortgagee in possession.

MORTGAGE.—A mortgage deed contained (inter alia) a power of sale, exercisable by the mortgagee on three months' notice to the mortgagor, his heirs, executors, or administrators, or any or either of them. Some time after the execution of the mortgage deed a deed of arrangement was made between the same parties, by which the mortgagee was empowered to enter into possession of the mortgaged property, and to receive the rents on certain trusts therein declared. There was a declaration that nothing in this deed contained should prejudice the rights of powers of the mortgagee under the mortgage deed, and a further declaration that the mortgagee might, at any time after a specified day, determine the trusts thereof, and that, on delivering of such notice, the mortgagee should be at liberty to exercise the powers vested in him by the mortgage deed to the same extent as if such trusts had never been declared. The mortgagee entered into possession under this second deed, and some time after the said specified day he gave notice to exercise his power of sale, but he never gave any notice to determine the trusts of the second deed:—Held, reversing the order of the Master of the Rolls, that the power of sale could not be exercised so long as notice had not been given to determine the trusts of the deed of arrangement.

It is not necessary to give notice of the intention to exercise a power of sale contained in a mortgage deed to a devisee of the mortgagor when the mortgage deed provides that the notice is to be given to the mortgagor, his heirs, executors, or administrators, or any or either of them.

By an indenture dated the 11th April, 1847, and made between Thomas Gill (since deceased), the husband of the plaintiff, of the one part, and the defendant of the other part, certain property was conveyed to the defendant by way of mortgage. In the indenture was contained a power of sale, with a proviso that the defendant, his executors, administrators, or assigns, should not exercise it, unless and until he or they should have given a notice in writing to Thomas Gill, his heirs, executors, or administrators, any or either of them, to pay off the moneys owing on the security of the said indenture, and default should have been made in payment of such moneys for three calendar months from the time of giving such notice.

Several further charges were made upon the property in favour of the defendant, and ultimately an indenture, dated the 5th July, 1861, and indorsed

on the original mortgage, was made between the same parties, whereby the property was made subject to a further charge in favour of the defendant, and the defendant was authorised and empowered by the plaintiff to enter into possession of the property, and to receive the rents and profits thereof, upon certain trusts therein mentioned. And it was thereby declared and agreed, that nothing therein contained should prejudice or affect the rights, remedies, powers and authorities respectively vested in the defendant, his heirs, executors, administrators, or assigns, under or by virtue of the therewithin written indenture, and other the securities thereinbefore mentioned, referred to, and contained, or any of them, or the provisions for the safety or the protection of the purchasers contained in the therewithin written indenture, or any of them, it being the true intent and meaning of the parties thereto, that the indenture now in statement should take effect as a deed of arrangement between the parties thereto, but should not affect the title to the said premises comprised therein. And it was further declared and agreed that it should be lawful for the defendant, his heirs, executors, administrators, or assigns, on, or at any time after the 31st December then next, upon notice in writing to Thomas Gill, his heirs, executors, or administrators, or any or either of them, to determine and put an end to all and every the trusts by the said indenture now in statement declared of the rents and profits to be received by the defendant after the said 31st December, and that, upon the delivery of such notice, the defendant, his heirs, executors, administrators, or assigns, should be at liberty to use and exercise the rights, remedies, powers, and authorities respectively vested in him, his heirs, executors, administrators, or assigns, under or by virtue of the said mortgage deed and other the securities thereinbefore mentioned, referred to, and contained, or any of them, to the same extent, and in the same manner, in every respect, as if such trusts had never been created or declared.

Shortly after the execution of this last deed the defendant entered into possession under it, and he had never given any notice to determine the trusts thereof.

Thomas Gill died on the 20th October, 1861, having devised and bequeathed to the plaintiff all his real and personal estate, and having appointed three other persons executors, one of whom alone proved the will.

The defendant gave notice on the 2nd November, 1865, to the executor, of his intention to exercise the power of sale.

This bill was filed by the devisee against the mortgagee on the 31st January, 1866, and it prayed the usual accounts and decree for redemption, and an injunction to restrain the defendant from selling the property.

The Master of the Rolls refused the injunction.

Selwyn, Q.C., and *C. H. Smith*, for the appellant.—The injunction ought to have been granted for two reasons:—First, the notice to exercise the power of sale was given only to the legal personal representative of the deceased mortgagor, who had no interest in the property. It ought, on a fair and equitable construction of the proviso, to have been given to the devisee, who was the only person interested in the property. This is not a question of the rights of a purchaser, who might be entitled to protection under the terms of the proviso, but it is entirely a question between the parties to the mortgage deed. Secondly, the true construction of the deed of arrangement is, that the mortgagee could never exercise the power of sale at all, so long as he was in possession under the terms of that second deed. He was in possession as a trustee, and not in the position of a receiver under a common receivership deed, and that possession could only be terminated by giving notice in the way provided by the second deed. This notice has never been given. They cited *O'Connor v. Spaight* (1 Sch. & Lef. 309); *Jenner v. Morris* (9 W. R. 391, 3 D. F. J. 45).

Baggallay, Q.C., and *E. Charles*, for the respondent.—The argument on the other side really comes to this—that after notice had been given to

exercise the power of sale, the exercise of that power could be at once stopped if the mortgagor chose to file a redemption bill. At any rate there can be no doubt that the word "assigns" was purposely left out of the proviso for notice of the exercise of the power of sale in order to simplify the position of the mortgagee, and the parties must be bound by the terms of their contract. As to the second deed: its object was merely to enable the mortgagee to enter into possession without incurring the liabilities of a mortgagee in possession. It is simply equivalent to a common receivership deed, which would not affect the mortgagee's rights at all. The notice to terminate the trusts of the second deed might be given at any moment before the actual sale. At any rate it would be nugatory to grant an injunction, since notice could be given to-morrow to determine the possession under the second deed, and then a sale could be made in three months. In *King v. Heenan* (3 D. M. G. 890), it was held that a receivership deed did not interfere with the rights of a mortgagee, though there was no declaration as there is in the present case to that effect. The registration of this suit at a *lis pendens* would be quite enough to affect any purchaser under the power of sale.

Selwyn, Q.C., in reply.—If the sale could not take place for three months we should have ample time to pay off the mortgage debt. The effect of registration as a *lis pendens* would simply be to depreciate the price obtained at the sale.

KNIGHT BRUCE, L.J.—Under the peculiar circumstances of this case, I think that the order under appeal should be discharged, and that there should be an injunction to restrain this sale, but without prejudice to any question in the cause, the plaintiff undertaking to speed the cause, and to abide by any order the Court may ultimately make as to the property. My opinion is founded on the very peculiar character of the instruments, and especially of the deed of arrangement, the validity and consequences of which deserve great consideration, and are open to much argument. But, for the existence of that deed, I am by no means satisfied that I should have thought the injunction due. The costs must be altogether reserved.

TURNER, L.J.—With great respect to the Master of the Rolls, I also think that the injunction is due. In saying this I wish it to be clearly understood that I do not at all proceed upon the ground that the amount due upon the mortgage is in dispute. If that were so, a mortgagor would have but to raise a dispute about the sum due, in order to deprive his mortgagee of his remedies under the mortgage deed. Nor should I be inclined to interfere upon the facts as they stand with regard to the mortgage deed. That deed has provided a particular mode in which notice of the intention to exercise the power of sale must be given, and the notice has been so given. The party who has entered into such a contract cannot complain of its consequences. But, with regard to the second deed, there is a substantial ground upon which the Court is bound to interfere. It is not, as has been argued, a simple receivership deed. It contains an express clause that, upon a particular act being done, the mortgagee shall be at liberty to exercise his powers and rights under the mortgage deed. I think it a serious question whether the true construction of this deed is not, that the reservation to the mortgagee, in the former part of the deed, of all his powers under the mortgage deed, is to be taken as made by the latter part of the deed, to be subject to this exception—that they are not to be exercised except upon the delivery of the notice mentioned in the latter part of the deed. This seems to be a reasonable and fair construction, and at any rate it is so open to argument, that I think the injunction must be granted. The costs, both here and at the Rolls, must be costs to the cause.

By consent an immediate decree for redemption was taken.

[LORDS JUSTICES.]

March 8, 1866.

THOMAS v. TAYLOR.

14 W. R. 493.

This was an application, on the part of the defendant, to take the amended bill off the file for irregularity. The plaintiff had, after the defendant had answered, obtained an order of course to amend on payment of twenty shillings costs. He filed his amended bill on the last day limited for that purpose, but did not, till after that day, tender the twenty shillings to the defendant. Vice-Chancellor Stuart refused the application with costs, and the defendant appealed.

Caldecott, for the appellant, now moved accordingly.

Rodwell, for the plaintiff, *contrà*.

The LORDS JUSTICES refused the motion with costs, and the defendant, by his counsel, now admitting and undertaking to admit at the hearing the facts stated by way of amendment, ordered that no answer be required in respect of the amendments.

[LORDS JUSTICES.]

March 5, 8, 1866.

Re TRUMP.

14 W. R. 494.

Practice—Bankruptcy Act, 1861, s. 192—Registration of deed of assignment for benefit of creditors—Affidavit of debtor.

BANKRUPTCY. N.—*The affidavit of the debtor usually required upon the registration of a deed of assignment for the benefit of creditors may be dispensed with.*

This was an application for a direction to the Registrar in bankruptcy to register a deed of assignment, made by Trump for the benefit of his creditors, without the usual affidavit of the debtor, but upon an affidavit of an accountant who had investigated the position of the estate. The application had been made to Commissioner Goulburn, and he had refused it. Trump was abroad, and this was the last day for making the registration.

Swanston now applied to the Court *ex parte*. He referred to section 192 of the Bankruptcy Act, 1861, and to the 19th of General Orders made thereon. The affidavit has been, in some cases, dispensed with, as, for instance, where the debtor was in gaol, and refused to make the affidavit.

The LORDS JUSTICES directed notice to be given to the creditors who had not executed the deed, and the matter to be then mentioned again. Meanwhile, the deed to be provisionally registered.

March 8.—*Swanston* now stated that he had an affidavit of service on the creditors who had not executed, and that they did not appear.

The LORDS JUSTICES accordingly made an order for registration of the deed, as of the day when the application was originally made.

STUART, V.C., Feb. 23, 1866.

HUME v. POCOCK.

14 W. R. 495; L. R. 1 Eq. 662; 14 L. T. 127; 12 Jur. N.S. 223.

Vendor and purchaser—Insufficiency of title.

SPECIFIC PERFORMANCE. VENDOR AND PURCHASER.—Where a vendor makes an erroneous statement as to title in the contract of sale, which title, in a suit for specific performance, and on a reference ordered by the Court, is declared not such as to enable him to convey, but the purchaser, with knowledge of the defect, enters into possession, and improperly takes advantage of his information to his own advantage and adversely to the vendor, the Court will permit the vendor to amend his bill with a view of obtaining a modified performance of the contract, within the principles laid down in *Murrell v. Goodyear* (2 Giff. 51).

This case came on for further consideration. The original bill was for specific performance of a contract to purchase certain lands, of which the plaintiff, in the contract for sale, alleged himself to be mortgagee in fee, with a power of sale. The purchaser, however, as was alleged, in perusing the abstract of title, discovered the plaintiff to be a mortgagee for a term of 1,000 years only, and without a power of sale; and, upon discovering this, purchased the reversion in fee from the mortgagor for a nominal consideration. In the meantime the purchaser had been admitted into possession, and had expended considerable sums in the erection of works on the property; and he refused to accept the mortgagee's title, offering, however, to pay off the amount of his mortgage-money and interest—a sum considerably less than the amount of the purchase-money. The Lords Justices, before whom the hearing came on appeal, made a decree for specific performance, and ordered the purchase-money and interest to be paid into court and to be charged on the estate, subject, however, to a reference as to title. The chief clerk found that the plaintiff was a mortgagee for a term only, without a power of sale as to part of the lands sold, and that his title was not such as to enable him to convey.

Malins, Q.C., and Fry, for the plaintiff.—The purchaser is not entitled to use his information of defects in vendor's title to his own advantage adversely to the vendor. He cannot under such circumstances avail himself of the purchase of the equity of redemption to defeat his contract: *Murrell v. Goodyear* (8 W. R. 398; 2 Giff. 51, 1 D. F. J. 432).

Bacon, Q.C., and Macnaghten, for the defendant.—The bill should be dismissed with costs. The plaintiff has not fulfilled the terms of the agreement for sale, and can make no title.

March 8.—STUART, V.C.—This case has now come before the Court under extraordinary circumstances. The decree of the Lords Justices has directed the specific performance of the agreement, provided that a good title can be made. The certificate now shows that a good title cannot be made, and the defendant asks, as of course, that the bill be dismissed out of court, there being no motion by the plaintiff to vary the certificate. But other parts of the Lords Justices' decree seem rather to indicate that the Court foresaw the ultimate possibility of a modified performance of the agreement to purchase. The possession of and dealing with the property by the defendant may account for that part of the decree which directs the defendant to pay into court the interest on the purchase-money, and the still more important and unusual declaration that the purchase-money with interest is a charge upon the estate. This seems to show that the Court had in view the ultimate possi-

bility that even if a good title could not be shown by the plaintiff, he might still be entitled to some relief as a vendor, and this is confirmed by the fact that the decree was made after the defendant, by his answer, admitted that he had, subsequently to the contract, purchased the equity of redemption, and by the variation made by the decree in the order as to payment of purchase-money (an order made before the answer was filed). The certificate is conclusive against the title. The plaintiff now relies on the principle of the case of *Murrell v. Goodyear*, one of the class of cases in which a modified performance of the agreement has been decreed. If the frame of the bill justified it, there is certainly enough in the decree to entitle him to proceed now to show his right to relief on that footing. But the bill prayed no alternative relief, and contains no averments on which any other relief can be given than on the footing of the plaintiff being a mortgagee in fee, with power of sale. It is quite possible that if the plaintiff had amended his bill with reference to some of the statements in the answer, he might have averred and proved a case for relief on the principle that since the contract the defendant had ascertained and himself cured the defect in the title by purchasing the equity of redemption, and that he is now, by means of the contract, in possession and enjoyment of the plaintiff's beneficial interest in the property. On such ground he might be entitled to recover, if not the whole, at least some other sum less than the contract price. But a case of that kind must be distinctly averred and proved so as to give the defendant an opportunity to make out a case against relief of that kind. Considering the terms of the decree and the declaration of lien in favour of the plaintiff, I think that the court cannot dismiss this bill, and thereby allow the defendant to continue in possession of the plaintiff's interest in the property without paying any price or making any compensation. The case must stand over with liberty to the plaintiff to amend the bill or to file such supplemental bill as he may be advised.

WOOD, V.C., March 2, 1886.

Re CRABTREE.

14 W. R. 497.

Practice—"The Trustee Act, 1850"—Costs—How to be raised.

TRUST AND TRUSTEE.—Where an order had been made for the appointment of new trustees under "The Trustee Act, 1850," and for the payment of the costs out of the trust estate; and it was subsequently shown that the trust estate consisted entirely of realty; the order was amended by the insertion of words authorising the trustees to raise the costs out of the realty by way of mortgage, the mortgage deed to be approved by the judge at chambers.

In this matter an order had been made for the appointment of new trustees under "The Trustee Act, 1850," and for the payment of the costs attending such appointment out of the trust estate.

Batten stated that the trust estate consisted of realty only, and asked that the order might be amended by the addition of words authorising the trustees to raise the costs out of the estate by way of mortgage. He referred to *Ex parte Davies* (16 Jur. 882), where Vice-Chancellor Parker, upon appointing a new trustee under the Act, by consent directed that the costs of

the proceedings, with interest thereon at 4l. per cent., should form a charge on the inheritance. There was no opposition to the present application.

Wood, V.C., allowed the application, and said that the order should be amended by the insertion of words directing the costs, when taxed, to be a charge on the inheritance, such charge to be raised by way of mortgage, and the mortgage deed to be approved by the judge at chambers.

Wood, V.C., March 13, 1866.

MORGAN v. FULLER.

14 W. R. 497; L. R. 2 Eq. 296; 14 L. T. 353.

Patent—Trial—Power of the Court—Alteration of the record.

PATENT.—*When a cause is set down for trial the Court will not alter the record by the addition of an issue not raised in the pleadings.*

This was an adjourned summons to add further issues; it was taken out by the defendant in the suit, which was to restrain the infringement of a patent. Replication had been filed, and the cause had been set down for hearing.

The present application was, according to the decision of the Court, an application to raise an issue which had not been raised in the pleadings.

Fooks for the defendant in the cause.

W. Pearson for the plaintiff.

Wood, V.C., said the application was not a matter of form. Certain issues had been raised by the answer. The defendant now wished to suggest an additional issue. This he should have done by a supplemental answer. For the Court to direct an issue to be raised that had not been raised in the pleadings, would be for the Court to exceed the power of control which it possessed over its own general orders. The application must be dismissed with costs.

[BANKRUPTCY.]

Jan. 10, 1866.

Ex parte MADDISON. *Re* MADDISON.

14 W. R. 501.

Bankruptcy Act, 1861, ss. 185, 186, 187—Form of deed under—Right of non-assenting creditors to sue—Inequality.

BANKRUPTCY.—*A deed of composition, under the 185th section of the Bankruptcy Act, 1861, made between the debtor of the one part, and the creditors who execute, on behalf of themselves and all other the creditors of the debtor, of the other part, is objectionable, on the ground that the creditors who are not parties have no right of action thereunder.*

And where it is shown in evidence that a creditor for 342l. has received preferentially bills of exchange for 50l. and 30l., irrespective of the composition payable under the deed.

The Court dismissed an application for a supersedeas of the bankruptcy with costs.

This was an application on behalf of the bankrupt, Henry Maddison, for an order under the 187th section of the Bankruptcy Act, 1861, declaring that the terms of a deed entered into by the bankrupt with his creditors were reasonable, and calculated to benefit the general body of the creditors under the estate, and for an order declaring the complete execution of the deed, and for a direction that the same should be registered with the chief registrar and the bankruptcy annulled.

By the deed, which was dated the 15th December, 1865, and made between the debtor of the one part, and "the creditors who execute on behalf of themselves and all other the creditors of the debtor" of the other part, the debtor covenanted to pay to his creditors a composition of three shillings in the pound upon the amounts of the debts due to them respectively, and the creditors thereby released their claims.

R. Griffiths, who supported the application, produced the deed, which had been executed by or on behalf of three-fourths in number and value of the creditors.

Brough, for opposing creditors, took a preliminary objection on the ground that the costs of a former application of a similar nature by the bankrupt had not been paid.

HOLROYD, Commr., intimated that he would not proceed unless the costs were paid.

The amount of costs was then discharged and the hearing proceeded.

It was elicited upon an examination of the bankrupt that he became bankrupt about a year since, and that he had obtained an order of discharge. The second petition bore date the 7th September, 1865, the bankrupt's debts being about 1,400l. *Mr. Hemming*, of Birmingham, jeweller, was a creditor for 171l., in respect of goods supplied; 86l. at the end of May, and 85l. in the middle of July; and *Mr. George Blunt* was a creditor for 29l., in respect of goods delivered in June. At a sitting for examination, held before *Mr. Commissioner Goulburn*, an adjournment *sine die* was ordered and protection disallowed. *Mr. Samuel Powell*, of Birmingham, was a creditor for 342l., and he had executed the deed. At the time of such execution *Powell* received two bills of exchange for 50l. and 30l. each, drawn by the bankrupt upon and accepted by one *Thwaites*, an accountant. According to the bankrupt's evidence *Powell* had stated that if he would hand him the additional bills he would, at a future time, deliver to him further goods. *Powell* had since died.

Brough submitted upon this evidence that *Mr. Powell* having been induced to execute by the delivery of two bills of exchange preferentially, the deed was bad. The deed was objectionable upon the further ground that the creditors who were not parties could not sue upon the covenant of the debtor. He referred to *Gurrian v. Kopera* (13 W. R. 843), *Chesterfield and Midland, &c., Company v. Hawkins* (13 W. R. 841).

R. Griffiths contended that the bills having been given in consideration of a promise to deliver goods at a future date, the circumstances did not amount to a preference. [*HOLROYD, Commr.*—It is unfortunate that the bills were handed over at the time of the execution of the deed by *Mr. Powell*.]

HOLROYD, Commr.—Here is a clear case of inequality, and it is impossible for the Court to hold that the deed is reasonable. The deed is also objectionable upon the further ground which has been pointed out. The application must be dismissed with costs.

[PROBATE.]

Feb. 20, 1866.

In the goods of ANNA MARIA BELLAMY (deceased).

14 W. R. 501.

Will written partly in ink and partly in pencil—Probate of—Intention—Appearance of document—Indorsement of envelope—Codicil.

WILL.—Where a will seemed to have been first written in pencil and afterwards traced with ink, but not completely, words in some cases being written in ink above, and apparently in substitution for, the pencil writing, and in other parts the pencil writing standing alone,

The Court declined to include the pencil writing in the grant of probate of the will.

The fact that a will is found with a codicil in an envelope indorsed as containing the codicil only will not raise any presumption that the will was not meant to take effect.

The deceased died on the 29th of October, 1863. Previous to her death, on the 3rd of the same month, she produced to her brother George Bellamy a sealed envelope with the following indorsement:—"August 20th, 1865. This is my last will. Anna Maria Bellamy. Witnessed by my two servants, Mary Hill and Mary Martyn." The indorsement was in her own handwriting. On the afternoon of the same day she produced to him another paper in her own handwriting partly in ink and partly in pencil, and requested him to write it out for her, which he did exactly in the form in which he found it written by herself. It was dated September, and, as he concluded that it must be a mistake for October, he mentioned it to her the following day, on which she desired him to correct it, which he did by drawing his pen through the word September and writing "October" under it. Previous to this he had been desired by her to send to her room the two servants mentioned in the indorsement as having attested her will. He did so, and it was when he went into her room with them that he mentioned the mistake and corrected it. Having done so, and delivered her the copy he had made, he went out of the room, leaving her with the two servants. After the death of the testatrix, her brothers and the person who was appointed co-executor with them found, in a small leathern bag in which she usually kept her papers, the envelope endorsed "August 20th, &c.," above referred to, but it was empty; and also another envelope endorsed "Codicil to my last will—witnessed by my two servants, October 3rd, 1865, Mary Hill and Mary Martyn." This last envelope contained the codicil above referred to as having been copied and corrected by George Bellamy, a will bearing date the 20th of August, 1865, signed by the testatrix, and attested by the two persons already mentioned, and another paper dated the 2nd of May, 1864, at its beginning, and December 29, 1864, at its end, and signed by the testatrix only. This paper contained various dispositions. The will and informal paper were in the handwriting of deceased, and the codicil was in the writing of George Bellamy. The will appeared to have been first written in pencil, and such pencilling was afterwards traced by a pen; but in some parts the ink did not follow the writing in pencil, but seemed to have been written in substitution for it, but the pencilling was not erased. In some parts there was no ink writing over the pencil, so that there was more pencil than ink writing. The two attesting witnesses swore to having signed the will and codicil, but stated that they could say nothing as to the pencil writing.

Spinks, Dr., now moved for grant of probate of the will and codicil to the executors named.

SIR J. P. WILDE.—Probate may pass of the will and codicil, but not of such writing in pencil in the will as is not traced with the pen, as it seems to have been the intention of testatrix to have the ink writing only regarded as her will.

[ADMIRALTY.]

March 6, 1866.

THE "HELEN."

14 W. R. 502.

Master's wages—Amount in which action entered insufficient to cover claim and costs.

SHIPPING.—*The defendants having occasioned great delay and extra expense, so that the amount in which the action had been entered proved insufficient to cover the amount pronounced to be due to the plaintiff with his costs of suit, the Court ordered that the ship should not be released from arrest until payment of the plaintiff's claim and costs should have been made.*

This was a cause of wages instituted by the master of the *Helen* against that vessel and her owners intervening. The action was entered in the sum of 450*l.*, and the plaintiff claimed the sum of 234*l.* 17*s.* 8*d.*, being the amount shown to be due to him by an account which had been given to the plaintiff at the office of the defendants, by a clerk in their employment. The defendants, by objecting to the admission of the plaintiff's petition, and by setting up an untenable defence (see 14 W. R. 136), and by neglecting to file their counter claim after the Court had referred the matter to the registrar, had occasioned very great delay, so that, although the plaintiff had filed his petition on the 22nd of May, 1865, it was not until the 21st of February, 1866, that the registrar was able to make his report, when he reported that the sum of 205*l.* 17*s.* 8*d.* was due to the plaintiff, with interest till the time of payment. The plaintiff had been necessarily detained on shore for the purpose of giving evidence in support of his claim from the time of the institution of the cause until the 19th February, 1866, on which day he gave evidence before the registrar and merchants. The amount in which the action had been entered proved to be insufficient to meet the plaintiff's claim and costs. The defendants had not bailed the *Helen*, which, consequently, was still under arrest.

Clarkson, for the plaintiff, now moved the Court for leave to increase the amount of the action from 450*l.* to 900*l.*, and to amend the warrant of arrest accordingly, and to condemn the *Helen* in the amount reported by the registrar to be due to the plaintiff, and in costs, and to order the *Helen* to be appraised and sold. He submitted that, under the circumstances, the plaintiff was justified in having entered his action in 450*l.* only, as he had no reason to expect that the defendants would take the vexatious course which they had pursued, but for which the amount of the action would have been sufficient. He cited the *Temiscouata* (1 Jur. N.S. 479).

Pritchard, for the defendants, opposed the motion.

Dr. LUSHINGTON.—I am of opinion that the plaintiff was justified in thinking that the amount in which he entered his action would prove sufficient. Parties are frequently obliged to find bail for large sums when there is no occasion, and are thereby greatly harassed. In this case great delay has been occasioned by the course pursued by the defendants, and expenses conse-

quent thereon have been incurred by the plaintiff, who has been compelled to remain on shore for ten months in order to give his evidence. I shall now make an order which will probably cut this matter short. I order that the *Helen* be not released from arrest until the amount due to the plaintiff, together with his costs, including the costs of this motion, have been paid.

[ADMIRALTY.]

March 13, 1866.

THE "CORNELIA HENRIETTA."

14 W. R. 502.

Bottomry bond on English ship—Payment by bondholders of wages, subsistence-money, and expenses of return of foreign seamen—Repayment to bondholders out of proceeds of sale of ship.

SHIPPING.—This was a motion to pronounce for the validity of a bottomry bond, and also to decree repayment out of the proceeds of the sale of the ship of sums paid for seamen's wages, &c.

The *Cornelia Henrietta*, a British ship, belonging to the port of Margate, was forced, while in distress on her homeward voyage, in the month of August last, to put into the port of Martinique. The master, requiring funds, gave a bond on bottomry of ship, freight, and cargo for 2,290*l.* 12*s.* Many of the crew having died of yellow fever, he was short of hands, and accordingly, with the aid of the governor of Martinique, he obtained twenty men on condition that, as soon as the vessel arrived home, five of them should be sent to Havre, and the remaining fifteen back to Martinique. The vessel was arrested on her arrival in this country, and sold at the suit of the Salvage Association at Lloyds, who were the bondholders, and who, at the request of the French Consul, and after the suit had been instituted, paid for the wages, subsistence-money, and return-expenses of the foreign seamen a sum amounting to 526*l.* 19*s.*

Potter, on behalf of the bondholders, now moved that the bond should be pronounced valid, and that the sums paid for seamen's wages, &c., should be repaid out of the proceeds of sale of the ship. He cited the case of the *Lisbonnaise* (reported in the *Solicitors' Journal*, vol. 10, p. 441), where the Court had allowed a sum, which the bondholder had paid to the French Consul at Newcastle on account of a destitute crew, to be repaid to him out of the proceeds in the registry, and submitted that since by these payments the expense of a separate suit for seamen's wages, &c., had been saved, the parties affected by the bond could not object.

Dr. Deane, Q.C., for the owners of the cargo, said that he should not oppose the application since an arrangement had been come to between the parties to abide by the decision of the Court in the matter.

Dr. LUSHINGTON.—The payment of these wages and expenses is undoubtedly a great irregularity on the part of the plaintiffs. When once a suit of this kind has been instituted, the Court, and the Court only, should direct payment of wages, and the direction of the Court can be taken at any time, either with or without a separate suit. It is true that the Court has been asked to sanction a similar payment before now, but it is the last time that such a motion will be granted. I shall allow the plaintiffs to be recouped in the present instance, but I wish all parties to understand that if, after this warning, cases like the present occur, the same indulgence will not be extended to them.

Motion granted with costs.

[LORDS JUSTICES.]

March 19, 1866.

SIDEBOTTOM v. SIDEBOTTOM. SIDEBOTTOM v. WOODCROFT.

15 W. R. 507.

WILL.—The first of these suits was a suit for the administration of the estate of one Joe Sidebottom.

The widow of the testator was alleged to be a large debtor to the estate. A decree was made for administration. Before it was decided whether the alleged claim against the widow was valid, she died. She had bequeathed a large legacy to the plaintiff in the second suit, which was instituted to obtain payment of the legacy. The first suit was in Vice-Chancellor Wood's court; the second in Vice-Chancellor Stuart's. Vice-Chancellor Stuart made a decree for payment of the legacy, but its actual payment depended upon the non-establishment of the claim in the first suit. If that claim were established there would not be assets to pay the legacy. Under these circumstances Vice-Chancellor Stuart suggested that it would be better to transfer the second suit into Vice-Chancellor Wood's court.

Osborne Morgan now applied accordingly.

E. K. Karslake opposed, on the ground that Vice-Chancellor Wood's court was so blocked up with business that the causes could not be heard for a long time.

The LORDS JUSTICES said that it was clear that both causes ought to be heard by the same judge. On the question, which Court would be the most proper for the purpose, their Lordships expressed no opinion, but they could not disregard the opinion of Vice-Chancellor Stuart that both the causes should be heard by Vice-Chancellor Wood. They would, therefore, order the transfer as asked.

KINDERSLEY, V.C., Feb. 21, March 3, 1866.

BUTT v. THE IMPERIAL GAS LIGHT AND COKE COMPANY.

14 W. R. 508; 14 L. T. 349: affirmed, L. R. 2 Ch. 158; 16 L. T. 820;
15 W. R. 92 (L.C.).

Injunction—Nuisance—Obstruction of view—Practice.

EASEMENTS. GAS. INJUNCTION. NUISANCE.—A gas company granted a lease of a piece of ground abutting on the Regent's Canal at Hackney, with a covenant by the lessee to erect a lime kiln and keep up a road, and by the lessors to make the road, and, if it should be necessary to remove it (which they had power to do), to make a new one of like materials. The lessee built the kiln and premises, and the lessors made the road. In 1865 the lessors (having built two gasometers) proposed to erect a third, and enlarge a basin or lay-by, which would render the diversion of the road necessary, but it was proposed to reinstate it with a slight curve. The lessee filed a bill to restrain the erection of the gasometer and the alteration of the road: as to the gasometer, on the ground of nuisance and obstruction of the view of the plaintiff's premises; and, as to the road, that it was a mere device to alter the road. On motion an injunction as to the gasometer was refused; but that as to the road granted, on the usual undertaking by the plaintiff as to damages.

The bill was afterwards dismissed with costs. An inquiry was then asked for as to damages, and the order of dismissal was made without prejudice to any application as to damages.

This bill was filed in March, 1865, to restrain the Imperial Gas Light and Coke Company from altering a road, except to the south of a certain lay-by or basin, lying on the side of the Regent's Canal, in the parishes of St. John's, Hackney, and St. Leonard's, Shoreditch, and from erecting a gasometer, on the ground that it would be a nuisance, and would obstruct the view of the plaintiff's warehouse from the public.

The property in question (with other lands) originally belonged to the Regent's Canal Company, and the immediate site was occupied by a pond or pit called "Bonker's Pond," which had formed the receptacle for offal found floating in the canal, but was purchased by the defendant company; and in December, 1844, the plaintiff became their lessee for sixty years, at a rent of 15*l.*, of forty-five square yards. The lease contained two covenants, one by the plaintiff to build a lime kiln and buildings and keep up the road to be formed by the lessors, which he had done, and carried on the trade of a lime burner and seller of tiles, drain-pipes, &c.; and the other by the lessors, to make a good and hard road for carts and waggons on the bank of the lay-by, and in case it should be removed by the lessors (which they had power to do), to provide a new one of like materials. The access to the premises in question was from some houses called "Anne's-place," and now "Pritchard's-road," about 200 yards from the lay-by, the road being through gates, and, in fact, an accommodation road. In 1853 the defendants erected a gasometer, and in 1857 another, south of the lay-by; and in 1864 they desired to erect a third, and to enlarge the lay-by, at a considerable cost, which would necessitate an encroachment on the road, and an alteration of its course. This they did, and continued it nearly straight, so as to fall into the old one by a slight curve. The plaintiff remonstrated against the proposed gasometer, on the ground of nuisance, and to the alteration of the road as an infringement of the covenant of the lease, and filed this bill in March, 1865, and, on the 5th May, moved for an injunction—which was refused as to the nuisance, but granted as to the road on the plaintiff undertaking to abide by any order the Court might make as to damages.

On the question of nuisance scientific witnesses were examined, and *inter alios*—Dr. Letheby for the defendants, and Dr. Lankester for the plaintiff—who learnedly discussed the relative qualities of the two things; gas being spoken of by the one as comparatively harmless, and the lime burning a noxious operation; whereas, on the other hand, gas was characterised as unwholesome, and the lime burning as only causing vapours which formed a component part of common articles of consumption. It was also insisted by the plaintiff that the public in Anne's-place (where the gasometer was erected) would be unable to see his warehouse, and that his trade, as to chance custom, would be thereby injured. As to the road, he contended that the defendants had no right to make it as they were doing, but were, in fact, using the proposed enlargement of the lay-by merely as a device, in order to create a sham necessity for diverting the road. To these contentions it was answered that, as to the obstruction of view, the Court could not grant an injunction; and as to the road, what was proposed and being done was strictly within the terms of the covenant, and the expense of increasing the lay-by was a sufficient proof of the *bona fides* of the work.

Glasse, Q.C., and Rudall, appeared for the plaintiff, and argued that the third gasometer would operate as a great nuisance, would shut out the view of the public from the plaintiff's premises, and he would be injured by losing chance customers; and that the enlargement of the lay-by was a mere device to alter the road.

Baily, Q.C., and Bagshawe, for the defendants, insisted that this neighbourhood was devoted to noisome manufactures, and therefore there could be no

nuisance: that the obstruction of view could not be the subject of injunction; and they denied that the enlargement of the lay-by was made *malâ fide*; on the contrary, it would be a great expense.

Glasse, Q.C., in reply.

Authorities cited: *Newby v. Harrison* (9 W. R. 849).

March 5.—KINDERSLEY, V.C. (after stating the facts).—With respect to the question of nuisance let us consider the nature of this region which has been long devoted to gloomy operations, which fortunately have of necessity been banished from the inhabited parishes of London; and previously the site was occupied by an old pond, the receptacle of dead dogs and cats, and other offal found floating in the canal. Since gasometers have been built, rather an improvement has taken place; for being plunged in water and inverted, all escape of noxious effluvia seems to be prevented: and moreover the plaintiffs' manufacture is of a very analogous nature. The conflict of the evidence of Dr. Letheby, Dr. Lankester, and the other scientific witnesses is somewhat amusing. [His Honour referred to their opinions.] But if I were called on to elect between gas making and lime burning I should say both were very disagreeable, although, no doubt, some of the elements evolved by the latter may be imbibed in soda-water, ginger-beer, and champagne. The question, however, is, whether the plaintiff has a right to restrain this erection. As to the ground that it will prevent the view of persons in Anne's-place, it is impossible that that can be a ground for an injunction. As to the question of nuisance, the plaintiff cannot sustain the bill. With respect to the road, no doubt it is possible so to make the new road, that, after passing west, it should strike north and join the old road by a serpentine course. But it is sworn that the enlargement of the lay-by, which was an expensive operation, and therefore not likely to be otherwise than *bonâ fide*, is not a device, as the plaintiff charges, and that the new road is superior to the old one; the dates are in support of this view, for the contract was not till subsequently to the correspondence. The plaintiff's object is not an unfair one; but he comes here unreasonably, and requires from the defendants an alteration of the road which would, in fact, render it the worst possible for him. I cannot, therefore, grant the injunction, and therefore the bill must be dismissed with costs.

Baily, Q.C., and *Bagshawe*, then asked for an inquiry as to damages sustained by the defendants.

Glasse, Q.C., and *Rudall*, contended that this was impossible, as the bill was gone; and before the Court could grant a reference of this kind there must be some proof of damage, of which there was none; there was no evidence on the subject. It would be a mere roving inquiry.

Baily, Q.C., in reply.

KINDERSLEY, V.C.—If the defendants have sustained damage by reason of the injunction, justice requires that in some way means should be found to compensate them, and the question is whether I should now require an application to be made and evidence adduced to show damage, or whether I should give leave to make an application for an inquiry as to damage. I consider what is before the Court now does not prove damage, and if I were to dismiss the bill, and at the same time by the decree direct a reference as to damage, I should be deviating, technically, from the course of the Court, and it would be an anomaly. I think, therefore, I ought not to direct an inquiry, there being also the objection that there has been an answer not making a case of damages; although, if that were the only objection, there is, I think, sufficient *primâ facie* evidence to lead to the inference that there has been some damage, as the nature of the case renders it hardly doubtful that there has been peculiar detriment. It is not, therefore, inconsistent in dismissing the bill, to do so without prejudice to any application by the defendant in respect of damages. The defendant must then show a *primâ facie* case sufficient to justify an inquiry.

KINDERSLEY, V.C., March 6, 7, 1866.

COMPANY OF PROPRIETORS OF THE SHEFFIELD WATERWORKS
v. YEOMANS.

14 W. R. 509: affirmed, 15 W. R. 76; L. R. 2 Ch. 8; 15 L. T. 342 (L. C.).

Practice—Demurrer—Bill of peace.

PEACE (BILL OF).—Under an Act of Parliament certain parties had a right to certificates of claim against the plaintiffs, to be regarded as costs to be taxed in the usual way, and if unpaid within twenty-eight days to operate as judgments, with the same rights. Application being made by a solicitor, and not by the claimants, or by their written authority, 1,500 of the claims were not made within the time limited by the Act, but certificates were signed and sealed and delivered to the custos appointed under the Act and marked "not issued." On demurrer to a bill filed to restrain such custos from handing them over, and for delivery up and cancellation:—Held, that it was a bill in the nature of a bill of peace, and demurrer overruled on that ground; the question of validity of the certificates reserved until the hearing.

This bill was filed by the Sheffield Waterworks Company to restrain the town-clerk from issuing certain certificates in his hands, and for delivery up and cancellation of such certificates.

In consequence of the well-known Sheffield inundation, an Act of Parliament (27 & 28 Vict. c. cxxiv.) was passed to enable the sufferers to recover compensation against the Sheffield Waterworks Company. The facts were these:—In March, 1864, the inundation occurred, causing great loss of life and property; and by the Act as passed, three commissioners were appointed to assess the damage, and it was provided that the commissioners should, within six months after the date of their general certificate, make certificates of claims in favour of the several persons injured, which certificates should entitle the claimants to their costs, to be taxed by the taxing-master, and paid by the plaintiffs. And it was provided that if such costs should not be paid within twenty-eight days after demand, the certificate was to be regarded as a judgment, to be entered up at any time on production of the certificate, and execution should issue as on ordinary judgments, and the claimants should have the same rights as judgment-creditors. 7,315 claimants came forward, almost all of them in humble life, and a large fund was subscribed for their relief and a committee appointed under the presidency of the Mayor of Sheffield, of which the defendant Yeomans, the town-clerk, was solicitor and secretary; and sums of money were paid to the sufferers on their assigning over their claims to the committee. The powers of the commissioners under the Act ceased on 26th August, 1865, and the Act provided that all claims were to be brought in before that time. 1,500 of the claimants applied through a solicitor named Broadbent, but he did not produce their authority, and the commissioners came to a resolution that they would not issue any certificates except on personal application or written authority, and the certificates of these claimants were therefore delivered to Yeomans (who, under the provisions of the Act, was to have the custody of them) by Mr. Newbould, the clerk to the commissioners, who marked them "not issued." Upon the expiration of the limited time the plaintiffs required that the unissued certificates should be cancelled. A correspondence took place, and Yeomans stated his intention to deliver the certificates to the claimants unless restrained by injunction; and this bill was accordingly filed for an injunction, and delivery and cancellation of the certificates as above. The defendants other than Yeomans were John Ellis, William Ellis, V. Hickman, George Dumfield, and William Locke, as representing the 1,500 claimants, and they demurred generally for want of equity, on the ground that the

plaintiffs' remedy, if they had any, was at law. To this it was answered that these documents, being stamped and sealed out of time, were invalid, and therefore could not be recovered, and, moreover, that this was bill of peace: *Story's Equity*, 174, 3rd edit.

Baily, Q.C., and *Rodwell*, for the demurrer, insisted that the claimants were entitled to the certificates as soon as sealed. They stood on the footing of an award: *Brooke v. Mitchell* (6 M. & W. 477).

Glasse, Q.C., and *Bagshawe*, for the plaintiffs.

Lindley, for Yeomans.

Baily, Q.C., in reply.

KINDERSLEY, V.C.—There are two questions—one, whether, having regard to all the circumstances of the case, and the circumstances under which the documents, now in the hands of the town clerk, came into existence, those documents are such that the parties who may be called claimants are entitled to avail themselves of the demurrer, so as to require that the amount of their costs should be taxed by the taxing-master—that is the main question. The other relates to the nature and form of the bill, whether, whatever may be the rights of the parties, it is such a bill as it is competent for the plaintiff to file. As to the latter question, of course if the bill is not such a bill as it is competent for them to file in its form and nature, then it would be unnecessary to discuss the other question. I shall first consider the latter question.

This is a bill by the company raising this case. Here is a number of persons, each alleging that he is entitled as against the company to be paid a certain sum to be ascertained in respect of costs. Each claim is founded on the same state of circumstances; and what would be successful in one case would be so in all, there is no distinction, although in some cases there might be disputed facts. Each insists that he is entitled to have, out of the custody of the town clerk, these documents, in order to adopt the process under the Act to recover the costs, that is, go to the taxing master and get judgment entered up and issue execution. It is, therefore, the case of one body against a number of separate individuals, each claiming as against the one body a certain right, the right being the same in all, and the same reasons and arguments applying to all. Now the question is whether this is not precisely the case for a bill of peace, and if so, whether this is a proper bill *quoad* the nature of the case, and I think as to that, having considered the matter since yesterday, that this bill, *quoad* the form and nature of the bill, is a proper bill of peace. Where there are a number of persons claiming against one, or one person claims against a number, and where all are claiming alike, although at law they may be entirely disputed cases, that is the very case for a bill of peace; and I think this comes within the true object of such a bill. The bill seeks to restrain the issuing of the documents, *i.e.*, that the town clerk may not issue them pending the question. So far the demurrer cannot be sustained. The other question is, whether the documents ought to be delivered up and cancelled, or whether the parties ought to be allowed to have them and pursue their remedy. That depends on whether these are proper certificates; and this, again, depends on all the details and facts; what was done by the commissioners and their clerk by their direction, &c. Under the circumstances I shall not decide that question on demurrer, it is a question for the hearing. The demurrer must be simply overruled, reserving to the defendants the benefit thereof at the hearing, and reserving the question of costs.

KINDERSLEY, V.C., March 19, 1866.

SLATTERY v. AXTON.

14 W. R. 511; 14 L. T. 510.

Practice—County court appeals.

Under the 19th General Order, made by the Lord Chancellor under the County Court Act (Equitable Jurisdiction Act, 1865), an appeal from an equity claim must be brought on upon a case stated before this Court, as the judge appointed to hear such appeal.

Waller applied to the Court for direction under these circumstances. This was a claim in equity under the County Court Act (28 & 29 Vict. c. 99); reported 10 Sol. Jour. 462, for the specific performance of a contract to purchase a plot of land, the subject-matter being just under 500*l.* The judge, after hearing the plaintiff's counsel, and after witnesses on his behalf had been examined, cross-examined, and re-examined, and after hearing the counsel for the defendant, but no witnesses on his behalf, had dismissed the claim with costs, without hearing a reply. He (Waller) had protested against this course, and given immediate notice of appeal; but the question now was how that was to be prosecuted. There was no record except the judge's notes, as there had been only *vivâ voce* examination of witnesses, and no shorthand note taken.

Andrew Thomson, for the defendant, said he was anxious to facilitate the appeal, and was only anxious on the question of costs.

Baily, Q.C., as *amicus curiæ*, said that the 19th County Court Order only provided for a case to be stated.

Glassey, Q.C., *amicus curiæ*, said that at common law that was the course.

KINDERSLEY, V.C., said that that was his view, and he must decline to do anything except on a case stated; there was nothing now before him.

STUART, V.C., March 10, 1866.

LYON v. DILLIMORE.

14 W. R. 511; 14 L. T. 183.

Ancient lights.

EASEMENTS.—*Principles upon which the Court proceeds in determining the quantum of damages in cases of injury to ancient lights.*

This was a suit by a lessee of certain premises in the Mile End Road, to restrain the defendant from erecting a riding-school contiguous to plaintiff's premises, in such a way as to interfere with his rights to light and air. At the back of plaintiff's house, facing due south, was a workshop in which the plaintiff carried on his business as a repairer of jewellery and watches, and ship-model maker, and through a window on the south side by which he obtained his light. This was bounded on the south at a distance of sixteen feet by a wall eight feet nine inches in height and about twenty-eight feet in length. The defendant was the lessee of premises on the south side of this wall, which, before the proposed erection, consisted of vacant ground for a width of forty-seven feet. Upon this ground the defendant had commenced building a riding-school, using the party-wall to the south side of the plaintiff's

yard as a support for one side of the building. From the top of this wall the defendant carried a sloping roof, to the purline of which was a distance of about twenty-three feet, and from the purline to the higher portion of the roof about twenty feet. To restrain the defendant from proceeding with this building, the plaintiff filed his bill. There was the usual conflicting evidence as to the *quantum* of injury.

Malins, Q.C., and Surrage, for plaintiff.

Greene, Q.C., and F. H. Colt, for defendant, referred to *Robson v. Whittingham* (14 W. R. 291), *Clarke v. Clarke* (14 W. R. 115; 1 L. R. App. 16), *The Attorney-General v. Nicol* (16 Ves. 338), *Durell v. Pritchard* (1 L. R. App. 244; 14 W. R. 212); also to the Metropolitan Buildings Act, 18 & 19 Vict. c. 122.

STUART, V.C.—This case has occupied a great deal of time, and has been discussed with reference to various *dicta* of high authorities, more particularly as to what was said in *Clarke v. Clarke*. After all it seems to me that none of the *dicta* or cases referred to intended to alter the long-settled doctrine in questions of this kind. The right to light and air are recognised by law and are protected by it. There is a positive and peremptory enactment, giving an undisturbed enjoyment after twenty years and upwards. With reference to what has been said as to *quantum* of injury, no doubt the question is embarrassed by some *dicta* referred to in the argument, or rather by the construction which has, perhaps, been unfortunately put upon them, and which might seem to indicate that there is one rule for the enjoyment of light and air for great towns and another for country places—that because a man in a town has generally less light and air than a man in the country, that small quantity of the property he enjoys may be more readily invaded. But this result, I am sure, was never intended or even contemplated.

Again, it is said that the *quantum* of injury is to be ascertained by the Metropolitan Buildings Act, which practically establishes that, if a street be forty feet wide, and the buildings on each side forty feet high, any one desirous of raising his walls must extend their distance in the same proportion. In other words the distance and height must be in the same proportions. That principle seems to me a very good one, but the application of it to this case would show the plaintiff to have sustained a loss of light and air which the legislature did not think desirable.

The plaintiff is entitled to an injunction, although not one of a mandatory kind. If the parties consent I will fix the amount of damages at chambers. The defendant will pay the costs of the suit.

Wood, V.C., March 3, 1866.

TURNER v. ELKINS.

14 W. R. 512.

Will—Gift to children—Time of ascertaining the class—Period of distribution.

WILL.—Where there is a gift to children at twenty-one, a child born after the eldest attains twenty-one will be excluded.

The rule of Whitbread v. St. John is well established, and is only to be departed from in cases clearly exceptional.

This was a special case agreed upon for the purpose of determining what class of children were entitled to participate in the residuary real and personal

estate of the late William Lovett. By his will the testator devised a certain estate called the Grange Estate to trustees, in trust for Ann Buswell for life, subject to an annuity of 25*l.*, payable out of the rents to the person for the time being entitled to the estate immediately expectant on her decease, with remainder to Richard Lovett Turner, the then second son of W. L. Turner the elder, for life, with remainder to his first and other sons in tail, with remainder to John Heygate Turner, the then third son of the said W. L. Turner the elder, for life, with remainder to his first and other sons in tail, with remainder to each of the other younger sons of the said W. L. Turner the elder by his then late wife for life, with remainder to their first and other sons in tail, with remainder to W. L. Turner, the then eldest son of the said W. L. Turner the elder, for life, and remainder to his first and other sons in tail, with remainder to the after-born children of the said W. L. Turner the elder, in tail, with remainder to Ann Heygate, the eldest daughter of the said W. L. Turner the elder, and all his other daughters by his said then late wife, for life, in equal shares as tenants in common, with remainder to their children as tenants in common in tail, with remainders over. The testator then went on to devise three lots of land lately purchased by him, and all other his real estate, to such child or children of the said W. L. Turner the elder (other than and except the child or children who should, at the time of the first vested interest in the said three lots being acquired, be entitled to the possession or receipt of the rents of his said Grange Estate, in case the said Ann Buswell were dead) as, being a son or sons, should live to attain the age of twenty-one years, or, being a daughter or daughters should live to attain that age or be previously married with such consent as thereafter mentioned, their, his, or her heirs and assigns for ever, and, if more than one, as tenants in common.

His residuary personal estate he bequeathed in trust for such of the children of the said W. L. Turner the elder, (other than and except the child or children who should at the time of the first vested interest in the said residuary personal estate being acquired for the time being be in the possession or the receipt of the rents and profits of the said Grange Estate, under the limitations thereof thereinbefore contained,) who being a son or sons should live to attain the age of twenty-one years, or being a daughter or daughters should live to attain that age or be previously married with the consent in writing of their or her parents or parent, guardians or guardian, and if more than one, as tenants in common.

At the date of the will W. L. Turner the elder was a widower, and had ten children living. His second son, Richard Lovett Newman Turner, died, in 1858, an infant and unmarried. After the death of the testator W. L. Turner the elder married again, and had two children by his second wife, who is since dead. He is now a widower. Ann Buswell is still alive. Ann Heygate Turner, the eldest child of W. L. Turner the elder, attained twenty-one in 1863. One of the children of his second marriage, Alfred Samuel Lovett Turner, was born in 1861, and the other, Richard Lovett Newman Turner, in 1864.

W. H. Townsend, for the plaintiff Alfred Samuel Lovett Turner (the eldest child of the second marriage), contended that the persons entitled to participate in the real and personal estate were those children who were *in esse* at the time when Ann Heygate Turner, the eldest child, attained her age of twenty-one years, and who should fulfil the condition of attaining twenty-one, or marrying under that age. He cited *Mann v. Thompson* (2 W. R. 582; 1 Kay, 639), *Gillman v. Daunt* (3 K. & J. 48).

Speed, for the defendants in the same interest, cited *Singleton v. Gilbert* (1 Cox, 68), *Whitbread v. Lord St. John* (10 Ves. 152), *Clarke v. Clarke* (8 Sim. 59).

Hallett, for the child born after Ann Heygate Turner had attained

twenty-one, contended that the rule in *Whitbread v. Lord St. John* did not apply to the present case: *Mills v. Norris* (5 Ves. 835), *Shepherd v. Ingram* (Amb. 448), *Ellis v. Maxwell* (3 Beav. 586; 12 Beav. 104), *Mainwaring v. Beevor* (8 Hare, 44), *Armitage v. Williams* (7 W. 650; 27 Beav. 346), *Iredell v. Iredell* (25 Beav. 485).

Fischer for the trustees.

WOOD, V.C., said that the cases cited by Mr. Hallett are all distinguished from the present case by the fact that they are exceptions from the general rule laid down in *Whitbread v. Lord St. John*. That rule, even if it be artificial, is well established. It would have been strange that it should not have been exploded if it be artificial. The presumption in a marriage settlement is that all the children are to be provided for. In that case the children are necessarily ascertained before the period of distribution. Here there is a period of division, namely, at twenty-one, or marriage (in the case of a daughter). After that time no accretion must be permitted. His Honour, after discussing the cases of *Whitbread v. Lord St. John*, *Mainwaring v. Beevor*, and *Mills v. Norris*, said that here every child is let in till one attains twenty-one; when that event has happened the period of distribution has arrived, and the gift over cannot take place. His Honour then, referring to the difference of language in the devise of the real and the bequest of the personal estates, considered that the testator must have pointed to different states of circumstances, and therefore he should hold that no child born after Ann Heygate Turner attained twenty-one was entitled to any share in the residuary real or personal estate; and that, having regard to the different languages of the two gifts, the eldest son was excluded from a share in the residuary real estate, but was not excluded from a share in the personal estate.

WOOD, V.C., March 9, 1866.

STANDISH v. WHITWELL.

14 W. R. 512.

Trade mark—Infringement—Charge of fraud—Costs.

TRADE MARK.—*Long user of a trade mark gives such a property in it to the owner that another person cannot adopt the same device, even though it be his family crest.*

COSTS.—*A charge of fraud not made out will be visited with costs.*

Motion to restrain defendants from using the plaintiffs' trade mark. The plaintiffs carry on business in Staffordshire under the style of the "Eagle Coal and Iron Company," and have for many years branded their iron with a figure of an eagle—the trade mark which was alleged to have been infringed. The defendants, who are manufacturers of iron in the Cleveland district, have lately adopted a similar brand for one quality of their iron. The defendants alleged that the mark of the eagle was used by another well-known firm of Brown & Frere, and that the eagle was simply the crest of the Whitwell family, and had been so for many generations. For the plaintiffs evidence was given that the brand used by Brown & Frere was a phoenix, with the letters H. B., and was different in appearance from the plaintiffs' brand, and that there was no registry at the Herald's College of the alleged crest of the eagle as being that of the Whitwell family.

Giffard, Q.C., and *Speed*, for the plaintiffs, argued that their title to the

trade mark was clear; that a purchaser of defendants' iron with the new brand might easily be deceived into thinking it was plaintiffs' manufacture. Defendants could not have been ignorant of the eagle being our trade mark: *Seixo v. Provezende* (14 W. R. 357).

Rolt, Q.C., and Fry, for the defendants.—We have not infringed. There is no such resemblance between our brand and that of the plaintiffs as would mislead a person who intended to use the iron, and the difference between Staffordshire and Cleveland iron is well known. The principles of *Seixo v. Provezende* do not apply here. The remarks of Lords Cranworth and Kingsdown in *The Leather Cloth Company case* (13 W. R. 873), when applied to the present case, show that there is here no mere colourable variation. Plaintiffs have made a charge of fraud, which they have failed to make out, therefore they must pay the costs.

Giffard, Q.C., in reply on the question of costs, said that the defendants had gone on selling their iron marked with the eagle brand after notice of the infringement, and while the correspondence between the parties and their solicitors was going on, and that, by thus continuing to do what they knew to be a fraud, they had adopted the fraud.

Wood, V.C.—It has been conclusively proved that in 1844 the plaintiffs had established the name of eagle iron as being that of their iron. The use of the phoenix brand by a third firm was no evidence of the use of the eagle brand by any other persons than plaintiffs and defendants. The observation that the brand would not mislead those who had to use the iron did not apply, as only wholesale dealers bought with the brand on; in working the name became obliterated. The fact was that the defendants wished to get their iron into the London market as a rival to the Staffordshire iron. After the use of the eagle brand for many years by the plaintiffs, eagle iron had come to signify Standish's iron. He acquitted the defendants of beginning the use of the eagle brand fraudulently, but could not acquit them of impropriety in continuing to use it after having been remonstrated with. [His Honour then made some remarks on the angry tone of the correspondence.] His Honour granted the injunction with costs, except those of the plaintiffs' first affidavit. These were disallowed in consideration of the charge of fraud having been made, and not substantiated except as to part.

Wood, V.C., March 13, 14, 1866.

CROSKEY v. THE EUROPEAN AND AMERICAN STEAM SHIPPING
COMPANY (LIMITED).

14 W. R. 514.

Practice—Insufficient Answer—Vivâ voce examination—Evidence after decree.

DISCOVERY.—Where, after decree, a plaintiff has not sufficiently answered interrogatories filed by the defendant for his examination, the defendant's proper course is to except to the answer, and not to apply for an examination vivâ voce in court in the first instance.

This was an adjourned summons to consider the sufficiency of the answer of the plaintiffs to interrogatories exhibited by the defendants.

A decree had been made in this suit, dated the 29th April, 1863, directing an account of all dealings and transactions of the plaintiffs with the defendants;

and during the prosecution of this decree in chambers the defendants were allowed by the chief clerk to exhibit interrogatories for the examination of the plaintiffs with regard to certain payments and receipts by them. These interrogatories were subsequently approved of by the judge; but they were never filed in the record office in pursuance of the statute 15 & 16 Vict. c. 86, s. 19. The plaintiffs put in an answer to the interrogatories, but the chief clerk decided that the answer was insufficient.

Daniel, Q.C., and Cotton, for the defendants in the cause.

Rolt, Q.C., and Swanston, for the plaintiffs, contended—1st. That the interrogatories were irregular, as they had not been filed in the record office. *2nd.* That the information sought by the interrogatories was sufficiently given by the plaintiffs' books, which they had produced to the defendants. *3rd.* That they ought not to be called upon to make any further answer, but ought to be examined *vivâ voce* before the judge in person. On the last point they relied upon *Hayward v. Hayward* (Kay App. 31; 2 W. R. 322).

Wood, V.C., said, that, as the interrogatories had been allowed and certified by himself, he should pass by the question of their informality. With regard to the substance of the case, the plaintiffs said that the defendants had access to the books of account from whence they could find out all that the plaintiffs themselves knew, but it appeared that the books did not correctly show the payments that had been made by the plaintiffs; and his Honour was not persuaded but that the plaintiffs could show more than appeared in the books. Then, as to the course to be taken, his Honour adhered to every word that he had said in the case of *Hayward v. Hayward*, and when you found an obstinate defendant who refused to answer, the only course was to bring him before the judge; but the present plaintiffs were not in that position, for when it had been decided that they must discover what payments they had made, the Court would assume that they would do their best to make such discovery; and therefore they ought not to be brought before the judge personally in the first instance. Regard also must be had to the convenience of practice, for whole days might be occupied with the *vivâ voce* examination of persons by the Court. The plaintiffs must therefore put in a further answer within six weeks, and must pay the costs of this summons.

MATRIMONIAL.

March 20, 1866.

MAWFORD v. MAWFORD.

14 W. R. 516.

Petition for divorce—Answer—Amendment—Irrelevant matter.

DIVORCE AND MATRIMONIAL CAUSES.—*Where, in answer to petition by the wife, the husband alleged, in one paragraph, that the wife had been incontinent before marriage, and in another that she had been incontinent before and had committed adultery with the same person after marriage, the Court ordered the whole of the former paragraph, and so much of the latter as related to incontinence before marriage to be struck out as irrelevant.*

This was an application to have certain portions of the respondent's answer struck out. The wife petitioned for divorce, on the ground of the husband's cruelty and adultery; and the husband, by his answer, charged the

wife, in the 8th paragraph, with incontinence with A. B. before her marriage, and, in the 10th, with incontinence before and adultery after her marriage with C. D.

A. E. Miller, on behalf of the petitioner, moved to have the whole of the 8th paragraph, and so much of the 10th paragraph as related to incontinence before marriage, struck out as irrelevant and superfluous matter. That course was followed in *Fitzgerald v. Fitzgerald* (11 W. R. 86).

WILDE, J.O.—There is no doubt as to the propriety of the course suggested. Let the 8th, and so much of the 10th paragraph as relates to the incontinence before marriage, be struck out.

[PRIVY COUNCIL.]

Feb. 10, 1866.

MAHARAJAH RAJENDUR KISHWUR SING v. SHEOPURSHUN
MISSUR.*

14 W. R. 521.

Bengal—Plaint—Misjoinder of claims—Multifariousness.

INDIA.—*A claim for rent in arrear and a claim to remove clouds on the title to demise raised by the tenant are not objectionable on the ground of multifariousness, and may therefore be included in the same plaint.*

This was an appeal from a decision of the late Sudder Dewanny Adawlut, of Bengal, which reversed a decision of the Zillah Court in favour of the appellant, the plaintiff in the suit. The decision of the Sudder Court proceeded solely on the ground of misjoinder of causes of action in the plaintiff's suit. That objection had been raised in and overruled by the Court below.

The causes of action were stated in the first paragraph of the plaint. It alleged that the plaintiff sued not summarily, but in due form, for possession of certain mouzars which it described by names and boundaries, and which it alleged to be his hereditary property; and also to recover certain arrears of rent, for which a summary suit was pending, and also certain rent inserted in a kabooleut dated 5th of the month of Assin, 1258 Fusli, by the annulment of a summary award of the deputy-collector of the district Chumparun, dated 29th May, 1854, and by the cancellation of a letter affirming the Bahakee Birt tenure, dated 17th of the month of Assin, 1232. This specification of the causes of suit was accompanied with statements of the falseness of the claim to the Birt tenure, of the danger which the plaintiff apprehended to his proprietary title from the summary decision above mentioned, that its annulment is impossible without a regular suit, and he concluded the paragraph by stating that he sued, therefore, for the reversal of the summary award, the confirmation of his proprietary interest and possession, and the refutation of the allegations of the defendant respecting the Bhakee Birt.

Sir R. Palmer, A.G., and Leith, appeared for the appellant.

There was no respondent's case.

LORD CHELMSFORD now delivered judgment.—The case as alleged in the plaint, if the plaint be regular, must be brought within the principles stated

* Present—Lord Chelmsford, Sir James W. Colvile, Sir Edward Vaughan Williams, and Sir Lawrence Peel.

in Mr. Macpherson's book on Civil Procedure, p. 111. 3rd edit., where, he says, "A plaint may have an appearance of doubleness when it prays not only for possession, but that the transactions upon which the defendants are supposed to found their title may be set aside; but the latter prayer is merely subsidiary to, and in fact forms part of, the former, because possession cannot be given without first removing the existing impediments." The question here, therefore, only relates to the unity of title, and connection and dependence between the claims of the plaintiff. In this suit the plaintiff's title is one; it is his proprietary right as zemindar. We must look to the plaintiff's admitted title as zemindar and to the interference with such title by an established tenure of this kind, to learn what is meant by the term "possession." The mouzahs are part of the plaintiff's zemindary; the plaintiff is the assessed proprietor under the decennial settlement. The defendant claims that which would, if established, be a dependent tenure, the zemindar being his immediate superior in the holding. All the distinct portions of the plaintiff's claim flow from, support, and have relation to and connexion with, his proprietary title, which *primâ facie* entitles him to the collections. The farming lease supports it, the rent payable under that lease supports it, and the removal of the adverse title would confirm it. If this tenure be not interposed between the zemindar and the cultivators, the ordinary relation between him and them exists; but, if it be interposed, the zemindar's general proprietary title to the collections is gone, and in lieu of it he is simply entitled to some jumma from the *mesne* proprietors. It is obvious, then, that the assertion of such a title is a serious prejudice to a zemindar, and may materially interfere with his successful management of his zemindary. Such an intermediate tenure cuts off the possession; that is, the zemindar's title to the rents and profits immediately derived from the cultivators. In this sense the term possession is used in this plaint. Now this injury, supposing the claim to the Birt tenure to be groundless, is not the less a wrong requiring a remedy, when it is put forward by one in possession under a title to an inferior right, derived from the zemindar—as, for instance, by a farmer of a portion of the zemindary. If such a claim were preferred by a person having such an interest, it would certainly be competent to the zemindar, if the claim amounted to a repudiation or worked a forfeiture of the existing interest, to sue for the restoration of possession, and the quieting of the claim also; because the limitation of his demand to that of possession would keep alive an adverse claim, and would also multiply suits. A zemindar, or landlord, may waive a forfeiture, and may treat a tenancy or interest as continuing which his tenant repudiates, or in respect of which he has incurred a forfeiture. Consequently, the mere inclusion of a claim for rent in a suit of this character cannot make the suit multifarious, unless it could be treated as multifarious if it insisted on the repudiation or forfeiture. If the Birt tenure be valid, the plaintiff has no title to possession in the sense in which he uses that term. He might have a right to rent for a time on the footing of contract or estoppel, even from a Birt tenant, if the latter accepted a lease, but that would rest on special grounds, and would not flow from his general proprietary title. Until this claim to a Birt tenure therefore be removed, the plaintiff cannot have the "possession" which he seeks, since, in some way or other, the defendant stands between the plaintiff, as owner of the *primâ facie* proprietary right, and the cultivators. Had the defendant admitted the tenancy under the kaboolut, the plaintiff's title to the rent would have been established, but that admission, unless qualified, would also have removed those impediments to the plaintiff's proprietary title which he desires to have removed; but as the defendant repudiates that tenancy altogether, he, at least when the plaintiff fails to prove it, cannot urge it against the plaintiff's title—*Rajah Oodit Purkash Singh v. Martindell* (4 Moo. I. A. 444). This lease being removed (the plaintiff having failed to prove it, and the defendant renouncing it) what bar is there to the assertion of the proprietary right to the

collections, unless the Birt tenure interpose one. On that bar the defendant does rely, and unless it be removed, the plaintiff can scarcely expect to lease or otherwise manage his zemindary with effect. It is an impediment in the way of his possession, which the suit is instituted to remove. The reasons alleged in the Sudder Ameen's Court for overruling the objection seem to be unsatisfactory; for as the title to mesne profits supposes a wrong, and the title to rent proceeds on contract, the union of such causes of action would be contrary to principle. But as these courts have the divided jurisdiction of a court of law and a court of equity substantially united in one court, a claim for rent in arrear, and a claim to remove clouds on the title to demise raised by the tenant, seem to be unobjectionable, and no authority was cited to support the objection. In truth the claim to rent under the farming lease supports the proprietary title. No inconvenience can result from the inclusion of these subjects in one suit, since the defence to the claim for rent, in fact, raised them all, and they were dealt with without confusion or difficulty.

Decree reversed.

CRANWORTH, L.C., March 24, 1866.

Re LONDON INDIARUBBER COMPANY (LIMITED).

14 W. R. 527; 14 L. T. 316.

Practice—Companies Act, 1862—General order thereon—Rules 2, 53—Advertisement of winding-up petition.

In this case, which has been already reported, [1866] E. R. A. 651, it was subsequently discovered that the petition had been advertised in only one London newspaper besides the *London Gazette*, instead of in two such newspapers, as required by rule 2 of the General Order of the 11th November, 1862.

Westlake now applied to the Court to dispense with the advertisement in a second newspaper under the power given by rule 53 of the same General Order.

The LORD CHANCELLOR said that the petition must be duly advertised. The order for winding-up might be drawn up seven days after the advertisement.

ROMILLY, M.R., Feb. 23, 27, 1866.

THOMLINSON *v.* DIXON.

14 W. R. 528.

Agreement for lease—Specific performance—Damages.

SPECIFIC PERFORMANCE.—Decree for specific performance without prejudice to the question of damages.

This was a suit for specific performance of an agreement for a lease. Damages were also prayed for by the bill.

The plaintiffs, under an agreement for a lease, made in the month of February, 1855, had entered into possession of a water-mill, which they



worked in their business as millers. As tenants of the mill they were entitled to the flow of water in the stream on which the mill was built, and by which it was worked. The flow of water in the stream depended on the existence of a weir which was situated higher up the stream on the lessor's property.

In the month of August, 1862, the weir was destroyed by a flood, and the main body of the water of the stream escaped by another canal. After the destruction of the weir the plaintiffs, in the month of September, 1863, requested the lessors, the defendants, to permit them to erect a temporary weir pending the construction of the permanent weir; this permission the lessors, the defendants, refused.

The defendants commenced the erection of a new weir in the month of June, 1863, which was not completed till the month of August, 1864. In June, 1864, on the plaintiffs filing their bill, the defendants themselves erected a temporary weir.

Jessel, Q.C., and Fry, for the plaintiffs.—If the defendants had executed a lease according to the agreement, the lease would have contained a covenant for the repair of the weir, or at all events the plaintiffs would have been entitled at law to enter on the lessors premises, for the purpose of effecting such repair, or of erecting a temporary weir themselves; and it is because the defendants would not erect a temporary weir, nor allow the plaintiffs to do so, that damages are asked for. Damages are only sought from the date of the defendant's refusal to allow the plaintiffs to erect a temporary weir until the erection of a temporary weir by the defendants themselves: *Pomfret v. Ricroft* (1 M. & S. 321); *McSwiney v. Haynes* (1 Ir. Eq. Rep. 322). It had been decided in the Court of Exchequer that, where damages had been sought in a court of equity and refused, an action at law for damages will not be permitted; because a court of equity is now, by statutory enactment, with respect to any question of damages, a court of co-ordinate jurisdiction with a court of law.—The learned counsel, however, could not find any report of the case referred to.

Baggallay, Q.C., and Bagshawe, for the defendants.—The plaintiffs' right to damages depends on the liability of the defendants to repair the weir.

LORD ROMILLY, M.R.—Specific performance of the agreement must be decreed. The lease to be settled in chambers in case the parties differ. The defendants undertaking not to plead the decision of this Court as a defence to any action at law brought by the plaintiffs against the defendants to recover damages, the plaintiffs are to be at liberty to bring any such action against the defendants, the decision of this Court being expressly without prejudice to the question of damages.

ROMILLY, M.R., Feb. 23, 27, 1866.

THE DUDLEY AND WESTBROMWICH BANKING COMPANY
v. SILVESTER.

14 W. R. 528.

MORTGAGE.—*Foreclosure suit—Legal and equitable mortgage—Sale under legal mortgage after institution of suit—Costs of parties disclaiming.*

This was a foreclosure suit.

The plaintiffs held a legal mortgage over certain property, and an equitable mortgage over certain other property. Since the filing of the bill the plaintiffs

had sold the property comprised in the legal mortgage. The parties interested in the property comprised in the legal mortgage had been made defendants to the suit.

Selwyn, Q.C., and J. W. Peck, for the plaintiffs.

Buckton, Martineau, Nalder, W. Pearson and Lovell, for the different defendants.

LORD ROMILLY, M.R.—There must be the ordinary foreclosure decree. The parties interested in the property comprised in the legal mortgage who have disclaimed any interest since the sale of such property, or now disclaim, must have their costs.

ROMILLY, M.R., Feb. 27, 1866.

Re COLLEY'S TRUST.

14 W. R. 528; L. R. 1 Eq. 496.

VESTED, CONTINGENT AND FUTURE INTERESTS.—*A clause for reversion of settled property in case all the objects of the settlement fail does not produce a reversion pro tanto on the failure of some of them.*

This was a question raised by petition under a settlement.

By a settlement property was settled upon a husband and wife, and the survivor of them, for life, and on the death of the wife the property was settled equally among the children, or if there should be only one child, then upon such only child of such husband and wife, the same to be a vested interest, and paid to such children or child on their or his attaining twenty-one. And if all the children of the husband and wife should die under twenty-one, then the property was settled on the husband absolutely; and in default of their being any children or child of the husband and wife, then the property was to revert to the settlor.

Four children of the husband and wife attained twenty-one, one died under that age. The question was whether the share of the child dying under twenty-one reverted to the settlor.

Archibald Smith for the children.

Roupell for the representatives of the settlor.

ROMILLY, M.R., decided that the share of the child dying under twenty-one, did not revert to the settlor, but went to the children who attained twenty-one.

ROMILLY, M.R., March 3, 1866.

WILSON'S MORTGAGED ESTATES.

14 W. R. 529.

COMPULSORY PURCHASE.—*Petition—Several incumbrancers—Conduct of decree.*

A railway company bought land subject to several incumbrances. An inquiry as to the priority of the incumbrances at chambers was asked for. A petition was then presented by the mortgagor of the property bought by

the railway company and one of his incumbrancers, asking for the conduct of the inquiry in chambers. This was opposed by another incumbrancer, who also presented a petition, on the ground of the misconduct of the mortgagor; that the mortgagor was not to be found, and was in fact purposely keeping out of the way; and that the co-petitioner of the mortgagor, who was his solicitor, had shown bad faith towards the other incumbrancers by having concealed the existence of his claim from the knowledge of the other incumbrancers; and he asked that the conduct of the inquiry should be entrusted to himself. The two petitions now came on together.

Southgate, Q.C., and *Colt*, for the petition by the mortgagor and solicitor.

Baggallay, Q.C., and *Pearson*, for the other petition.

Hemming, for another incumbrancer who appeared on the petition, not having been served with it, complained that the company had taken no notice of his claim, but had treated only with the mortgagor.

Speed for the railway company.

LORD ROMILLY, M.R.—The mortgagor and his incumbrancer, who first presented their petition, are entitled to the conduct of the inquiry. The absence of the mortgagor is immaterial, if an incumbrancer joins with him in his petition, even although such incumbrancer should be the solicitor of the mortgagor, the validity of his incumbrance being, as in this case, as yet undisputed. The other incumbrancers can, under an order made on this petition, dispute the validity of the security of the solicitor of the mortgagor. As to Mr. Hemming's client, unless his client chooses to come in under this order, it must be made without prejudice to his rights whatever they are. The question of what costs are to be paid by the railway company to be reserved.

KINDERSLEY, V.C., Feb. 24, March 10, 1866.

Re ARBUCKLE.

14 W. R. 535; 14 L. T. 538.

Followed, *In re Colgan*, [1882] E. R. A.; 51 L. J. Ch. 180; 19 Ch. D. 305; 46 L. T. 152; 30 W. R. 266 (Ch. D.); *In re Bruce*, 1882, 30 W. R. 922 (Ch. D.); *In re Tanner*, [1884] E. R. A.; 53 L. J. Ch. 1108; 51 L. T. 507 (Ch. D.).

Infant—Maintenance—Contingent interest—Policy of assurance.

INFANT.—Where an infant is contingently entitled to a fund, and there is nothing in the instrument creating the interest to warrant maintenance, the Court can only direct it in the case of the infant being one of a class entitled, with the consent of those entitled in remainder who are competent to consent.

Where an only child was contingently entitled under a will containing no direction as to maintenance, and the parties entitled in remainder were of another family, and infants:—Held, that no maintenance could be ordered; but a reference to chambers ordered to effect an insurance on the chance of the infant dying under twenty-one, and thus provide maintenance out of the accumulations.

This was an adjourned summons on the question whether Edith Anne Vaughan Arbuckle, an infant, entitled to 10,000*l.* if she attained twenty-one,

under the will of her great grandmother Sarah Kent, could be allowed maintenance in the meantime? The will was dated in February, 1856, and the testatrix, after various gifts on which no question turned, devised and bequeathed all the residue of her real and personal estate to trustees (subject to pay thereout the yearly sums thereafter mentioned, in regard to any child or children of her daughter Sarah Neild who for the time being should not reside with her, or in trust for the issue of any such child or children) in trust to pay the income thereof to her daughter Sarah Neild, for her life, for her separate use, for the maintenance and support of herself, and for the maintenance, support, and education of such of her children as should, for the time being, reside with, or be maintained or educated by her. Then followed a clause against anticipation, and the testatrix directed that after the death of the said Sarah Neild, the said residuary estate should be held in trust for her child and children then born or to be born in her lifetime, equally if more than one, for their his or her respective lives or life; and from and after the decease of each or any child of her said daughter Sarah Neild so born or to be born in her lifetime, whether such death should happen before or after her (the testatrix's) death, or during the lifetime or after the decease of her said daughter, the shares which the said children of her said daughter so dying did take or have, or were to take or have taken, for his or her life, should be held in trust for his or her respective child or children, who respectively, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or be married, equally among them, if more than one, and the executors administrators and assigns of such son or sons, daughter or daughters, respectively: and in case any child of the said Sarah Neild should have no son or daughter who should attain a vested interest in the shares in which such child had a life interest, then upon like trusts for the other children of the said Sarah Neild, and the will proceeded: "Provided that so long during the life of my daughter Sarah Neild, as any of her children, being of the age of twenty-one, should cease to, or should not reside with, or be maintained by her, then my trustees shall, out of the income of my residuary estate, pay or apply for the benefit of such child the yearly sum of 50*l.*, to commence from the time when such child should cease to reside with or be maintained by her; and that in case any child, whether son or daughter, being under the age of twenty-one years, of my said daughter shall cease to, or shall not reside with, or be maintained by my said daughter, whether at or after my decease, then in regard to such or any such child my said trustee shall, out of the income of my residuary estate, pay or apply for the benefit of such or any such child, the yearly sum of 50*l.* during the remainder of the life of my said daughter from the time that he or she shall attain the age of twenty-one years, and, as regards a daughter, notwithstanding that she may be married; and as to any child who, being a daughter, and being entitled to the yearly benefit of the sum of 50*l.* shall be married, such yearly sum shall be for her separate use without power of anticipation. And if any child, having become entitled to 50*l.* a-year, shall afterwards die in the lifetime of my said daughter Sarah Neild, leaving lawful issue him or her surviving, then the sum of 50*l.* shall, during the life of my said daughter, continue payable and be applied for the maintenance and support of such issue, notwithstanding that the father, being the widower of any daughter of my said daughter, shall be of ability to maintain such issue. But in case any child of my said daughter shall afterwards die without leaving lawful issue, then the yearly sum of 50*l.* shall cease. Provided that in case any child or children of my said daughter die in my lifetime, and with respect to the issue of such child, my trustees, during the life of my said daughter, shall pay and apply out of the income of my residuary estate, for the maintenance or benefit of the lawful issue of each such child, the yearly sum of 50*l.*, to commence from the time of my decease, notwithstanding that the father may be of ability to maintain

such issue. And in case any child of my said daughter, being a son or daughter, being under the age of twenty-one years, ceases to reside or be maintained by her, and afterwards dies under twenty-one leaving lawful issue, then my trustees shall, during the life of my said daughter, out of the income of my residuary estate, pay and apply for the maintenance or benefit of the lawful issue of each such child the yearly sum of 50*l.*, to commence from the time that the child so dying would, if living, have attained the age of twenty-one years, notwithstanding that the father is of ability to maintain such issue."

The testatrix died in March, 1857, and Sarah Neild died in 1864.

Sarah Neild had nine children, of whom Mrs. Arbuckle, the mother of the present infant, was one; and several of these nine children, including Mrs. Arbuckle, had children, and some of them were still infants and had none. Mrs. Arbuckle predeceased her mother, leaving one child, a daughter, the present applicant, seven years of age, who was therefore entitled to her mother's one-ninth share of the fund of 90,000*l.* (that is 10,000*l.*) on her attaining twenty-one, with accumulations in the meantime, and with the chance of additions by survivorship. Mrs. Arbuckle ceased to reside with her mother, and became entitled to the 50*l.* a-year, and on her death her only child was entitled to it during Sarah Neild's life. Mrs. Arbuckle being dead, leaving this only child, whose father was an officer in the Royal Artillery with limited means, it became desirable, if possible, to obtain maintenance for the infant, and an application for the purpose was made in chambers; but, the point being one of some nicety, was adjourned into court for argument.

Glasse, Q.C., and Prendergast, appeared in support of the summons.

James Kaye, for the trustees of Sarah Kent's will, and for the other parties entitled in remainder, who consented to this application. But (at the suggestion of the Court) he referred to the authorities against the application.

Authorities cited:—*Lambert v. Parker* (G. Coop. 143), *Lomax v. Lomax* (11 Ves. 48), *Inclendon v. Northcote* (3 Atk. 430), *Mole v. Mole* (1 Dick. 310), *Greenwell v. Greenwell* (5 Ves. 194), *Fendall v. Nash*, in note to *Greenwell v. Greenwell*, *Collis v. Blackburn* (9 Ves. 470), *Fairman v. Green* (10 Ves. 44), *Eratt v. Barlow* (14 Ves. 202), *Heath v. Perry* (3 Atk. 101), *Haley v. Bannister* (4 Mad. 275), *Cavendish v. Mercer* (5 Ves. 195), *Errington v. Chapman* (12 Ves. 20), Spence's Eq. 11th ed. 185, 288, Chambers on Infants, 283, *Brown v. Temperley* (3 Russ. 263).

KINDERSLEY, V.C.—I need hardly say that having regard to the circumstances, it is most desirable, if it can be accomplished, to give maintenance to this young lady, in order to enable her father to give her proper advantages. Here is a fund of 10,000*l.* to which she will become entitled if she attains twenty-one, and therefore, of course, she has no present interest and no right to the income, but on attaining twenty-one she will be entitled to the capital and also the accumulations for fourteen years.

It has been contended that there are two grounds, on either of which the Court may find its way to give maintenance; one that upon the construction of the will there is an intention to give maintenance, although there is no express direction in that particular; the other that, supposing the former not to prevail, there is a doctrine of the Court by which, if there be equal claims of survivorship amongst a class of children, the Court will (if the persons entitled in default of any one attaining twenty-one, consent) give maintenance, and that it may, under that doctrine, be possible to order maintenance for this child. Now I have looked into both these points, and all the cases, or a great many of them, on the second point, and I am under the necessity of saying that neither on one ground or the other can I find the means of giving maintenance. But it is very satisfactory to me to reflect that, having considered the matter, I think that in chambers by a policy of insurance we may find the means of getting maintenance. The will is most carefully and skilfully drawn, and has entirely attained the object of the testatrix, which

was to provide for Mrs. Neild, her daughter, her children, and grandchildren, being three sets, and yet it is so done that none of the limitations are too remote. It is so drawn that there is no vested interest in any grandchild of Mrs. Neild until some one or other of them, being a son, attains twenty-one or being a daughter marries; and in case any of them should die without leaving a child who should attain twenty-one, that life interest is to go over among the others in like manner as the original shares. Then comes the clause with respect to the 50*l.* a-year. [His Honour read the clause.] It appears to me the whole matter was deliberately done by the testatrix, although it is difficult to see with what object, for if a child ceased to reside with the daughter, not having attained twenty-one, when it would *à fortiori* require maintenance, it was not to have it, so that it does not stand on the footing of maintenance. It is most carefully done; there is no confusion, no blundering or bungling, and if I were to attempt to give a construction, giving to children in the condition of Miss Arbuckle maintenance, I should be making the will for the testatrix.

Then comes the other question; and it appears to me clear that the principle sought to be relied on does not apply to this case; that principle is simply this—supposing a fund is given among such of a class of children as shall attain twenty-one *simpliciter*, and suppose there are six children all under age, none having a right to receive anything, till some attain twenty-one, the income being accumulated; the Court has gone so far as to hold that as all those children have *inter se* an equal chance, and as it is for their common benefit that all should have maintenance, the Court will grant the maintenance out of that which would otherwise be available for accumulation, taking the chance of which of them will live; and if that were the case here I should find no difficulty, provided the persons entitled in remainder gave their consent; but here the fund goes over to another family, and there are infants who cannot consent, and there are distinct funds, though originally portions of the same. The principle relied upon, therefore, is here incapable of application, and therefore I cannot do what is asked.

But let me suppose the income to be 300*l.* a-year, and that we want £100, I think an assurance can be effected on this sort of principle, that the office shall be bound, if this young lady dies at any time before twenty-one, upon her death to make good such a sum as shall be equal to all the equal half-yearly payments, including the premiums, with compound interest. In that way the accumulations would be made good if the fund goes over, while if she attains twenty-one the office pays nothing, and it will be only anticipating so much of the accumulation. There may be some details which I have not anticipated, but I do not feel any doubt of a scheme of this kind being capable of being carried out. There must, therefore, be a reference to chambers with that object.

Glasse, Q.C.—The parties are extremely obliged, but probably a life policy would be the best.

STUART, V.C., March 22, 1866.

FORSBROOK v. FORSBROOK.

14 W. R. 537; L. R. 2 Eq. 799; 14 L. T. 282; 12 Jur. N.S. 285: reversed,
16 W. R. 290; L. R. 3 Ch. 93 (L. JJ.).

PERPETUITY. — Will — Construction — Rule against perpetuities — Enlargement of life estate.

This was a special case.

A testator gave and bequeathed “to William Forsbrook all my real and

personal property, subject to proviso hereinafter named, to wit—It is my will that the aforesaid William Forsbrook, my brother, shall pay or cause to be paid to my daughter, Sarah Brown, a weekly sum of ten shillings during her life and after the decease of my aforesaid brother William Forsbrook and my aforesaid daughter Sarah Brown, it is my will that my aforesaid real and personal property be inherited by my nephew Charles Forsbrook and my nephew Thomas Forsbrook, the sons of my late brother Thomas Forsbrook, during their lives, and after the decease of my said nephew Charles Forsbrook, and after the decease of my said nephew Thomas Forsbrook, it is my will that the eldest son of the aforesaid Charles Forsbrook and the eldest son of the aforesaid Thomas Forsbrook inherit the aforesaid property during their lives, and so on, the eldest son of each of the two families of the name of Forsbrook to inherit the aforesaid property for ever."

All the nephews, and the eldest sons of Charles and Thomas Forsbrook, were alive at the testator's death.

The judgment of the Court was now asked as to whether the two nephews, Charles and Thomas, took estates in tail male, or estate for life only, with remainder to their eldest sons in tail male.

W. Pearson, for the plaintiff, contended that the estates tail were in the two nephews, Charles and Thomas. The ultimate remainders over being void, as infringing the rule against perpetuities, the Court would, on the *cy près* doctrine, follow as nearly as possible the intention of the testator. The paramount intent here was to admit all the issue. The word "eldest son" is here *nomen collectivum*, and a word of limitation only. If estates tail are not declared in the two nephews, and their two sons should die in their lifetime, the heir-at-law will take. This would manifestly be a violation of the testator's intention. Rather than this, *Seaward v. Willock* (5 East, 198) would be followed, and life estates only be given: *Fearne's Cont. Rem. Jos. Smith's ed.*, vol. ii., p. 268; *Wollen v. Andrews* (2 Bing. 126); *Lewis v. Puzley* (16 M. & W. 733); *Doe v. Garrod* (2 B. & A. 87); *Robinson v. Robinson* (1 Burrow, 38).

STUART, V.C.—This is a case where the doctrine in *Seaward v. Willock* is entirely excluded, for although the testator gives a succession of life estates, the context clearly shows these estates must be enlarged into estates in tail male. The only question is whether the words which are used to enlarge these are to enlarge the estate of the first two tenants for life, or the estates only of the sons of these two tenants for life. I am clearly of opinion that, on no principle authority, looking at the words of the will, can it be said that the estates of the two first tenants for life are to be enlarged. The eldest sons of these two must take estates by purchase, as persons in existence and certain at the time of the testator's death.

Declare the two nephews to take estates for life, and their eldest sons to take estates in tail male.

Wood, V.C., March 10, 1866.

GRIGGS v. GIBSON. }
MAYNARD v. GIBSON. } No. 2.

Ex parte FRANCES EVELYN MAYNARD.

14 W. R. 538. The proceedings on the third head of the petition will be found at [1866] E. R. A. 504.

Maintenance of an Infant—Allowance for a residence—Power of charging in favour of children given by a will to the testator's son, and attempted to be exercised by the donee who died before the testator—The Wills Act, s. 33.

INFANT.—*Where a testator directs the payment of an annual sum of money, just sufficient for the mere maintenance of a minor entitled to the possession of the settled estates, to be applied for such maintenance, and manifests a clear intention that such minor shall reside at the principal mansion on the estates, although no further allowance for the minor's maintenance will be ordered by the Court, yet such a sum will be directed to be paid out of the rents of the settled estates as will suffice to defray the expenses of keeping up the mansion as a residence for the minor.*

Josselyn v. Josselyn (9 Sim. 63), stated to be erroneously reported.

POWERS.—*A power given by a will to a tenant for life to charge the settled estates in favour of his children is not "an interest not determinable on the death" of the donee within the meaning of the 33rd section of the Wills Act.*

This was a petition presented by Frances Evelyn Maynard, the infant plaintiff in the second of these suits, by the Honourable Blanche Adeliza Maynard, her mother and next friend. The object of the petition was threefold: first, with reference to the proper sum to be allowed out of the rents, profits, and income of the estates of the late Right Honourable Henry, Viscount Maynard, the testator in these causes, for the maintenance of the petitioner; secondly, with reference to the maintaining and keeping up during the petitioner's minority of the family mansion house, park, and pleasure grounds, in the county of Essex, called Easton Lodge, and the coach-houses, stables, green-houses, out-houses, and premises thereunto belonging, and with reference to the proper sum to be allowed for the same out of the said rents, profits, and income; and, thirdly, with reference to the right of the infant defendant Blanche Maynard to an annuity of 400*l.* charged on the real estate of the testator by a codicil to the will of Charles Henry Maynard, deceased, the late father of the petitioner, and of her sister the said infant defendant.

The facts bearing on the first two divisions of the petition were as follows:—

On the testator's death, which happened May 19th, 1865, the petitioner, under the limitations in his will, became tenant for life in possession of his estates, but subject to the trusts in the will respecting the receipt of the rents and profits of the said estates by the trustees of the will during the minority of any person for the time being entitled to the possession or to the rents, issues, and profits of the said estates, whereby the trustees were directed out of such rents, issues, and profits, to pay and apply any annual sum or sums of money according to the age of such minor, not exceeding the clear annual sum of 400*l.*, for or towards the maintenance and education of such minor; and to accumulate the surplus of such rents and profits, and to invest the same in the purchase of other estates, to be settled to the uses declared by the will.

The testator by his will, dated August 29th, 1843, and made during the lifetime of his wife, who predeceased him, gave unto the trustees thereof all his family and other plate, household goods, furniture, and effects, linen, china, mirrors, glass, books, pictures, paintings, maps, prints, medals, coins, wines, liquors, live and dead stock, including deer, and all the musical and other instruments, and also all the other articles and things of what nature or kind soever which, at the time of his decease, should be in or about or belonging to his mansion-house called Easton Lodge, and the coach-houses, green-houses, out-houses, and premises thereunto belonging (except any money or securities for money, and any carriages, horses, or harness which might be selected by his said wife) upon certain trusts thereby declared during the life of his said wife, if she should so long continue his widow; and subject thereto, upon trust to permit the same to be held and enjoyed, so far as the rules of law and equity would permit, by the person or persons who, for the time being, should, under or by virtue of that his will, be entitled to the possession, or to the rents, issues, and profits of the said mansion-house called Easton Lodge, yet so nevertheless that the same should not, for the effect or purpose of transmission, vest absolutely in any child of any person thereby made tenant for life thereof,

unless or until such child should attain the age of twenty-one years; but, nevertheless, such child should, during his or her minority, be entitled to the use and benefit thereof.

The testator by his will gave his said mansion-house called Easton Lodge, together with the park and pleasure-grounds thereunto belonging or thereunto adjoining, with their and every of their appurtenances, to the uses, and subject to the powers therein declared of and concerning his other freehold estates and hereditaments, except as to a term of 1,000 years therein limited to the trustees, and also except the several powers of leasing, and the power of sale and exchange therein contained.

The testator, by a codicil to his will, dated August 15th, 1850, after revoking certain trusts declared in the will respecting his mansion-house in Grosvenor Square, London, and the articles and things which might be therein at his decease, declared his will and mind to be that from and immediately after his decease the trustees of the will should stand possessed of the said mansion-house in Grosvenor Square, with the offices and of the several articles and things which might be therein at his decease, upon trust to permit or suffer the person who, at the time of his decease, should, under the limitations in his will, be or thereupon become entitled to his mansion-house called Easton Lodge, to select such of the said articles and things as such person should think proper to have removed to Easton Lodge. And he made a declaration as to the non-vesting of the articles and things which should be so selected in minors, and as to the enjoyment thereof by minors, similar in every respect to the declaration which he had made in his will as to the articles which should be, at his decease, in or about Easton Lodge.

By an order of the Court, made in the second of these suits, and dated July 21st, 1865, it was ordered that the trustees of the will should be at liberty, out of the rents, issues, and profits of the testator's estates, to pay the petitioner's mother, as her guardian, the annual sum of 400*l.* for her maintenance, from May 19th, 1865, and until further order.

By the decree made in these causes, and dated July 25th, 1865, it was, amongst other things, declared that the petitioner's mother should be at liberty, until further order, to reside at Easton Lodge with the petitioner and the said infant defendant. Accordingly the petitioner, with her mother and the said infant defendant, went to reside there on August 5th, 1865, and they have since continued to reside there.

Under these circumstances the petitioner submitted that she was entitled during her minority to reside in, and to have the use and occupation of, Easton Lodge, with its appurtenances, and the park and pleasure-grounds thereunto belonging or adjoining; and also to have the use and enjoyment at Easton Lodge of the family and other plate, household goods, furniture, and effects at Easton Lodge, and also the articles and things in the mansion-house in Grosvenor Square which had been selected to be removed from thence to Easton Lodge. And the petitioner further submitted that inasmuch as the testator had directed that Easton Lodge, with the park and pleasure-grounds, were not to be included in the power of leasing, and that during the minority of any person for the time being entitled thereto, such minor was to have the use and enjoyment there of the articles therein, and also of the articles to be removed thither from Grosvenor Square, he must have intended that Easton Lodge, with the park and pleasure-grounds, were, during such minority, to be kept up in a fit and proper manner as the residence of, and as an establishment for, such minor.

The petition prayed that a further and sufficient allowance might be made and paid out of the income of the testator's estates for the petitioner's maintenance during her minority, and that a proper and sufficient annual sum might be allowed and paid out of the income of the said estates for keeping up the mansion-house, park, and pleasure-grounds of Easton Lodge, and a proper establishment there, as a residence for the petitioner during her minority,

regard being had to her station in life and her fortune and prospects, and as and from the 5th day of August last, when the petitioner first went to reside at Easton Lodge; and that the trustees might be ordered to pay the sums so to be allowed to the petitioner's mother, as her guardian, until further order.

The petitioner's mother filed an affidavit in support of the petition, which was to the effect that she calculated that it would require the sum of 4,000*l.* annually to keep up Easton Lodge, with its stables and other outbuildings, park and gardens, in a proper state and condition.

It appeared that the net rental of the testator's estates, after allowing for all the charges created on the same by the testator's will, the interest on a mortgage of 24,000*l.*, the allowance for the petitioner's maintenance, land-tax, insurance, and other outgoings, amounted to about 11,000*l.* The mortgage of 24,000*l.* had, by the testator's will, been directed to be paid off out of the rents of his estates.

Amphlett, Q.C., and *Walford*, for the petitioner, said that as to the first branch of the petition, they could hardly ask the Court to direct the payment of a larger sum than that fixed by the testator for the petitioner's maintenance. On this point *Walford* called the attention of the Court to the case of *Josselyn v. Josselyn*, as it is reported in 9 Sim. 63. He said that there was an error in that report, which was discovered by Mr. Macpherson, and made public by him in his work on the Law relating to Infants, p. 229 n. It appeared from Mr. Macpherson's correction that the additional money allowed for the infant's maintenance in that case was paid, not out of property in which the infant had only a contingent interest, but out of the rents of real estate in which the infant had a vested interest. As to the second head of the petition, however, they contended that it was perfectly clear from the testator's will that he never intended Easton Lodge to be let. If it was not to be let, some provision should be made for keeping it in a habitable and proper condition. In *Thellusson v. Woodford* (5 Russ. 100), a testator directed a certain house to be kept as a place of occasional residence for his sons and trustees, but made no express provision for so keeping it, and the Court ordered a sufficient sum to be applied for that purpose out of the bulk of the testator's property which was directed to be accumulated. It was of the greatest importance that the petitioner should be brought up on the family estates, and in the midst of her future neighbours and tenantry. Having regard to the net income of the settled estates, and to the character of Easton Lodge, the annual sum of 4,000*l.* would not be too great to be allowed for the proper keeping up of the house and establishment. All the persons entitled in remainder, except one, who was travelling about, and whose present address was unknown, were represented by counsel.

Rolt, Q.C., and *Faber*, for the trustees.

Osborne, Q.C., *Schomberg*, and *Briggs*, appeared for other parties.

WOOD, V.C., said that he had no doubt that the testator's intention was that Easton Lodge should not be let, but should be kept up as a place of residence for the person who should from time to time be entitled to the settled estates. The testator had clearly, and over and over again, manifested this intention. Easton Lodge was expressly exempted from the term of a thousand years, and from the power of leasing given by the will, the furniture and articles in it at the testator's decease were made heir-looms, and all the other articles elsewhere, which were made heir-looms, were directed to be taken thither and to be kept there. The allowance made for the petitioner's maintenance, though sufficient for that purpose irrespective of keeping up any establishment for her, was wholly inadequate to keeping up a large mansion like Easton Lodge with its park and pleasure grounds. Under these circumstances, even if the persons entitled in remainder to the testator's settled estates had objected to the petitioner's present application, he should still have made an order that some additional sum should be allowed her, though he should have felt it his duty to make a much more narrow inquiry as to the exact amount which it would

be proper to allow her. As it was, however, there being no objection on the part of anyone as to the allowance or as to the amount of the sum which had been mentioned as the proper and necessary sum, and having regard to the fact that after deducting the yearly sum of 400*l.* already applied for the petitioner's maintenance and the yearly sum of 4,000*l.* now asked for out of the net rents of the estates, the only charge on the property directed to be paid off out of such rents could still be paid off in less than four years, he should make an order for the payment of the annual sum of 4,000*l.* out of the rents of the testator's estates to the petitioner's guardian, for the purpose of keeping up Easton Lodge with its park and pleasure-grounds, as a residence for the petitioner. This sum would be paid from the 5th of August last, when the petitioner first went to reside at Easton Lodge, and until further order.

[DIVORCE.]

March 6, 13, 1866.

CLINTON v. CLINTON.

14 W. R. 545; L. R. 1 P. & D. 215; 14 L. T. 257.

See, *Bonsor v. Bonsor*, [1897] E. R. A.; 66 L. J. P. 35; [1897] P. 77; 76 L. T. 168; 45 W. R. 304 (P. D. & A.).

Writ of sequestration—When issued to enforce orders of the Court.

DIVORCE AND MATRIMONIAL CAUSES.—*Where the Court, on a decree for judicial separation at the suit of the wife, ordered her permanent alimony to be paid out of income receivable by trustees, and payable by them to the husband, and such trustees, though served with a copy of the order, refused to comply with it, on the ground that the terms of the instrument creating the trust did not permit them to dispose of any part of the trust money in that way.*

The Court ordered a writ of sequestration to issue against all money coming into the hands of the trustees for the respondent so far as the arrears of alimony and costs.

This was an application for a general writ of sequestration against all moneys destined for the respondent in the hands, or to come into the hands of, Messrs. Ouvry & Farrar, trustees of a will, under which the defendant is entitled to 400*l.* per annum.

A decree for judicial separation had been obtained in April, 1865, by the applicant, in a suit instituted by her against the present defendant; and on the 25th of July, 1865, the Court ordered the respondent, until further order, to pay to the petitioner permanent alimony at the rate of 110*l.* per annum, payable quarterly, to commence from the date of the final decree. The respondent has not been within the jurisdiction of the Court since that order was made, but it was served on his solicitors in the suit for judicial separation, and also on Messrs. Ouvry & Farrar, the trustees above named, and through whom it was alleged the respondent draws his income. No portion, however, of this alimony had ever been paid. The defendant is the brother of the late Duke of Newcastle, under whose will it is alleged the above income of 400*l.* per annum is derived. The writ was to compel the recovery of three quarters of the alimony decreed, and the costs of that decree and of the present application.

The order for permanent alimony directed 110*l.* to be paid to the petitioner until the respondent made it appear that the 400*l.* per annum given him by the will of the Duke of Newcastle ceased to be paid. On the solicitors for the

petitioner applying to the trustees for payment of the alimony, they replied that they did not consider they had power to apply any part of the annuity given by the Duke of Newcastle to the respondent in payment of such alimony.

The petitioner's affidavit set forth that she was in circumstances of the greatest indigence, and that the defendant resided permanently in Dieppe, where he lived in comfort with the lady with whom he had committed the adultery which was the ground for the suit for judicial separation. It appeared further that the present Duke of Newcastle had intimated to the petitioner, through a friend of her's, that arrangements were made which would enable the respondent to pay the petitioner 1l. a week, which she declined.

Tristram, Dr., now moved that a general writ of sequestration do issue against all moneys in the hands, or to come into the hands, of Messrs. Ouvry & Farrar, or either of them, for the personal use, support, or benefit of the respondent, by virtue of the second codicil to the will of the late Duke of Newcastle, for three quarters' arrears of alimony, and the costs of and incidental to the decree for alimony, and to this application, and to the writ of sequestration.

The Court granted a decree *nisi* for sequestration to issue as prayed for.

Feb. 13.—Swabey, Dr., on behalf of the trustees appeared to shew cause.—By the terms of the will the trustees hold any part of the annuity of 400l. which they do not choose to pay into Lord Thomas Clinton's (the respondent's) own hands, in trust for the persons entitled to the rents of the land on which it is secured, and if anyone but Lord Thomas Clinton can take any part of the 400l. it must be his assignees in bankruptcy.

Tristram, Dr., appeared in support of the rule.—The 400l. given to the respondent in the will of the late Duke of Newcastle, is by way of rent-charge, and it is laid down in *Wilson v. Metcalfe* (1 Beav. 263), that a rent-charge may be taken by sequestration. The sequestration must be general in order that the trustees may have no room to object. I presume this Court will order sequestration to issue in the same cases as the Court of Chancery, and there it issues for non-compliance with order to answer, or for non-payment of money into Court: *Johnson v. Chippendale* (2 Sim. 55); *Franklyn v. Colhoun* (12 Ves. 3).

WILDE, J.O., after hearing the arguments, made the rule absolute, and sequestration was ordered to issue accordingly.

[PRIVY COUNCIL.]

Feb. 26, 1866.

LALLA BUNSEEDHUR v. MUSSUMAT GUNAISH KOER.*

14 W. R. 547.

Agra—Charge by guardian on the estate of his ward—Hindoo law—Purchase at an execution sale set aside—Rate of interest allowed.

INDIA.—He who sets up a charge upon a minor's estate, created in his favour by the guardian, is, by the Hindoo law, bound to show at least that, when the charge was created, there were reasonable grounds for believing that the transaction was for the benefit of the estate.

The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud which has brought about the execution

* Present—Lord Chelmsford, Sir J. W. Colville, Sir E. V. Williams, and Sir Laurence Peel.



sale, seems wholly untenable. The question is, in the former case, which of two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong-doing. A court of equity may withhold its hand in the one case, and yet set aside the sale with or without terms in the other.

This was an appeal from a decree of the Court of Sudder Dewanny Adawlut of the North-Western Provinces at Agra, dated the 20th of July, 1863, which affirmed a decree of the Principal Sudder Ameen of Zillah Allahabad, dated the 11th November, 1861, and also from another decree of the same Court, made on a partial review of the previous decree, and dated the 31st of May, 1864. The suit out of which the appeal arose was brought by Koonwur Bindersee Dutt Singh (whom, though he has since died, and was represented on the record by his widow and heiress, it will be convenient to call the respondent) to recover from the appellant a talook and other ancestral property, with mesne profits.

It appeared that Sheodutt Singh, the respondent's father, had had in his lifetime pecuniary dealings with Seetaram Singh, the appellant's father, and that he had been thereby involved in a long course of litigation with the appellant.

In 1828 Seetaram Singh, the father of the appellant, had lent, or agreed to lend 29,500rs. to Sheodutt Singh, on a mortgage of the ancestral talook now in dispute. The talook consisted of twenty-nine villages, and the mortgage was to be a usufructuary mortgage, by way of lease for ten years of the whole talook. Before this arrangement was completed, it turned out that two other persons, named Baijnauth and Bishun Dayal, claimed to be prior mortgagees of part of the talook. It was at first settled between Sheodutt Singh and his mortgagees that Seetaram should apply part of the 29,500rs. in paying off Baijnauth and Bishun Dayal; but it was ultimately arranged between those two persons and Seetaram that the three should be jointly interested in the mortgage, the share of Seetaram being taken to be 17,700rs. and that of the other two 11,800rs.

The instrument of the 27th of May, 1828, by which this so-called partnership was effected, provided that if it should be deemed advisable thereafter to dissolve the partnership, the property should be divided and held separately in the proportions above specified. They entered into possession of the mortgaged property in June, 1828, and in 1831 dissolved their so-called partnership; thereupon Bishun Dayal and Baijnauth became mortgagees in possession of twelve, and Seetaram became, or ought to have become, mortgagee in possession of the remaining seventeen, villages of the talook; but, as a matter of fact, he never was in possession of five of these villages, they having been, prior to the mortgage, transferred by Sheodutt Singh to his wives and two other persons.

Seetaram carried on his general business in partnership with one Sheosuhai, and, on the dissolution of their partnership, and a consequent division of its assets, this mortgage fell to the share of Sheosuhai. He was never, however, recognised as mortgagee by Sheodutt Singh, nor was his name recorded as mortgagee until after June, 1838, when the period of ten years, during which the possession of the mortgage was to continue, expired. Sheosuhai and the other parties then in possession of the mortgaged premises retained possession after June, 1838; they allowed the Government revenue to fall into arrear, in consequence of which the estate was attached, and let in farm, for six years, to one Ilahee Buksh, by an assignment of whose security Torab Ali acquired the whole of the interest as mortgagee (if any) of Sheosuhai, and also the mortgage rights of Baijnauth, those of Bishun Dayal having become vested in some other parties. Torab Ali instituted proceedings on the mortgage securities against Sheodutt Singh, claiming the balance alleged to be due on them; but these proceedings, though successful in the Court of First Instance, were ultimately dismissed by the Sudder Court, apparently on the ground that the

mortgage-debt had been satisfied by the perception of rents during the possession under the ten years' lease.

In this state of things, and on the 17th June, 1842, Sheodutt Singh brought the first suit of which there was any mention in the case, against the appellant and his brother since deceased, as the sons and representatives of Seetaram Singh, and against all the other persons who, in the course of the transactions lastly above stated, had become interested in the mortgage securities or had been in possession of the mortgaged premises. The object of the suit was to recover possession of the property, on the double ground that the principal and interest of the mortgage-debt had been liquidated by the collections, and that the period for which the property had been mortgaged had expired; and it also claimed a large sum for the mesne profits of the four years during which it was alleged possession had been wrongfully retained. Although the plaint in this suit expressly stated that the principal and interest of the mortgage-debt had been liquidated by the collections, the representatives of Seetaram Singh did not dispute that allegation. Their defence was simply that by reason of the assignments to Sheosuhai by Seetaram, he had ceased to have either interest or liability in the matter. The course of the suit was as follows:—

On the 26th of June, 1843, the Principal Sudder Ameen decreed in favour of the plaintiff for redemption and possession of the estate after the expiration of the farm, but non-suited the claim for mesne profits and damages. On a remand from the Sudder Court, the same officer, by a decree dated the 28th of November, 1843, made the appellant and his brother, as co-heirs of Seetaram, liable jointly with Sheosuhai in the sum of 16,570rs. 7a. 9 as mesne profits for the year 1246 (A.D. 1839-40), but dismissed the claim for damages for the years 1247, 1248, and 1249 B.S. It should also be mentioned that he expressly found in his judgment that the mortgage-debt had been discharged. There was an appeal from this second decision, and the Sudder Court, by its original decree on that appeal, held that the appellant, as the then sole heir and representative of Seetaram (his brother having died), was solely liable to the plaintiff for the mesne profits and damages due to him; and that the sum awarded by the principal Sudder Ameen ought to be increased by the mesne profits of the years 1247, 1248, and 1249. Their decree seems to have proceeded on the ground that Seetaram and his estate were primarily liable to the mortgagor for the non-delivery of the possession when it ought to have been re-delivered; and were accountable for the mesne profits of the whole estate, notwithstanding the transfer to Baijnauth, Bishun Dayal, Sheosuhai, and others. The appellant applied for and obtained a review of this decree on the grounds that he was improperly charged with the mesne profits of the twelve villages held in possession by Baijnauth and Bishun Dayal; that he was improperly charged with the profits of the five villages of which, by reason of their assignment to Sheodutt's wives and others, Seetaram was never in possession, and that he was improperly charged with a certain amount under the head of "sayer;" and he again raised the question that the effect of the transfer to Sheosuhai was to determine the liability of Seetaram for the profits of any part of the estate. The majority of the Court decided against the appellant on the last point, and in his favour on the three others; and the final decree was against him for the sum of 14,865rs. 10a. being the amount of the profits claimed in respect of the twelve villages of which Seetaram was unquestionably in possession after the dissolution of the so-called partnership between him and Baijnauth and Bishun Dayal. This final decree was dated the 1st of March, 1846. The appellant satisfied this judgment by payment into the court to the amount of 26,211rs. 12a. 9; and these moneys were afterwards paid out through the Mooktar of Sheodutt Singh.

The appellant having thus satisfied this decree, instituted, in the year 1847, a suit against Sheodutt Singh. His claim was founded on the wrong done to Seetaram by reason of his not getting possession of the five villages assigned to the wives of Sheodutt Singh, and was for the profits of those

villages during the ten years of the mortgage lease. The gross amount claimed was 27,129rs. 6a. 6 principal, and an equal sum for interest.

The proceedings in this suit are contained in vol 4, p. 60, of the Sudder Decisions for the North-Western Provinces (1849), from which it appears that the Principal Sudder Ameen, on the 31st of December, 1847, decreed in favour of the appellant; but he awarded him only so much of the profits as fell within the period of twelve years prior to the institution of the suit, treating the rest of the claim as barred by the Regulation of Limitation. The Sudder Court, on appeal, reversed this decree, and, by its decree, of the 26th of March, 1849, dismissed the appellant's suit altogether, the Court having apparently been of opinion that if Seetaram had any claim for damages in respect of the failure to give him possession of these villages, he should have sued during the currency of the lease; and that, at all events, his representative (the appellant) could not then maintain that action. The appellant obtained leave to appeal to her Majesty in council against this decree, and his appeal was pending in 1850, when the *ikrarnamah*, which will presently be referred to, was signed. In the meantime, in 1848, Sheodutt Singh had brought his suit against the appellant for the profits of the talook during the years of the farming lease, which were not covered by former suit, and had obtained a judgment for the sum of 7,480rs. 4a. 9. He had also commenced a third suit against the appellant in the name of his son, the respondent, in respect of property derived by the respondent from his mother. That suit was undecided on the 3rd of July, 1849, when Sheodutt Singh died.

It appeared that for advances to carry on the above litigation against the appellant, and otherwise, Sheodutt Singh had become largely indebted to another (and probably rival) capitalist, named Mohun Lall. At the time of Sheodutt's death his only son and heir (the respondent) was but four years old, and his step-mother, Goolab Koonwur, became his guardian. In February, 1850, a negotiation took place between that lady and the appellant, which resulted in her executing to him, on the 17th day of that month, an *ikrarnamah* or deed of compromise (the provisions of which are sufficiently stated in the judgment), by which she, amongst other things charged the minor's estate with the payment of a sum of 27,000rs. to the appellant, and undertook to prosecute certain claims against Mohun Lall, the appellant undertaking to advance money on certain terms for that purpose, as also for the purpose of resisting the claims which Mohun Lall was prosecuting against the estate. In February, 1851, Mohun Lall having obtained judgment against the estate for 26,986rs. 15a. 4, and taken out execution thereon, had advertised the property now in dispute for sale on the 20th of that month. To prevent this sale the appellant advanced the amount of the judgment-debt; and on the 19th of February commenced a suit against Goolab Koonwur, as the guardian of the respondent, in which he claimed as due to him from the estate 1st, the amount of that advance; 2nd, the sum of 27,000rs., which was stipulated by the *ikrar* to be paid to him; and, 3rd, a further sum of 1,354rs. 1a. 9, alleged to have been advanced for the purposes of the proceedings against Mohun Lall; making in all the sum of 55,341rs. 1a. 1. On the following day the guardian, as defendant, filed a confession of judgment, admitting the whole amount claimed to be due, undertaking to pay it by annual instalments of 7,000rs., reciting the *ikrar* and the advance of the 26,986rs. 15a. 4; hypothecating the minor's estate as a security for the whole amount admitted to be due; and providing that, in the event of any failure in the payment of the annual instalments, the appellant should be at liberty to take out execution against the hypothecated property for the whole amount of his judgment-debt with interest. It was stipulated, however, that the 27,000rs. should bear no interest, and that the rate of interest on the rest of the debt should be 6 per cent.

The instalments were not paid, and, in 1853, the appellant took out

execution on the judgment confessed for the sum of 70,168rs. 7a. 11, put up the property for sale under that execution, and, on the 20th June, 1858, purchased it himself for 51,635rs. In consequence, however, of a mortgage on the talook, which was held by Mohun Lall, and gave rise to a protracted litigation, he did not obtain possession of that portion of the property purchased until the year 1860.

The respondent attained his majority in December, 1860, and commenced this suit on the 22nd of July, 1861. By his plaint he impeached as invalid and collusive the ikrar, the cognovit or judgment by confession, and the execution sale. The Principal Sudder Ameen of Zillah Allahabad made a decree in his favour on the 11th of November, 1861, awarding him possession of the property sued for, with 36,470rs. 11a. 6 for mesne profits and damages, but allowing the appellant to set off against this sum the sum of 28,418rs. 3a. 10, which was compounded of the before-mentioned items of 26,986rs. 15a. 4, and 1,354rs. 1a. 9.

On appeal, the Sudder Court of Agra, by its decree of the 20th of July, 1863, generally affirmed this decree, but reduced the damages awarded by an allowance of 5 per cent. for the cost of collection and management, and by the sum paid for income tax; and also reduced the deduction or set off allowed to the appellant by the item of 1,354rs. 1a. 9. And by its decree of the 31st of May, 1864, made on an application for review of judgment, the same Court modified its own decree by allowing the appellant interest on the principal sum of 26,986rs. 15a. 4, which was to be deducted by him, at the rate of 5 per cent. The present appeal was brought against these three decrees.

Forsyth, Q.C., Pontifex, and Melvill, for the appellant.

Sir R. Palmer, A.G., and Leith, for the respondent.

Sir J. W. COLVILLE now delivered judgment (after stating the facts as above).—The first and principal question that arises upon the present appeal is, whether the ikrar of the 17th of February, 1850, which was executed by his guardian during his minority, is binding upon the respondent. In dealing with this question we have no difficulty about the *ratio decidendi*, since it is admitted that the principles which govern it have been authoritatively laid down in the case of *Hunoomanpersad Pandey*, (6 Moo. I. Ap. 423). It is there said, "the power of the manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded." And, again, "The lender is bound to inquire into the necessity for the loan and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate." It follows, from the passages above cited and from the rest of this judgment, that he who sets up a charge upon a minor's estate, created in his favour by the guardian, is bound to show, at least, that the manager is acting in the particular instance for the benefit of the estate." It follows, from the passages above cited and from the rest of this judgment, that he who sets up a charge upon a minor's estate, created in his favour by the guardian, is bound to show, at least, that when the charge was so created there were reasonable grounds for believing that the transaction was for the benefit of the estate. The learned counsel for the appellant have not ventured to contend that the stipulations of the instrument to which these principles have now to be applied, were, upon the face of them, beneficial to the respondent's estate. Their arguments have been directed to show that the whole transaction might be justified by a consideration of the circumstances in which the parties stood, and of the nature of the litigation in which Sheodutt Singh had in his lifetime been engaged. It becomes necessary,

therefore, to review, as briefly as may be, the very tedious and intricate history of that litigation. [His Lordship here proceeded to review the history of that litigation, the substance of which has been set out above.]

Hence, at the date of the ikrarnamah, the position of the appellant and the respondent's guardian with reference to the antecedent litigation was this:—The appellant had been decreed to pay, and had paid, 26,211rs. 12a. 9, in respect of the final decree of 1846. By the decree of 1848 he had been found liable to pay, but had not paid, 7,480rs. 4a. 9 with (probably) interests and costs. Another suit was pending against him, but had not been decided. On the other hand he had brought a suit to enforce a claim for upwards of 50,000rs. against the estate of Sheodutt Singh. But this claim had been only partially decreed in his favour by the Zillah Court, had been wholly dismissed by the Sudder Court, and was the subject of an appeal to England. This being the position of the parties, what were the provisions of the ikrarnamah which the guardian was induced to sign? The first clause, after stating that the appellant had been unjustly made to suffer the losses which he had sustained, by reason of Sheodutt Singh's first suit, partly in order to compensate him for such losses, and partly in order to induce him to abandon the appeal in his own suit, made the estate liable to pay him 27,000rs. without interest. This clause was obviously against the minor's interest, in so far as it re-opened the questions closed by the final decree of the first of March, 1846; admitted the injustice of the claim on which it was founded, and gave compensation to the appellant for the loss which it had inflicted upon him. It is contended, however, that the success of the appeal was so probable, and the consequences of that success were so serious, that the guardian was justified in spending 27,000rs. to avert that danger from the estate. This is the point which has been most laboured at the bar, but their Lordships can find in the facts before them no reasonable grounds for such a conclusion. In the course of their ingenious argument, the learned counsel for the appellant were almost constrained to admit that the particular action was misconceived, inasmuch as it was brought to recover the mesne profits of certain villages of which *ex concessis*, the defendant had not been in possession. They were further obliged to admit that, under Regulation XXXIV. of 1803, the interest of the holder of a usufructuary mortgage in the property would cease on the liquidation by the usufruct of the principal and interest of his debt; and, consequently, that in any action founded on the breach of the agreement, express or implied, to give possession of the five villages, it was essential to allege and prove that, by reason of the non-delivery of such possession, something still remained due on the mortgage. Their Lordships have extreme difficulty in seeing how such a suit could have been maintained by the appellant; since, in the first suit of Sheodutt Singh against him, it had been alleged and proved as a fact that the mortgaged debt had been fully discharged; and he, instead of taking issue on that allegation, had sought to escape liability by showing that, by reason of Seetaram's assignment to Sheosuhai, he had no interest whatever in the mortgage. But, assuming that he might have maintained such a suit, they have to observe that it would have been founded on a cause of action different from that on which the suit actually brought proceeded; and that it is not to be supposed that, if the appeal had come here, this committee would have taken the unprecedented course suggested by Mr. Pontifex, of reversing a decree that had dismissed a suit improperly conceived, and of remanding the cause in order that it might be moulded into a suit of an entirely different character. To their Lordships it appears that the appeal occasioned no such danger to the minor's estate; and that there are no grounds for saying that the stipulations of the 1st clause, so favourable to the appellant, were for the benefit of the minor, or could have been reasonably supposed to be so. The 3rd clause appears to their Lordships to be of the same character. No plausible reasons have been assigned why the guardian should embark in an expensive litigation

in order to recover back from Mohun Lall sums for which he would necessarily have to account in the general account then open, and unsettled between him and the estate; or why, in consideration of advances for the purposes of that litigation, she should agree to divide with the appellant moneys which, if recovered, would belong to the minor's estate. The latter objection affects also the 7th clause.

There is a conflict of evidence concerning the alleged payment of the sum of 7,480rs. 1a. 9, mentioned in the 4th clause. The oral evidence to negative the payment is undoubtedly very loose and unsatisfactory, and the gomastah of the appellant has given some evidence of the fact of payment, which he corroborated by the production of an entry in the appellant's books. On the other hand, it is remarkable that the appellant, though examined as a witness on other points, did not depose to this payment; and the circumstance that the claim in respect of which this sum had been decreed, was of precisely the same character as those which the first clause of the document had pronounced to be unjust, tends to justify the conclusion of the Courts below, that this clause was, under colour of an admission of a payment that was never made—the release of a judgment-debt to the prejudice of a minor's estate. Their Lordships do not think it is necessary to decide the question whether this payment was really made. If it was not made, the clause, no doubt, affords another strong argument against the validity of the ikrar; but if it was made, it would not in any degree cure the other defects of that instrument, which would have to be considered as if this clause were not inserted in it. The 5th clause seems to imply the abandonment of the suit pending at the date of Sheodutt Singh's death. It was therefore also to the prejudice of the estate. If the above-stated view of the particular clauses of the ikrar be correct, the only ground on which the instrument can be supported is, that the transaction, as a whole, was for the benefit of the estate, because the necessity for obtaining the pecuniary assistance of the appellant was so urgent that the guardian was justified in submitting to the extraordinary and usurious terms on which it was to be given. There is no proof of such a necessity; and it might be sufficient for the purposes of this appeal to say that, in their Lordships' judgment, the appellant has wholly failed to relieve himself of the burden which the law casts upon him of showing that he had good grounds for supposing that this transaction was for the benefit of the estate.

Their Lordships, however, are disposed to go further, and to say that the Courts below were warranted in imputing the character of fraudulent contrivance to this transaction. The negotiation out of which it sprang was one between a Purdah woman, acting as the guardian and manager of an infant's estate, and a keen man of business, at that time a debtor to the estate. She is induced to sign an instrument which transforms the debtor into a creditor, and heavily burthens her ward's property, without consideration, except the merely colourable one of the abandonment of the appeal, and the promise of future advances for the purpose of litigation, of which a portion, at least, was neither necessary nor prudent; of litigation which, if unsuccessful, would be ruinous to the estate, and, if successful, was to result in a division of spoils absolutely incompatible with her duty as guardian. It is not shown that, in coming to this agreement, she had the assistance of proper or independent advisers. On the other hand, it is not shown affirmatively by what practice (if any), upon her ignorance or her fears, she may have been induced to execute the document. She may or she may not have been fully informed as to what she was doing. But whether she was herself defrauded, or whether she acted in collusion with the appellant, the transaction was in either case a fraud upon the respondent.

It has, however, been strongly urged that this finding of the invalidity of the ikrar is not fatal to the title of the appellant, as purchaser, at the execution sale. It has been contended that his rights are identical with those



which a stranger purchasing at the same sale would have had; that the execution was good, at least, to the extent of the 26,987rs., advanced to save the property from sale at the suit of Mohun Lall; and that the rights of the respondent against the appellant, taking them at their highest, are limited to the recovery of the difference between the last-mentioned sum and the price bid at the execution sale. Another argument in favour of this conclusion was, that the respondent had not really been injured by the sale of his ancestral property under this execution, because he would equally have lost it if it had been sold at the suit of Mohun Lall. As to the latter argument, it seems sufficient to observe that we have to deal with the rights of the parties in the events that have happened, not in those that might have happened; that the salvation of the property by other means from the sale at Mohun Lall's suit was not absolutely impossible; and that, in any case, an execution for 26,987rs. is less formidable than one for upwards of 70,000rs. Again, it is to be observed that, if the respondent has been wronged by the sale of his property at the suit of the appellant, the relief suggested falls very far short of an adequate remedy for that wrong. The property of which he has been deprived was ancestral; and the feeling on the subject of ancestral property is so strong in those provinces, that the policy of allowing it to be taken in execution, and sold under judicial sales, has been seriously questioned. And even if no account is to be taken of that feeling, it is notorious that landed property, when sold under an execution, rarely, if ever, realises its full value. It follows, therefore, that to restore the property to the respondent, on the terms of paying to the appellant what may be justly due to him, is far more equitable than the proposed limitation of his remedy to the surplus proceeds of the sale; and the only question is whether the sale has interposed an effectual bar to the application of the more appropriate equity.

Their Lordships concur with the learned judges of the Sudder Court in dissenting from the authority of the case stated to have been decided in 1847, by two out of three of the then judges of the Sudder Court of the North-Western Provinces. The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of two innocent parties shall suffer; in the latter whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong-doing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other. In the present case the judgment by *cognovit*, the execution, and the sale, are all tainted with the fraud which entered into the original transaction, the execution of the *ikrar*. All are parts of the contrivance by which the respondent has been deprived of his property, and the appellant has acquired it. Their Lordships, therefore, are of opinion that both the courts below were right in decreeing that possession of the property should be restored to the respondent. In considering on what terms this should be done, their Lordships concur with the Sudder Court in thinking that the only principal sum for which the appellant was entitled to receive credit was the 26,987rs. That he had no title to the 27,000rs. follows obviously from what has been already said. Nor has he, in their Lordships' opinion, shown any better title to the 1,354rs. That sum had been advanced for costs for the litigation in which he involved the guardian under the 3rd clause of the *ikrar*. Of that litigation, if it had been successful, he would have had half the fruits. It was unsuccessful. He cannot be allowed to carry on this kind of speculation at the risk and costs of an infant's estate.

The only remaining point—and it is one on which their Lordships have felt some difficulty—is the rate of interest to be allowed on the 26,987rs. The Attorney-General has insisted that it was a favour to the appellant, in the circumstances, to give him any interest at all on that sum; that the rate

was in the discretion of the Court below; and that their Lordships should not interfere with that discretion. On the other side it has been argued that the rate ought to be twelve per cent., such being the current rate of interest, and that which the judgment debt of Mohun Lall would naturally have carried. The contention below on the hearing of the application for a review was that the rate should be six per cent., or the contract rate, as shown by the confession of judgment. Their Lordships have come to the conclusion that the third course is that which should be adopted. If interest was to be allowed at all—and they think the Court below was right in allowing it—the rate should be fixed according to some principle, not according to the arbitrary discretion of the judges. On the other hand, the appellant has no right to complain if he receives interest at the rate for which he stipulated when he made the advance. It may be true that he would not have advanced his money on terms so favourable to the estate if he had not had in view the corrupt advantages for which he had stipulated in the ikrar. But there is no reason why the Court, because it will not let him reap the benefit of those improper stipulations, should make a new contract for him in respect of this particular advance.

On the whole, then, their Lordships will humbly recommend to her Majesty that the decree of the Sudder Court be modified by the allowance of interest on the 26,987rs. at the rate of six per cent. instead of that of five per cent. per annum, but that in all other respects that decree be affirmed with costs. They do not think that so slight a modification ought to deprive the respondent of the costs of this appeal.

Decree affirmed as modified.

CRANWORTH, L.C., March 24, 1866.

Re TOLHAUSEN'S PATENT.

14 W. R. 551.

Patent—Sealing—Prior user—Evidence.

PATENT.—*In a case where there was but one affidavit distinctly swearing to public use and sale of an alleged invention prior to the date of the application for a patent, the Great Seal was ordered to be affixed to the patent.*

This was a petition that the Great Seal might be affixed to the petitioner's patent, as of the 7th September, 1865, notwithstanding the objections on the part of the opposer, and that, if necessary, the time of provisional protection might be extended.

The original petition was presented on the 7th September, 1865, and provisional protection was granted on that day. The petitioner gave notice to proceed on the 8th November, and objections were, on the 5th December, 1865, lodged by Mr. Nottage, the opposer, to the effect that the invention was not new at the date of the application. The matter was, on the 7th December, referred to the Attorney-General, and he, on the 21st February, 1866, gave permission to the petitioner to proceed. Before, however, the patent could be sealed, further objections were lodged by Nottage, to the effect that the alleged invention had been publicly used and sold before the date of the application. The person alleged to have sold them, however, made no affidavit on the point. The provisional protection expired on the 7th March, and the present petition was presented on the 3rd March.

The alleged invention was a species of firework commonly known as "Pharaoh's Serpents."

Willcock, Q.C. for the petitioner.

McGregor, for the opposer, urged that there had been delay on the part of the petitioner, and relied on the evidence which was produced of prior public sale. He also read passages from works on chemistry to show that the substance of which the alleged invention was composed was well known to chemists long before the application, and argued that there was no novelty except in the name of "Pharaoh's Serpents."

Willcock, Q.C., in reply.

The LORD CHANCELLOR said that however absurd it might seem to affix the Great Seal to a patent for such a trivial matter as the present invention, yet, as there was only one affidavit distinctly swearing to public sale prior to the date of the application, and that was not corroborated by the person alleged to have sold the goods, he could not refuse to affix the Great Seal. If the alleged invention should turn out not to be new, the matter could be set right in another way.

ROMILLY, M.R., March 3, 1866.

DICKSON v. HOOK.

14 W. R. 552.

Settlement—Separate use of wife—Restraint on anticipation—Advances by trustees—Liability.

HUSBAND AND WIFE.—*A married woman, restrained from anticipation, cannot agree to release her trustees from liability incurred by their disregard of that restraint.*

This suit, which has stood over from time to time since the year 1855, was instituted against the trustees of a settlement by a married woman, to obtain the replacement of trust funds which had been improperly dealt with by them.

By a settlement, made on the marriage of a lady, the sum of 10,000*l.* was settled upon certain trusts for her separate use, without power of anticipation. The trustees of the settlement, at the request of the lady and her husband, had from time to time advanced money from the *corpus* of the fund, for the husband's benefit.

Subsequently the lady, by her next friend, filed a bill, alleging mismanagement of the trust fund of the settlement, and seeking to have so much of the fund as had been improperly dealt with by the trustees replaced.

She submitted to have so much of the fund as should have been advanced to her husband with her consent allowed to the trustees.

Baggallay, Q.C., and *Waller*, for the plaintiff.

Selwyn, Q.C., and *Roxburgh*, for the defendant Hook, contended that the plaintiff had, by her bill, precluded herself from requiring the replacement of any moneys advanced by the trustees to her husband; and the liability of a trustee would not extend to any improper dealing which might have taken place before his appointment.

Jessel, Q.C., *Wickens*, and *Southgate, Q.C.*, for other defendants.

LORD ROMILLY, M.R.—To allow the trustees to avail themselves of the wife's submission to allow the sums advanced to her husband, would be to disregard the clause in restraint of anticipation. The trustees were bound to know whether they were acting within their powers. There must be an order for an inquiry as to the state of the trust funds, and a direction that the trustees shall replace what may be found due from them respectively.

ROMILLY, M.R., March 7, 8, 1866.

SHARP v. WRIGHT.

14 W. R. 552; L. R. 1 Eq. 634; 14 L. T. 246.

See, *In re Metropolitan Coal Consumers' Association; Grieb's Case*, [1890] E. R. A.; 59 L. J. Ch. 532; 45 Ch. D. 606; 62 L. T. 561; 38 W. R. 462 (Ch. D.).

Receiver—Copies of accounts.

RECEIVER.—*Where the plaintiff and the receiver appointed in a suit appear by the same solicitor only one copy of the receiver's account will be allowed on taxation.*

In this case a solicitor, who acted both for the plaintiff in the suit and for a receiver appointed by the Court, claimed to be allowed the costs of two copies of the accounts. In passing five of the receiver's accounts, the Chief Clerk had allowed a charge for making a copy of each account for the plaintiffs. On the sixth account being passed an objection to the allowance of such charge was made by certain parties interested in the estate, who had obtained leave to attend the proceedings, on the ground that the same solicitors appeared for the plaintiffs and the receiver.

A question had also been raised as to whether it was the practice of the taxing masters, where the same solicitor is concerned for both the plaintiff and defendant, to allow copies to be taken by either party of documents brought into chambers by the other side: a change of this nature having been allowed by one of the taxing masters in this case.

The Master of the Rolls had referred to the taxing masters (other than one appealed from) on the above questions, and they had reported to his Lordship in effect that, although the costs of receivers' accounts so seldom came into their office that it could not be said that there was any express practice relating thereto, still they could not discover any reason for excepting such accounts from the general rule, that a solicitor concerned for two or more parties is not allowed to charge for supplying himself with copies of documents prepared by himself, and that, therefore, a charge for a copy of the receiver's account for the plaintiff, the same solicitor being concerned for the receiver, ought not to be allowed; and that it was not the practice in taxing the costs of a suit, where the same solicitor was concerned for plaintiff and defendant, to allow copies to be taken by either party of documents brought into chambers by the other side, a rule to which no exception could be pointed out.

Jessell, Q.C., and *Smart*, now contended that though the rule where the same solicitor appears for plaintiff and defendant was as above stated, this practice had not been followed in the case of a receiver; and that as the plaintiff might change his solicitor, it was important that he should have a separate copy of the receiver's accounts.

Swanston, who opposed, was not called on.

LORD ROMILLY, M.R.—The question is whether a solicitor may be paid for making copies of any documents which were not required for the service of his clients? A solicitor might, if the question were answered in the affirmative, be paid for making copies of documents in his possession, which copies he did not mean to use, and which, in fact, would in all probability never be made. Only one copy of the receiver's account would be allowed: the charge which had been allowed in taking the sixth account to be deducted in taking the next account. The costs of this application to be costs in the cause.

ROMILLY, M.R., March 12, 1866.

In re CONSTANTINOPLE AND ALEXANDRIA HOTELS COMPANY.

14 W. R. 553.

*Winding-up order—Creditor of company—Production of documents—*15 & 16 Vict. c. 86, s. 18—*Order.*

COMPANY.—A creditor must produce documents relating to his claim against a company being wound up by the Court, or his claim will be peremptorily disallowed.

This was a question arising in a winding up of the above company, in the course of being carried out in chambers.

Bevir, on behalf of the company, asked that certain creditors who had made claims against the company in chambers might produce the documents under which they claimed.

Locock Webb, for the claimants, objected to produce the documents.

LORD ROMILLY, M.R.—No person can come in to prove a debt against a company which is being wound up under the order of the Court, without producing all documents which he would have to produce under the 18th section of the Chancery Amendment Act, 15 & 16 Vict. c. 86. The creditors who object to produce the documents asked for must produce the same, or they will not be allowed to proceed in establishing their respective claims.

WOOD, V.C., March 7, 1866.

TRINDER v. TRINDER.

14 W. R. 557; L. R. 1 Eq. 695.

Explained, *Beahan v. Beahan*, 1869, Ir. R. 3 Eq. 427 (M.R.). Distinguished, *Morrice v. Aylmer*, [1875] E. R. A.; 44 L. J. Ch. 212; L. R. 10 Ch. 148; 31 L. T. 660; 23 W. R. 221 (L.C. & L. J.): affirmed, [1876] E. R. A.; 45 L. J. Ch. 614; L. R. 7 H.L. 717; 34 L. T. 218; 24 W. R. 587 (H.L.). Referred to, *Bothamley v. Sherson*, [1875] E. R. A.; 44 L. J. Ch. 589; L. R. 20 Eq. 304; 33 L. T. 150; 23 W. R. 848 (M.R.). Discussed, *Flood v. Flood*, [1902] 1 I. R. 538 (M.R.). Referred to, *In re Slater*, [1906] E. R. A.; 75 L. J. Ch. 660; [1906] 2 Ch. 480; 95 L. T. 350 (Ch. D.): affirmed, [1907] E. R. A.; 76 L. J. Ch. 472; [1907] 1 Ch. 665; 97 L. T. 74 (C. A.).

*Will—Construction—“My shares in the Great Western Railway”—*Misdescription—*Subsequently acquired personalty.*

WILL.—A testatrix in her will, dated 1856, made a bequest to the plaintiff, F. S. Trinder, in the following words:—“I bequeath to F. S. Trinder my shares in the Great Western Railway.” At the time of making her will she had no shares properly so called in the Great Western or in any other railway. She had, however, purchased, in 1846, some shares in the Wilts Somerset and Weymouth Railway, which, by an Act of Parliament, had been converted, in 1851, into “Wilts and Somerset Railway Stock of the Great Western Railway Company;” and she had purchased, in 1846, a sum of stock in the Great Western Railway. Between the times of making her will and a codicil,

which did not refer to the bequest to the plaintiff, she purchased some other sums of stock in the Great Western Railway, and after making the said codicil she purchased another sum of like stock.

Held, that all the stock in the Great Western Railway, including the stock which had formerly been shares in the other railway, of which the testatrix was possessed at the time of her death, passed to the plaintiff under the bequest in the will.

This was a motion for decree.

Hester Ann Hulbert, widow, deceased, in her will, dated 10th April, 1857, made the following bequest to F. S. Trinder, the plaintiff in this suit:— "I bequeath as follows to F. S. Trinder the sum of 300*l.*, secured upon the bond of the trustees of the Melksham Paving Act, and the securities for the same, also my shares in the Great Western Railway."

At the time of making her will the testatrix had no shares properly so called in the Great Western or any other railway company. She had in January, 1846, purchased five 50*l.* shares in the Wilts Somerset and Weymouth Railway Company, which, in the year 1851, were, under the provisions of "the Great Western Railway Act, 1851," whereby the undertaking of the Wilts Somerset and Weymouth Railway became vested in the Great Western Railway Company, converted into 250*l.* "Wilts and Somerset Railway Stock of the Great Western Railway Company."

She afterwards, but before the date of her will, viz., in 1855, purchased 40*l.* "preference 5*l.* per cent. stock, redeemable, of the Great Western (original) Railway Company."

These sums of stock were standing in her name in the books of the Great Western Railway Company when she made her will. After the date of her will she purchased, at divers times, several other sums of stock in the same company, and subsequently to such purchases made a codicil to her will, which codicil did not in any way mention the bequest to the plaintiff. After the date of the codicil she purchased another sum of stock in the same company. All the above-mentioned sums of stock were standing in her name in the books of the Company at the time of her death.

The question before the Court was whether any of the stock, and, if any, then what portion thereof, passed to the plaintiff under the will.

Giffard, Q.C., and *Wickens*, for the plaintiff, contended that he was entitled to all the Great Western Railway stock of which the testatrix died possessed. The word "shares" in the will was evidently a mere misnomer, for the testatrix must have meant something, and she had no shares whatever, properly so-called. The word "my" would not of itself make such a bequest as the present specific. They cited *Goodlad v. Burnett* (1 K. & J. 341); *Lady Langdale v. Briggs* (8 D. M. G. 391; 4 W. R. 703); and *Doe d. York v. Walker* (12 M. & W. 591).

Daniel, Q.C., and *John Pearson*, for the defendants.—The testatrix could never have intended to pass all her stock under the description of "shares." At the date of her will she was possessed of stock which had been shares, and there was no doubt that that was the stock which she intended to bequeath to the plaintiff. Otherwise not one blunder, but a continued series of blunders must be imputed to her.

Wood, V.C., said that the difficulty in this case arose from the fact that the "Wilts and Somerset Stock of the Great Western Railway Company," of which the testatrix was possessed at the time of making her will, had formerly been shares, properly so-called, in another railway company. On the whole, however, he was of opinion that the testatrix made an unintentional mistake in describing as "shares" what really were sums of stock. Nor could he, without over-refining, draw any distinction between the company's

original stock, which might properly be described as stock in the company, and stock which had been converted into the company's stock, and which might, more properly, be called stock of, or *belonging to*, the company. He should therefore hold that the plaintiff was entitled to all the stock which, at the time of the death of the testatrix, stood in her name in the books of the Great Western Railway Company, including the Wilts and Somerset Railway Stock of the same company.

LORDS JUSTICES, March 15, 1866.

PAYNE v. PARKER.

14 W. R. 562; L. R. 1 Ch. 327; 14 L. T. 157; 12 Jur. N.S. 221.

Distinguished, *Pointon v. Pointon*, [1871] E. R. A.; 40 L. J. Ch. 609; L. R. 12 Eq. 547; 25 L. T. 294; 19 W. R. 1051 (V.C.).

Practice—Statute 15 & 16 Vict. c. 86, s. 42, r. 9.—*Discretion of the Court*—*Trustee*—*Cestui que trust*.

TRUST AND TRUSTEE.—*The trustees of a settlement do not sufficiently represent the beneficiaries thereunder in a suit for the purpose of making one of those trustees liable for the misapplication of trust moneys which were the subject of another settlement of which he was also a trustee.*

This suit was instituted against (among other parties) the trustees of a deed of the 24th March, 1849, and its principal object was to make those trustees liable for trust funds which had been misapplied by one of them. The plaintiff was entitled to a moiety of the trust funds; and the other moiety, which had originally belonged to one John Payne, had been made the subject of settlement by him upon his marriage. There were two trustees of that settlement, one of whom was also a trustee of the deed of March, 1849, and therefore an accounting party in this suit.

Both the trustees of John Payne's settlement were defendants to this suit, and he, too, was named as a defendant out of the jurisdiction. None of the other beneficiaries under his settlement had been made parties. This was an appeal by the accounting trustees from a decree of Vice-Chancellor Wood, and they insisted (*inter alia*) that some, at least, of the beneficiaries (within the jurisdiction) under John Payne's settlement ought to be before the Court.

Willcock, Q.C., and *Prendergast*, for the plaintiff, referred to the statute 15 & 16 Vict. c. 86, s. 42, rule 9.

Giffard, Q.C., and *F. T. White*, for the appellants.

Kay, for defendants in the same interest as the plaintiff.

Crouch, for that trustee of John Payne's settlement who was not an accounting party.

TURNER, L.J., said that the beneficiaries under John Payne's settlement were, by virtue of the settlement, represented by two trustees; but now, one of those trustees being a party accountable in this suit, they were, in fact, represented by only one trustee. He thought this was a case in which the Court ought to exercise the discretion given to it by section 42, rule 9, and to require one of the beneficiaries to be made a party to the suit.

KNIGHT-BRUCE, L.J., concurred.

It was then arranged that the appeal should stand over in order to amend the bill by making John Payne's wife, one of the beneficiaries under his settlement, a party to the suit.

LORDS JUSTICES, April 17, 1866.

FRYER v. DAVIS.

14 W. R. 564; L. R. 1 Ch. 390.

Practice—Vacating enrolment of decree—Mistake.

PRACTICE.—*Where a decree, carried into the registrar's office on behalf of the plaintiff, had been, by mistake, delivered out to the defendant's solicitors, and enrolled by them, the enrolment was ordered to be vacated.*

This was a motion on the part of the plaintiff to vacate an enrolment of the decree which had been made by the defendant.

The decree was pronounced by the Master of the Rolls, on the 16th of January last, and it simply dismissed the plaintiff's bill with costs. Minutes of the decree were settled by the registrar on the 6th March, and it was passed on the 9th March, and sent for entry on the 10th March. It was taken for entry by a clerk of the defendant's solicitors at the request of a clerk of the plaintiff's solicitor, and on behalf of the plaintiff. On the 13th March it was taken away by the defendant's solicitors, and enrolled on the 16th March. On the 14th March the plaintiff's solicitor made inquiries at the registrar's office for the decree, and was told that it was mislaid, and again on the 16th, when he was told that it could not be found. On the 17th March he inquired again, and then discovered that the decree had been taken away and enrolled by the defendant's solicitors.

Jessel, Q.C., and *Everitt*, for the plaintiff, contended that the defendant's solicitors had acted improperly in taking away the decree, of which the plaintiff had the carriage. The decree would not have been given out from the registrar's to the defendant's solicitor's clerk unless under the supposition that he represented the plaintiff, on whose behalf he had, in fact, originally taken it there. The plaintiff ought not in this way to be deprived of his right of appeal. They referred to *Hill v. South Staffordshire Railway Company* (12 W. R. 699; 2 D. J. S. 230).

Beavan (Selwyn, Q.C.), with him), for the defendant.—The plaintiff has been guilty of negligence in not entering a *caveat* against enrolment. The decree was made as long ago as the 16th January, and was really the defendant's decree, though the plaintiff had the carriage of it. In the absence of *mala fides*, the Court would not deprive a party of the advantage he had obtained by means of the practice of the Court. The defendant might have taken an office copy of the decree and enrolled it at any moment. He cited *Williams v. Page* (5 W. R. 854; 1 De G. & J. 561); *Wildman v. Lade* (4 De G. & J. 401).

KNIGHT-BRUCE, L.J., said that, without any imputation upon the defendant or his solicitors, it was clear that a mistake had been made in the registrar's office.

TURNER, L.J., said that it was the duty of the entering clerk to deliver
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out the decree to the party from whom he received it. There was no ground for imputing *mala fides* here, but the decree was wrongly delivered. The motion must therefore be allowed, but there would be no costs.

STUART, V.C., March 17, 1866.

WATERS v. THE EARL OF SHAFTESBURY.

14 W. R. 572; 14 L. T. 184; 12 Jur. N.S. 311: varied, [1867] E. R. A.;
15 W. R. 289; L. R. 2 Ch. 231; 15 L. T. 489 (L.C.).

Account—Landowner and steward—Fiduciary relationship.

FRAUD AND MISREPRESENTATION. PRINCIPAL AND AGENT.—*Where A., a landowner, entered into a contract with a land drainage company for an advance of money and the execution of certain drainage works, the money to be charged on the inheritance of the lands, and by an indenture of the same date made between A., the company, and B. (the steward and land agent of A.), it was covenanted that B. should execute the works as the contractor of the company and that A. should pay the expenses of the same, advancing money from time to time for the purpose,*

Held, that there was nothing in the relationship between the parties to prevent the steward from entering into a remunerative contract with his employer, provided that no advantage was taken of his fiduciary position; and that the covenant by the landowner to pay expenses was not evidence of a contract that the steward was to act only as his agent, such as to destroy his position as contractor for the company.

Therefore, in an account of the dealings between the parties the steward was held entitled to be credited with the balance between the sum for which he had covenanted to do the works and their actual cost.

This was a suit instituted by Robert S. Waters, the late steward and land agent of the Earl of Shaftesbury, praying that a general account might be taken of his dealings with the defendant whilst in his employment, and praying a special declaration of his being entitled to remuneration as a contractor with the General Land Drainage and Improvement Company, in respect of certain drainage works done by the company on the defendant's estates.

By an indenture dated the 11th May, 1857, made between the General Land Drainage and Improvement Company of the one part, and the defendant of the other part, the company agreed, with the sanction of the Inclosure Commissioners, to execute certain drainage works for the defendant for the sum of 15,600*l.* This amount was to be advanced by the company and charged upon the inheritance of the lands in the said indenture mentioned, by way of an annual rent-charge, for thirty years, at the rate of six per cent. per annum. By another indenture of the same date, made between the defendant, the company, and the plaintiff (after reciting the first indenture, and that application had been made to the Inclosure Commissioners to sanction the said provisional contract, and that the Earl was desirous that the company should employ the plaintiff as their surveyor and agent for the execution of the said works, and that the company were willing to employ him, and that the plaintiff was willing to act as such surveyor and agent), it was covenanted by the several parties thereto, each one with the others, respectively, that—

“1. The said Robert Short Waters shall, so long as he duly performs

and observes these articles on his part, be the agent and surveyor of the company, for the purposes of the improvements.

" 2. If the Inclosure Commissioners sanction the provisional contract either wholly or partially, and either with or without modification, the said R. S. Waters, his executors or administrators, will, before the first day of March, 1860, execute the proposed improvements, but with such modifications (if any) as the Inclosure Commissioners shall require and sanction, and will execute the same as aforesaid in a scientific, skilful, and substantial manner, and with good and efficient workmanship, labour, and materials, and according to the specifications, plans, and sections referred to in the provisional contract, and to the satisfaction of the commissioners of the company.

" 3. The said R. S. Waters, his executors or administrators, will execute, as aforesaid, the improvements specified in the second schedule to the said recited indenture for the sum of 13,270*l.* 3*s.*, and will execute, as aforesaid, the improvements specified in the third schedule to the said indenture for the sum of 1,516*l.* 12*s.*, and the company will pay to him or them those sums forthwith after the execution, as aforesaid, of the improvements.

" 4. The said earl, his executors, administrators, or assigns, will pay to the said R. S. Waters, his executors or administrators, all the expenses which he or they shall incur in or about the execution, as aforesaid, of the improvements, or otherwise, under these presents, and,

" 6. On the improvements being executed, as aforesaid, the accounts between the company and the said earl, his executors, administrators, or assigns, and between the company and the said R. S. Waters, his executors, administrators or assigns, respectively, shall be stated and settled and credit shall, in the accounts between the company and the said R. S. Waters, his executors or administrators, be given to the company for the payment by them to the said R. S. Waters, his executors or administrators, at the time of the completion of the sums of 13,270*l.* 3*s.*, and 1,516*l.* 12*s.*," subject to certain deductions, should the modifications before referred to be adopted.

By two indentures of the 30th June, 1862, a similar contract was entered into between the parties, in respect of some further works to be done on the defendant's estates, whereby the company agreed to execute other drainage works for the sum of 11,277*l.*, to be advanced and secured and the works to be executed by the same parties and in the same manner as agreed in the former contract.

The plaintiff's case upon the contracts was, that when he left the service of the defendant in 1863, he had executed the whole of the works under the contract of the 11th May, 1857, and that the company had paid to the defendant the sum of 14,786*l.* 15*s.* under that contract; and that he had executed the works under the second contract, for which the defendant had received from the company the sum of 6,221*l.* 18*s.* These sums, together amounting to 21,008*l.* 13*s.*, had been received by the defendant, but he had advanced only 17,181*l.* 1*s.* to the plaintiff, the actual cost of the drainage works executed. The plaintiff now claimed to be entitled to the balance between those two sums, 3,827*l.* 12*s.*, as payable to him by virtue of his office of contractor. A considerable portion however of this sum the plaintiff stated to be still due for labour, and he admitted that the sums of 77*l.* 10*s.* 8*d.* and 225*l.* 14*s.* had been rightly disallowed. The plaintiff, it appeared, received a fixed salary of 430*l.* per annum from the defendant, and had, when superintending other drainage works for the defendant, in fulfilment of a contract with the Inclosure Commissioners under the Public Money Drainage Act, received remuneration at the rate of five shillings per acre. To this remuneration the Earl and the Inclosure Commissioners had given their sanction.

In the general and private accounts between the plaintiff and defendant it appeared that the total claim of the plaintiff was 1,800*l.*, in addition to the 3,800*l.* claimed on the drainage contracts. On the other hand, the defendant

repudiated one head of account, called the "Private and Domestic Account," upon which the balance in plaintiff's favour was asserted to be 4,499l. 7s. 7d., the effect of such repudiation being to make a balance in the defendant's favour.

The defendant contended that the salary above mentioned entitled him to the whole of the plaintiff's time and labour; that he was the true contractor for the works and the plaintiff was his agent; that the arrangement, if for the plaintiff's benefit, was void in consequence of the confidential relation in which he stood to the defendant; and that to hold it good would be a fraud on the remainderman, as charging the inheritance with an unnecessarily large sum for the improvements.

Malins, Q.C., and C. H. Roupell, for the plaintiff.

Sir R. Palmer, A.G., Bacon, Q.C., Sir Hugh Cairns, Q.C., and Snape, for the defendant.

STUART, V.C.—There is no question about the right of the plaintiff to a general account, and there is no question as to the relation in which the plaintiff stood to Lord Shaftesbury, except as to the extent of the right of his Lordship to the services of the plaintiff. The whole argument in behalf of the defendant had rested, first, on the fiduciary relation which has subsisted between the plaintiff and the defendant; secondly, upon the clauses in the deed which provide that Lord Shaftesbury is to pay all the plaintiff's "expenses" in regard to the contract for executing the drainage works; thirdly, on the fact that all the money for the purpose of executing the works required during their execution was supplied by the defendant; and, finally, it was argued (although I could not exactly comprehend the grounds of the argument) that if the demands of the plaintiff in regard to the sums for which he sought credit were complied with, some fraud would be committed upon the "remainderman." If that argument is worth anything it would be a fraud upon the defendant too.

Now, under those four heads I think all the argument addressed at such length, and with such eloquence on behalf of the defendant, has rested. On the first point, the main stress of the defendant's argument was that the fiduciary character in which the plaintiff stood to the defendant entitled the latter to the whole of the plaintiff's time and services of every kind, and in every work and operation in which the defendant might be engaged in regard to his estate. The fallacy of that view appears at once on looking to the unquestioned facts. But first let us see how this point is put forward in the pleadings. The argumentative passage in the answer is remarkable, and I propose to read it. It is this, "I submit to the judgment of the Court whether the plaintiff, being in a fiduciary position towards me as such agent, receiver, and manager as aforesaid, and at a fixed salary, was or not, or is or not, prohibited by the rules of this honourable Court as legally incapable of making any profit to himself in any matter coming within the scope of such appointment." Now, what are the "rules of this Court" as to persons in a fiduciary situation? In the case of a land agent it is no part of the doctrine of this court that a contract may not be made between a land agent and his employer for the benefit of the agent. In the case of *Lord Selsey v. Rhoades* (2 Sim. & St. 41), which went to the House of Lords, the doctrine of the Court was very clearly laid down. That was the case of a land agent of Lord Selsey in the management of settled estates taking a lease for his own benefit under circumstances which, upon the representation of the plaintiff, entitled him to file a bill in this court to set the lease aside. The marginal note of the case states clearly enough the circumstances: "A bill to set aside the lease of a farm granted to the steward by the employer, dismissed with costs, although the lease was for a term longer than was usual on the estates, and was granted at the solicitation of the steward on an agreement made before the subsisting lease had expired, and at a rent lower than had been

offered to the steward on behalf of the occupying tenant." Now those are strong circumstances in favour of setting aside a lease, and the question in that case was whether the fiduciary character in which the land agent stood to his employer did not vitiate a contract of that kind. Sir John Leach there states, in the terms recognised by the House of Lords, the doctrine of the Court upon the subject. He says, "These doctrines may be considered as comprised in the general maxim that a steward dealing with his employer shall derive no benefit from his situation as steward. The employer may, if he pleases, treat with his steward preferably to any other person, and this preference is a bounty. But the steward cannot take advantage of his preference unless he fully imparts to his employer all the circumstances of existing competition."

It is therefore clear that, according to the doctrine of this Court, a steward and land agent may contract with an employer to execute any work for the employer, and on estimates prepared by himself; provided there be such an interposition and enough done to show that no advantage was taken of the employer from the confidence which he naturally reposed in his agent. I know nothing to have prevented Lord Shaftesbury, if he wished, from executing any work of improvement on his estate with his own money, although he had estimates prepared and the assistance of his steward to execute those works. It would be indeed necessary to show that the steward took no advantage of his position in preparing the estimates, and that there was no fraud.

This is a case in which, looking at the nature of the instrument, there was every possible precaution to prevent any fraud upon any of the parties, either the remainderman or Lord Shaftesbury himself as tenant for life. The works were executed under two instruments, which the defendant's counsel has very properly said must be considered as one. The first instrument was a contract to which the plaintiff was no party. It was a contract between the defendant and the Lands Improvement Company, by which, by certain covenants between them, the company undertake to execute the work for a certain sum. Now it is perfectly true that the estimates were prepared by Lord Shaftesbury's land agent, and it is perfectly true that they were not blindly adopted by the company; for there is the intervention in these transactions, not only of the adviser and agent of the Improvement Company, but, what is of still great importance, of those commissioners appointed by Government, with Parliamentary powers and Parliamentary duties, who are to settle what is proper to be charged upon the land. The first suggestion is that the company shall execute the work; then the contract proceeds upon the fact of its being convenient that Lord Shaftesbury's land agent should act as surveyor and agent of the company; the next suggestion, that Lord Shaftesbury's land agent shall be the person to contract to do the work, is acted on also. That is clearly provided for by the second deed; and all the arguments on the part of the defendant have been to get out of the actual effect and operation and construction of that deed. According to the covenant of that deed, the plaintiff was bound to execute the work, and the company was bound to pay him. That is beyond a doubt. But then it is said that is not the whole of the deed. There is a clause in the deed by which Lord Shaftesbury had covenanted to pay all the expenses of the contractor. I asked during the argument, and I got no answer to the question, "If a contractor, upon the simple relation of contractor and employer, contracts to do works for a certain sum, and binds himself by deed to execute those works, does he become less entitled to any profit from the works because the employer agrees to indemnify him against loss?" It is impossible to contend that a contract of that kind would not be perfectly valid. But then it is said, in fact, it is a mere nominal obligation as contractor, for that, in fact, Lord Shaftesbury supplied all the money to do the works. Had the employer, by arrangement with the contractor, and without any specific contract upon

that subject, supplied from time to time all the money necessary to execute the work, it is perfectly plain that that would not invalidate the contract nor destroy the relation of employer and contractor. And the question is here in fact this: Whether, where the plaintiff bound himself by the solemn obligation of the deed to this land company to execute the works for a certain price, Lord Shaftesbury is not to pay the price because it is part of the contract that he should indemnify the contractor against the expenses, and because he supplied him with the money for the execution of the works.

But then it is said that Lord Shaftesbury, through his agent, executed the work, and that any profits arising from the contracts ought to accrue to the benefit of the remaindermen, and consequently to Lord Shaftesbury himself in his lifetime. The absurdity of that is apparent from this: that if the Act of Parliament is positive in anything, it is that the adjudication of the commissioners shall be final as to what is to be done to the inheritance, and the adjudication being final, the survey is made. There is no charge of fraud against the commissioners, no charge that they have been defrauded, no charge of fraud against anybody, but all having been done under a careful inspection, the works are completed, the question is whether the contract is not to have its legitimate operation? It seems to me that it must.

The evidence shows that, so far from all the burthen of the contracts producing an obligation or a contract incurred by the land agent with a view to execute the works for the benefit of the inheritance, there were other works executed under a Government contract. Works to the amount of 4,700*l.* were executed after these works were completed. As to these the plaintiff had only acted as a sort of master of the works. He superintended, and he had performed certain extra duties for which he required extra remuneration. He made a charge and demand for those extra labours. How is that dealt with? The commissioners declined to sanction it till the landowner was communicated with. This was done, and the landowner had expressed his satisfaction with the charge, and it was paid. Now, how does that accord with the notion that every moment of the time and all the labour and skill of the plaintiff was at the command of Lord Shaftesbury for everything connected with the estate. Why the attempt to get rid of the effect of this is to say that this was mere bounty of Lord Shaftesbury—a mere gift. Gift and bounty are voluntary things. If a man makes a charge, and he is paid that sum, “gift or bounty” are the last terms to use. It is perfectly plain upon the whole transaction that what was charged for, in reference to this contract and the execution of the works and the deeds by the plaintiff, was of an extraordinary kind, requiring extraordinary skill, exposing the plaintiff to risk in case the landowner should become incapable of performing his obligation, and deprive him of the expenses and supplies for which he had nothing to rely on but the covenant of the landlord.

That is my view of the case, and that confidential relation that exists is not such as to entitle the landowner, on a case of this kind, to say that the plaintiff is not entitled to credit for the sum claimed in taking this account.

Decree, therefore, first, a general account of all dealings between the plaintiff and the defendant; and declare that in taking the said account, so far as regards the works done and executed under the contracts respectively in the pleadings mentioned, the plaintiff is to be credited with 14,709*l.* 4*s.* 4*d.* and 5,996*l.* 4*s.* 3*d.*, paid by the said Land Drainage and Improvement Company to the defendant as in the pleadings mentioned; and is to be debited with all sums of money paid and all materials received or taken by, or supplied to him by, or at the expense of the defendant, and also with the interest charged against and paid by the defendant in respect of monies raised and advanced by him, or on his credit, in the execution of the works.

STUART, V.C., March 1, 6, 7, 8, 23, 1866.

LAWTON v. FORD.

14 W. R. 575; L. R. 2 Eq. 97; 14 L. T. 320.

Unsatisfied terms—Interest unpaid—Statute of Limitations—Family arrangement.

LIMITATIONS (STATUTES OF).—*Where, in a re-settlement of a family estate in 1829, and in a subsequent family arrangement of 1851, two previously created terms for 1,000 and 500 years were treated and acknowledged as subsisting, but between the two dates no interest had been paid upon them:—Held, that the Statute of Limitations did not operate, and the sums secured by them were ordered to be raised.*

In September, 1801, the manor of Lawton and other hereditaments, comprised in a term of 1,000 years, were conveyed to Thomas Parker and his executors for the residue of the said term to secure the payment of 4,000*l.* and interest. At the same date the same manor and the hereditaments comprised in a term of 500 years were conveyed to one Henshall and his executors, for the residue of the said term, to secure a further sum of 4,000*l.* By an indenture dated the 17th March, 1829, after reciting *inter alia* that the said two sums of 4,000*l.* and 4,000*l.* had not been paid, and that the same were subsisting charges on the estates, the Lawton estates were resettled, and in March, 1831, C. B. Lawton became entitled to an estate for life under the settlement, and to a beneficial interest in one of the sums secured. He died in 1860, and was succeeded by John Lawton as tenant for life, with remainder to his son William Percy Lawton as tenant in tail, who is at present in possession. In January, 1851, a family arrangement was entered into to which C. B. Lawton was a party, and which contained recitals acknowledging that interest had not been paid on the mortgage charges for many years, and a statement by C. B. Lawton, the then tenant for life, that he acknowledged them as subsisting charges.

In March and April, 1851, the residue of the terms for securing the two sums of 4,000*l.* were assigned to the defendant Ford and another, in trust for parties beneficially interested. Interest was then paid by C. B. Lawton from 1st January to 31st December, 1851. No interest had subsequently been paid, owing to questions arising as to the rights of the parties beneficially interested. The plaintiff now asked that the two sums of 4,000*l.* might be raised and paid, and the rights of the parties declared.

Kenyon, Q.C., and J. W. Chitty, for the plaintiff.

Malins, Q.C., W. M. James, Q.C., Greene, Q.C., Craig, Q.C., T. C. Renshaw, O. Morgan, Cracknell, Lewin, Dickenson, Herbert Smith, and W. Barber, for defendants.

Bacon, Q.C., and Watson, for the infant tenant in tail, contended that, as no interest had been paid from 1829 to 1851, the Statute of Limitations had barred the claim. The family arrangement in 1851 could not revive the terms or the right to have these sums of money raised.

STUART, V.C.—This argument has only been maintained by counsel shutting their eyes to the fact that this is a case of subsisting unsatisfied terms. The recitals in the deed of 1829, taken with those of the deed of 1851, are conclusive on the subject. This was a deed by which a re-settlement was made by the then owner of the inheritance, who by it limited his estate to an estate for life. The deed of compromise of 1851, to which the settlor of the deed of 1829 was a party, recognises these terms, and the validity of that family arrangement consists in the validity of these terms. No doubt there are great anomalies in the now settled law as to limitations of terms in

family settlements, but Lord Eldon, in *Codrington v. Lord Foley* (6 Ves. 364), has so expounded the law with reference to decisions of Lord Macclesfield, Lord Hardwicke, and Lord Thurlow, that I am surprised to have heard the argument which has been delivered. It is only necessary to refer to the treatise of Sir Charles Chambers on leases and terms for years to show that the law in respect to terms of years created in family settlements is perfectly settled. The statute can, on no possible construction, have any effect, and the case of the infant is untenable. In *Hayter v. Rod* (1 P. Wms.) nothing is to be presumed in favour of the inheritance. These terms have been dealt with as subsisting charges throughout, and the sums secured by them must now be raised.

Wood, V.C., March 12, 1866.

Re SANDERS.

14 W. R. 576; L. R. 1 Eq. 675; 12 Jur. N.S. 351.

Referred to, *Carolyn v. Carolyn*, 1881, L. R. Ir. 25 (n) (V.C.); *Long v. Lane*, 1885, 17 L. R. Ir. 11 (C. A.). Followed, *In re King*, 1890, 62 L. T. 789 (Ch. D.).

Will—Construction—Gift over—“Unmarried and without issue.”

WILL.—A testator gave a legacy to his remaining children in the event of his eldest son, the tenant for life, who was a bachelor at the date of the will, dying “unmarried and without issue.” The eldest son died a widower, and had never had a child:—Held, that the gift over took effect. “And” will not be read “or,” except in a case of necessity.

Petition for payment of fund out of Court.

The testator, by his will, gave a certain legacy of 20,000*l.* to his son Charles, who, at the time of the will, was a bachelor, for life, and after his death to any widow he might leave, for life, with remainder to his children as he should appoint, with remainder to his children equally, with a proviso that in case Charles should die unmarried and without issue, the legacy should go over to Samuel, Susannah, and Maria (who were the testator's remaining children), or such of them as should be living at the testator's death. Charles died a widower, but he had never had a child. Samuel, Susannah, and Maria survived the testator.

W. M. James, Q.C., and Prendergast, for the petitioners, contended that the gift over took effect. Here dying “unmarried” must mean dying wifeless, otherwise the words “and without issue” are meaningless, unless “and” is read “or,” which ought not to be done in this case: *Seccombe v. Edwards* (8 W. R. 595; 28 Beav. 440), *Mitchell v. Colls* (8 W. R. 208; Johns. 674), *Sturgess v. Pearson* (4 Madd. 412).

George Miller, for respondents in the same interest, cited *Day v. Day* (2 W. R. 700; Kay. 703).

Amphlett, Q.C., and Langworthy, for the two executors, and the husband of Susannah, who survived her, adopted a similar contention, citing *Grey v. Pearson* (5 W. R. 454; 6 H. L. Cas. 61), *Brownsword v. Edwards* (2 Ves. Sen. 249), *Maberley v. Strobe* (3 Ves. 450), *Fairfield v. Morgan* (2 B. & P. N. R. 38), *Wagstaff v. Crosby* (2 Coll. 746), *Cormach v. Copous* (17 Beav. 397).

Archibald Smith, for the husband of the residuary legatee, contended that the legacy of 20,000*l.* fell into the residue, and that *Sturgess v. Pearson* did not

apply to the present case. He cited *Heywood v. Heywood* (9 W. R. 62; 29 Beav. 9) contending that "unmarried" must mean without ever having been married.

Rolt, Q.C., Cotton, and Hemming, for respondents interested in the residue, adopted the last construction of the word "unmarried," alleging that the words "and without issue" became mere surplusage. This is a mere contingent gift. The gift imports an indefinite failure of issue, and is therefore void: *Feakes v. Standley* (24 Beav. 485). *Harrison v. Foreman* (5 Ves. 207) does not apply.

Giffard, Q.C., Speed, Barber, and Bardswell, for other respondents interested in the residue: *Willis v. Pluskett* (4 Beav. 208).

Druce, for the trustee who had paid the fund into court.

W. M. James, Q.C., in reply.—Where you have a gift, any words to defeat it must be construed strictly, whether the gift be contingent or not.

Wood, V.C., said that the construction was clear, both as to authority and intention. There was no question of remoteness. The question is, was Charles, at his death, unmarried and without issue. There were two alternative constructions. *Grey v. Pearson* is undoubtedly a different case. There has been a disinclination on the part of the judges to change the proper grammatical signification of words in order to prevent other words from being reduced to silence; but although "unmarried" primarily signifies "without having been married," the clear intention of the testator, was to mean, not having a person to provide for as he had done before by the previous gifts. His Honour then referred to the case of *Doe v. Rawding* (2 B. & Ald. 441), and said that the Court would not change "and" into "or" without necessity, but that if you construe a flexible word like "unmarried" to signify a widower, you give effect to the sentence. The case of *Wagstaff v. Crosby* proceeded on a sound doctrine. He must declare that the gifts over took effect.

Wood, V.C., March 10, 12, 1866.

Re THE BURIAL GROUND OF ST. PANCRAS, MIDDLESEX; THE MIDLAND RAILWAY (EXTENSION TO LONDON) ACT, 1863; AND THE MIDLAND RAILWAY (ST. PANCRAS BRANCH) ACT. 1864.

14 W. R. 576. For subsequent proceedings, see, [1867] E. R. A.; 36 L. J. Ch. 52; L. R. 3 Eq. 173.

Purchase by a railway company—Payment into court—Petition for investment and receipt of dividends—Lands Clauses Act, section 79.

COMPULSORY PURCHASE.—*The mere fact of the receipt of rents and profits by the trustees of a burial ground, who were appointed for the management thereof solely as a burial ground, and for the receipt and application of the burial fees, at the time when a portion of the burial ground is taken by a railway company (the ground being at that time closed for ever as a burial ground, and the rents and profits then being received springing from the use of the ground for other purposes), is not such a possession as brings the application of the trustees for the investment of the purchase-money, paid into court by the company, and for the payment of the dividends to them, within the 79th section of the Lands Clauses Act.*

Upon such an application being preferred, a simple direction for invest-

ment and accumulation was made; and the petition was directed to stand over for the appearance of such other parties, and the institution of such other proceedings as might be necessary for a final determination of the way in which the Court should deal with the fund.

This was a petition presented by the clerks to the trustees appointed and now acting under and by virtue of the Acts, 56 Geo. 3. c. xxxix., and 1 & 2 Geo. 4, c. xxiv.; of which the former was passed for the purpose of building a new parish church and a parochial chapel in the parish of St. Pancras, Middlesex, and for other purposes relating thereto, and the latter for (amongst other things) altering and enlarging the powers of the former. The present trustees, called in the petition "the church trustees," are more than sixty in number, and by the Acts the church trustees were to sue and be sued in the name or names of their clerk or clerks for the time being.

The subject of the petition was a sum of money which had been paid into court by the Midland Railway Company, as the price of certain portions of what was called in the petition "the additional burial-ground of St. Pancras," taken by the company under their compulsory powers. The church trustees claimed to be the trustees of this additional burial-ground; and the petition prayed that the said sum of money should be invested, and the dividends paid to the petitioners or other the clerk or clerks for the time being to the church trustees.

The history of the additional burial-ground, as stated in the petition, was as follows:—

By 32 Geo. 3, c. lxvi., certain persons were appointed to be a board of trustees for the purposes of the Act, and were empowered to purchase land for the formation of an additional burial-ground for the use of the parish of St. Pancras.

By section 8 of this Act it was enacted that the land so purchased should become and be absolutely vested in the vicar and churchwardens of the said parish and their successors, for the purpose of a burial-ground for the use of the said parish for ever.

By section 10 of the same Act it was enacted that the said trustees should cause the additional burial-ground to be enclosed, and also cause a small dwelling to be erected thereon for the residence of such person or persons as the trustees might think proper to appoint for the care and protection of the said ground; and that it should be lawful for the trustees to make and build such vaults or other conveniences for the interment of the dead as they should think proper; and that, when the additional burial-ground should have been fenced in and consecrated, the same should be made use of for the interment of the dead, subject, nevertheless, to such orders and regulations respecting the management thereof as should from time to time be made by the trustees, so that such orders and regulations should not interfere with or lessen the settled fees then payable to the vicar.

By section 11 of the same Act the trustees were empowered to borrow money for the purposes of the Act, and the money so borrowed and the interest thereof were thereby charged upon, and made payable out of, the fees which should be received by the churchwardens of the parish on account of burials, and likewise charged upon, and made payable out of, the poor rates as therein mentioned.

The trustees of the said last-mentioned Act, in execution thereof, purchased an additional burial-ground adjoining the old ground. The additional burial-ground was consecrated and used for the purposes of burial. The trustees also erected a small house on the ground so purchased, as provided by the Act.

By the before-mentioned Act, 56 Geo. 3. c. xxxix., the church trustees were appointed, and powers were given to them to erect a new parish church, and also a parochial chapel, to be called "Camden Chapel," and to purchase

land as sites for such new church and chapel; and it was enacted that, after the intended new church should be completed and consecrated, the then parish church should be called "the parish chapel of the parish of St. Pancras;" and that the church trustees should be empowered to raise money for the purposes of the Act, and to levy rates on the occupiers of land in the parish, and to fix the rates and fees for burial in the vaults of the new church and chapel, and to let the pews in the said new church and chapel, and to apply the pew rents for the purposes of the Act.

By the before-mentioned Act 1 & 2 Geo. 4, c. xxiv., the Act 32 Geo. 3, c. lxi., was repealed, except that the said additional burial-ground was to remain vested in the vicar and churchwardens of the parish and their successors for ever for the use of the said parish. By section 3 of this Act the church trustees and their successors were appointed trustees for carrying the Act into execution; and by section 2 it was enacted that all documents and sums of money remaining in the hands of the trustees of the repealed Act, or of any other persons for the purposes of the said repealed Act, should be paid and delivered up to the church trustees, and that the church trustees should pay and discharge all sums of money due from the trustees of the repealed Act, and indemnify the trustees of the repealed Act on account of the same. By the same Act the powers of the church trustees to borrow money and make rates for the purposes of the Act, 56 Geo. 3, c. xxxix., were extended; and divers powers and authorities, by the church building Acts of 58 & 59 Geo. 3, therein mentioned, given to the churchwardens and vestries of parishes, and powers of making rates, borrowing money, and fixing and receiving pew rents, were, so far as related to the parish of St. Pancras, vested in the church trustees. By section 44 of the same Act it was enacted that it should be lawful for the church trustees to fix the rates and fees to be paid for interment in the burial grounds of the parish, and to vary the same, &c., and that all such rates and fees should be paid to the churchwardens of the parish for the time being, who should, once or oftener in every year, upon such day or days, and at such time or times as the church trustees should direct, render to the church trustees an account of all such sum or sums of money as they should from time to time receive, and they were thereby required to pay unto the church trustees or their treasurer from time to time, the moneys so received by them whenever the same should amount to or exceed 200*l.*, and the balance thereof at the time of rendering such account; and powers were given to the church trustees of apprehending and distraining on the goods of any defaulting churchwarden. By section 53 of the same Act it was enacted that the rates and fees for burials in the burial-grounds of the parish, subject to any express charges which might be made on such rates or fees under the authority of the Act, should be applied, first, in payment of the salaries, wages, or allowances of the sextons and other persons who should be employed in or about the burial-grounds (the payments in respect of each ground being made, so far as might be, out of its own receipts); secondly, in payment of the expenses of keeping the burial-grounds in good order and condition and properly drained, and the fences thereof in good and substantial repair; and thirdly, the surplus was to go and be applied in the manner and for the purposes therein directed concerning the application of the pew rents, the ultimate application thereof being in aid of the poors rate of the parish.

The petition, after stating that the new parish church and chapel were duly erected, proceeded to state that the church trustees, in pursuance of the Acts, had received the burial fees arising from the burial-ground, and had kept and continued to keep in good order the burial-ground and the house erected thereon, and had always had the control thereof, and had paid the expenses of maintaining the house and ground out of the burial fees, and had so charged the same in their annual accounts rendered to the parishioners, as provided by 1 & 2 Geo. 4, c. xxiv., and had applied the residue of the moneys received

in respect of the burial fees in the manner and for the purposes directed by the Acts.

The burial-ground was closed for purposes of burial about eleven years ago by Order in Council; and under the provisions of the Burials Act, 15 & 16 Vict. c. 85, a new cemetery was provided for the parish at Finchley. The church trustees, however, under the said Burial Act, continued to receive the fees for burials at Finchley, and applied the same in the same manner and for the same purposes as the burial fees previously received by them were applied. The church trustees moreover, as well before as after the discontinuance of burials in the burial-ground, retained the burial-ground under their control, and remained in possession thereof. Recently the church-trustees let the sheep pasturage of the burial-ground, and received rent for the same; and they also recently repaired the wall of the ground at a considerable expense.

In 1863 the Midland Railway Company obtained power to purchase and take, and accordingly did purchase and take, for the purposes of their undertaking, a portion of the additional burial-ground, including the house erected thereon. Before however absolutely taking the house, they agreed to rent the same from the church trustees at a rent of 30*l.* per annum; and they were in possession of the house, and paid the rent to the church trustees from Lady Day, 1863.

By the Midland Railway (St. Pancras Branch) Act, 1864, the said company were further empowered to take, for the purposes of their Act, and they accordingly took, an easement under part of the burial ground; and it was provided that the compensation to be paid by the company in respect of the burial ground should be paid into the Court of Chancery, to the account of *ex parte* the burial ground of St. Pancras.

The price to be paid by the company for the land, house, and easement taken by them, as fixed by proper valuations, amounted to 2,350*l.* The company paid this amount into Court, to the account of the Accountant-General, "to the credit of *ex parte* the Midland Railway Company, *ex parte* the burial ground of St. Pancras, and the church trustees, vicar, and churchwardens, and vestry of the parish of St. Pancras, and the incumbent of the new parish of Old St. Pancras."

By "the incumbent of the new parish of Old St. Pancras" in the title of the account was meant the incumbent of the church in 56 Geo. 3, c. xxxix., designated "the parish chapel of St. Pancras."

The petitioners, on behalf of the church trustees, submitted that the latter were the parties in possession and receipt of the rents and profits of the lands in respect whereof the said moneys had been paid into court, as being entitled thereto at the time of such lands being purchased or taken, and that they were lawfully entitled to such lands within the meaning of the Lands Clauses Consolidation Act, 1845.

The petition prayed for the investment of the moneys in court, and the payment of the dividends to the petitioners, or other the clerk or clerks for the time being to the church trustees.

The petition was opposed by the vicar, the vicar and churchwardens, and the vestry of the parish, and by the incumbent of the parish chapel of the parish.

Osborne, Q.C., and *Vaughan Hawkins*, for the petitioners.—The church trustees have what is required by section 79 of the Lands Clauses Consolidation Act, 1845. Certainly their title to the dividends is quite clear; though, perhaps, if any question arose as to the principal sum a scheme for its application might be necessary. The taking of the land by the company does not secularize the money paid as its price. What title then can the vestry possibly show? The land was dedicated to ecclesiastical purposes for ever, and not until all those purposes have been satisfied can the poor's rate come in. The church trustees have always received whatever profits have arisen

from the land; while there were burials they received the fees; when there was sheep pasturage they received the payment for it; and they received the rent of the house when let to the company. No one can show a better title to the land than the church trustees.

E. Charles, for the vicar of St. Pancras.

Fooks and Fooks, jun., for the incumbent of the parish chapel of St. Pancras, asked that in case the prayer of the petition should be granted the Court would accompany the direction to pay the dividends to the church trustees with an order to them to put and keep the burial ground in good condition. It was now in a disgraceful state.

Giffard, Q.C., and *Pemberton*, for the vestry of St. Pancras, contended that mere possession was nothing, unless something else could be shown. The fee was vested in the vicar and churchwardens; the church trustees had nothing except certain managing powers so long as the ground was used for the purposes of burial.

Sargant, for the company, was not heard.

Wood, V.C., suggested that the proper course would be to order the investment of the money and the accumulation of the dividends until a definite decision could be come to on the proper way to deal with the fund.

Vaughan Hawkins.—The church trustees should not be interrupted in the pendency of the rents and profits. Besides, if accumulation should be directed, how can we stop it?

Wood, V.C., said that, though the 79th section of the Lands Clauses Act should, on the ground of public policy, be acted upon very strictly; yet he thought that the case contemplated by that section was not a case like the present, where it was clear that further proceedings, by bill or information, would be necessary before the Court could feel justified in parting with the money which had been paid in. The land on which this question arose was vested in the vicar and churchwardens in trust for the use of the parish as a burial-ground. Being used as a burial ground, the church trustees were from time to time to have the fixing of the fees; and the churchwardens, taking such fees as receivers for them, were to hand them over when they amounted or exceeded a certain sum. The petitioners therefore received all the profits that could be made out of the ground while it was a burial-ground; but when it ceased to be used for burials, their right to any profits out of it also ceased. There was nothing in the Acts authorising them to take any profit which might arise out of using the ground as a sheep pasturage, or from letting the house, which was intended as a residence for the sexton. The Court could not look upon the mere circumstance that they had, as a matter of fact, received such profit, as being a possession of the rents and profits which would entitle them to the benefits of the 79th section of the Lands Clauses Act. When the ground was closed for the purposes of burial the petitioners were arrested from deriving any profit from the only source from which they had shown themselves entitled to derive any, and they received compensation for being so arrested by the receipt of the fees at Finchley. Under these circumstances only a simple order for investment and accumulation could be made, and the petition would be directed to stand over until the last petition day in Easter Term. This would allow of any of the parties applying to the Charity Commissioners, or taking such other steps as they might be advised, towards bringing the matter into a proper shape for determination. The order would be made without prejudice to the rights of any of the parties.

Wood, V.C., March 14, 1866.

RISHTON v. GRISSEL.

14 W. R. 578.

Pleading—Answer—Exception—Correspondence.

PRACTICE.—Where the bill alleges that the defendant, in the course of a correspondence between himself and others, made certain representations respecting the subject-matter of the suit, and one of the interrogatories requires him to set forth a list of the correspondence, an answer which merely states that the correspondence contained no such representation, is insufficient.

This was a suit for an account of profits. The plaintiff had been clerk to the defendant, his salary being a percentage of the profits. Defendant had sold his business to a company, and one of the interrogatories asked whether the defendant did not, in the course of the negotiation, represent that his profits averaged from 7,000*l.* to 20,000*l.* a year, or what representation he did make on the subject, and whether verbally or in writing, and to whom, and it required him to set forth a list of all correspondence relating to the said negotiation. The defendant did not, in the answer, specify the persons to whom he made the representations, further than by stating that they were the persons to whom he sold his business, without giving the names; and the answer contained no list of correspondence, but merely a general statement that there were no letters making any mention of the profits. The plaintiff excepted to this part of the answer, and the exceptions had been allowed; and on the second answer coming in the plaintiff excepted again, and the defendants submitted, and made the usual tender of twenty shillings costs.

The third answer being considered unsatisfactory the plaintiff set down the exceptions again.

Hemming, for the plaintiff, argued that the third answer was also insufficient.

Pearson, for the defendant.—The objection that the names of the persons had not been given was not taken on the former argument on the exceptions. The defendant having submitted to the second set of exceptions, ought not to have been brought into Court again.

Hemming, in reply.—There was, at any rate, a suppression, if there was no mis-statement in the answer. We did not wish to bring defendant into court, but we had no choice: *Manchester, Sheffield, and Lincolnshire Railway Company v. Workop Board of Health* (2 K. & J. 25; 4. W. R. 5).

Wood, V.C., said that everything had been answered by the third answer, except as to the negotiations. The strict rule was that the words of an interrogatory must be answered either by admission or traverse. Here there was neither. There might have been correspondence not actually mentioning the profits, but having considerable bearing on the question. The right mode would have been to admit certain letters referring to them, but to say that such and such letters did not relate to profits: the plaintiff has a right to know all the letters that the defendant has got. The defendant must put in a further answer, giving a list of all correspondence, and stating where he claims protection.

As to the other point, it was doubtful whether the plaintiff could withdraw after the exceptions to the second answer. The exceptions must be allowed with costs.

Wood, V.C., March 19, 20, 1866.

FERRIER v. ATTWOOL.

14 W. R. 582: affirmed, [1866] E. R. A. 2856; 14 W. R. 597; 14 L. T. 278;
12 Jur. N.S. 365.

Exceptions to answer—Right to account and production.

DISCOVERY.—*Where a strong prima facie case is shown by the bill, defendant cannot be excused from giving discovery on the ground that such discovery only tends to establish his own case.*

Exceptions to answer and summons to produce.

This was a partnership suit. The defendant by his answer raised the issue of partnership or no partnership, alleging that the plaintiff was merely his clerk in his business of a cooper, at Liverpool, and that certain payments made by him to plaintiff were made as loans, and not as part of the partnership profits. The plaintiff and defendant had formerly been partners in the business of coopers. The plaintiff's claim to be a partner rested principally on the construction of an agreement set out in the bill.

The first exception was in respect of defendant's answer to an allegation of what passed at a meeting between plaintiff and him and a third party named Reynolds some years since, at which it was alleged that Reynolds agreed to become surety for the firm on the joint assurance of plaintiff and defendant. The answer stated defendant's "belief" as to the circumstances of the interview, and denied that defendant gave the assurance, and denied to the best of defendant's belief that plaintiff gave the assurance, but did not in so many words deny that they gave a "joint assurance."

The second exception was that defendant had not sufficiently answered an interrogatory, asking whether re-coopering and repairing was a branch of the business.

The third exception was to the answer to an interrogatory whether the cash-book of the business was not in the possession of the defendant. The answer referred the plaintiff to the books and papers in the schedule to the answer.

The fourth exception was that the defendant had not, in answer to an interrogatory, set out an account of all moneys received in the business. The answer had submitted that he was not bound to do so.

The 5th, 6th, and 7th exceptions were that defendant had not sufficiently answered whether the amount of certain moneys payable by the Mersey Docks and Harbour Board had been ascertained, and what was the amount received, and that he had not scheduled an account of such moneys.

The affidavit of documents claimed privilege for certain documents, on the ground that they tended exclusively to support the defendant's claim, and not that of the plaintiff.

Rolt, Q.C., and J. L. Bird, for the plaintiff, contended that the answer admitted a partnership, and that therefore they were entitled to the discovery asked, which was most material. It was important for them to have the partnership assets in court. The books and papers scheduled relate to the matters in question. The denial as to documents was only as "to the best of the defendant's belief." There is no mention in the schedule of the cash-book we ask for. They cited *Delarue v. Dickinson* (3 K. & J. 388).

Willcocks, Q.C., and Benjamin Hardy, for the defendant.—The question is whether the discovery now asked is material to the plaintiff's case. The question whether plaintiff is entitled to an account must be decided not now, but at the hearing. As to the money received from the Mersey Docks Company, we have only omitted to state the amount. That will simply be an item of account, if any is decreed. As to the schedule of documents, we

have set out a list of them, and plaintiff can judge for himself if they are material. As to the "joint assurance" to Reynolds, if defendant denies that either he or plaintiff gave the assurance, that is equivalent to denying the joint assurance. It is absurd to ask us to swear positively as to what plaintiff said at the interview. On the point of non-discovery they cited: *Adams v. Fisher* (3 My. & Cr. 527); *Turney v. Bayley* (12 W. R. 633). The matters inquired after by the first and second exceptions are very trivial. The cash-book inquired after must be one of those enumerated in the schedule: *Mansell v. Feeney* (9 W. R. 610, 2 J. & H. 320); *Swabey v. Sutton* (12 W. R. 124, 1 H. & M. 514); *Lett v. Parry* (1 H. & M. 517); *Perry v. Turpin* (2 W. R. 387; Kay. App. 49). The summons to produce was taken out before the exceptions were filed. This assumed the sufficiency of the answer.

Bird, in reply, on the first exception, urged that defendant's denial as to his belief was not enough, as he was present at the interview.

WOOD, V.C., said that the general rule that you must answer fully if you answer at all was illustrated by the present case. Here it was admitted that plaintiff and defendant were partners in another business. The defendant had alleged that plaintiff was only his servant, and had therefore refused discovery. In that state of affairs the whole question of receipts became a most important one, especially as there was strong *prima facie* evidence of a partnership. The documents inquired after might be most material. [His Honour referred then to the case of *Harris v. Harris* (4 Hare, 179).] His Honour disallowed the first exception, but allowed those from the second to the seventh, both inclusive, reserving the eighth and ninth, relating to documents, for consideration in chambers. As to the first, he considered that defendant's "belief" was sufficient answer to an interview which had happened long ago, and the assurance alleged to have been then and there given. The costs of five exceptions would be allowed, but there would be none of the eighth and ninth.

[PRIVY COUNCIL.]

March 17, 1886.

MUDUN MOHUN DOSS v. GOKUL DOSS.*

14 W. R. 590; 14 L. T. 646.

Agra—Wrongful attachment—Right of action—General damages—Proof of, when not necessary.

TORT.—*The proposition that a man whose possession was unlawfully invaded by a wrongful attachment ought to have given effect to that invasion, because it was made under colour of legal process, by removing the lock of his own storehouse, is untenable; and though the plaintiff might have received permission to use his own property, he was neither bound to accept the permission so accorded to him, nor, if he had accepted it, would he have lost his right of action, and he was entitled, at the very least, to a judgment for nominal damages.*

The principle ordinarily applicable to actions of tort is that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action.

Le Breton v. Ennis (4 Moo. P. C. 323) (as to the assessment of damages), followed.

* Present—Knight Bruce, L.J., Turner, L.J., Sir J. W. Colvile, Sir E. V. Williams, and Sir Laurence Peel.

This was an appeal against a decree of the Sudder Court of Agra, which confirmed a decree of the Civil Court of Mirzapore, dismissing the appellant's suit with costs.

The suit was brought to recover the damages alleged to have been sustained by the nominal plaintiff's employer, Dwarka Doss, in consequence of an attachment made at the instance of the respondent as the holder of a decree.

Dwarka Doss and the respondent had conflicting claims upon an indigo factory, lying between the villages of Putteetah and Sirswabur, which with three others, belonged to two persons, named Chunder Churun and Esserhund Neoghy.

At the beginning of the year 1856 the Neoghys were indebted to Mussumat Ooman Soondree, the wife of Tara Pershun Bagjee, in the sum of 17,761rs., partly for moneys advanced by her, and partly for moneys advanced by Dwarka Doss on her husband's guarantee, for the purpose of carrying on the factories; and those advances were secured by certain instruments of mortgage, dated respectively the 20th of January, 1852; the 18th of April, 1853; and the 1st of January, 1856. These securities embraced the block of all the factories and their crops for the year 1856—57.

On the 1st of January, 1856, Mussumat Ooman Soondree, by an instrument called a deed of re-mortgage, assigned all her interest in the factories under the before-mentioned securities to Dwarka Doss, in order to secure the sum of 9,761rs., being the balance then due in respect of his former advances together with the future advances to be made by him for carrying on the factories. And it was thereby provided that he should take the factories under his control and management during the year 1263 Fusli, or 1856-57; thereby giving him the first charge or lien on the crop.

It did not very clearly appear whether, under this stipulation, he took possession of the factories; or, if he did so, how long he continued in possession. But on the 7th of July, 1859, he obtained a decree in the Civil Court of Benares against Mussumat Ooman Soondree and the Neoghys for the sum of 23,672rs. as then due to him upon his mortgage; and on the 15th of the same month he and the Neoghys filed in court a petition embodying the terms of a compromise into which they had entered. The effect of this was that Dwarka Doss was to suspend the execution which he had taken out under the decree for 23,672rs.; and was to advance further sums for manufacturing indigo from the stumps then on the ground; and was to have the disposal of all the indigo manufactured. The works were to be superintended by one Balgobind Doss Seith, whom the Neoghys had nominated as their agent for that purpose. The rights of Dwarka Doss under the execution for any balance that might remain to him after the sale of indigo were expressly reserved to him both against the factories and against all the defendants to his suits. This arrangement was carried out by placing a servant or agent of Dwarka Doss in charge of the factories.

On the day on which this instrument of compromise was filed in the Benares Court (the 15th of July, 1859), the respondent obtained a decree in the Court of the Principal Sudder Ameen of Mirzapore against the Neoghys for the sum of 764rs., alleged to be due to him upon a mortgage of the Puttetah factory, dated in Phagoon Budee, 1st Sumbut 1911 (A.D. 1855) Dwarka Doss intervened in this suit as an objector, insisting that the factory had been attached for money due to him, and that the claim was fraudulent. But the Principal Sudder Ameen held that the objection could not be tried in that suit, and was no bar to the making of the usual decree in a suit based upon a simple mortgage-bond. He accordingly passed the ordinary decree against the defendants (the Neoghys), and the mortgaged property for the sum found due.

The respondent took out execution on this decree for 878rs. 10a. On the 17th September he obtained an order for the attachment of the Putteetah factory with the appurtenances, and of eight maunds of indigo, part of a

larger quantity of fifty maunds, alleged to be at the factory. On the 23rd of September the Ameen, accompanied by two servants of the respondent, who went to point out the property, proceeded to attach the factory and other property detailed in this application. He made an actual entry upon the lands and took an inventory of the property attached. He could not, however, complete the attachment of the eight maunds of indigo by actual seizure. These were part of a much larger quantity kept in a storehouse, which was under lock and key; and the servants of Dwarka Doss refused to give him access to the storehouse, or to remove this lock. In these circumstances he put his own lock also upon the door, and retired, leaving two peons in charge of the property attached.

The appellant, having heard of the application for the attachment, had, on the 22nd of September, applied to stay it. But, as the Dusserah holidays, during which the courts are closed for some weeks, began on the 24th, this application was ordered to stand over until after the vacation; and the same cause prevented any further application touching the actual attachment.

In October the Ameen, armed with a magistrate's order, and accompanied with a blacksmith, went to the storehouse for the purpose of breaking Dwarka Doss's lock, but appears to have desisted on the threat of the people in charge of the factory to quit the premises if the lock was broken, and to leave him responsible for all the indigo there. On the 5th of November, these circumstances having been brought to the notice of the Principal Sudder Ameen, he passed an order to the effect that if the defendants to the respondent's suit, or their agents, should fail to appear in court within a week, and substantiate their objection to the opening of their lock, it should be broken, and the eight maunds of indigo be forcibly attached. On the same day he required the respondent, as the decree-holder, to answer the appellant's objection of the 22nd of September within four days. On the 25th November the Ameen, having in the meantime received no order to suspend the attachment of the indigo, proceeded, under the order of the 5th of November, to remove the lock, attached eight maunds of indigo pointed out to him by a servant of the respondent, and made two inventories, one of the eight maunds of indigo attached, the other of the other property found in the storehouse which was not attached. Owing, however to some difficulty about weighing the indigo, all this property remained in the storehouse, apparently under the lock of the Ameen, or in charge of his peons, until the 8th of December, when the eight maunds were finally weighed and removed to a separate place, and the other contents of the storehouse were left at the disposal of Dwarka Doss's people. On the 12th of December the Ameen submitted to the Court a further report of his proceedings, and stated that he had, according to the respondent's request, attached no property belonging to the factory except the eight maunds of indigo. The objection filed by the appellant on the 22nd of September appears to have been thenceforward confined to these; and it was finally disposed of by an order of the 3rd of January, 1860, which, on the ground of the preferential claim of Dwarka Doss, directed the release of the eight maunds of indigo from attachment.

Some difficulty in carrying out this order was occasioned by the refusal of Dwarka Doss's agents to receive back this indigo except on terms with which the Ameen would not comply, but ultimately the eight maunds, and whatever else had been under attachment, were, by order of the Court, left at the disposal of those who were in possession and charge of the factory, and the peons were withdrawn from the premises on the 28th of February, 1860.

On the 25th of February, 1860, the suit, in which the present appeal arose, was commenced by the appellant against the respondent, by filing his plaint in the Civil Court at Mirzapore, in order to recover damages for the loss occasioned by the defendant's (the respondent's) wrongful attachment as above mentioned. The plaint after setting forth the principal facts aforesaid, relating to the rights of the appellant's principal, Dwarka Doss, as mortgagee, and relating to the attachment made at the instance of the respondent,

charged personal enmity against the defendant, and collusion between him and the two Neoghyas in obtaining his decree of the 15th July, 1859, and that he had induced the Ameen to attach, amongst other things, the storehouse in which seventy maunds of indigo cakes had been placed on shelves to dry. The claim was stated in the plaint as follows:—"To recover on account of loss of seventy maunds of indigo cakes at 200rs. per maund, 14,000rs.; on account of indigo plants which were grown on 257 beegahs of land, and which would have yielded four seers of indigo per beegah, 5,545rs., after deducting the subsequent expense of manufacture; and on account of stumps of indigo plants of the second year, grown on 105 beegahs, which would have yielded two seers of indigo per beegah, 1,250rs., after deducting the said expenses. Total claim, 20,795rs., being the amount of damages sustained by the plaintiff's employer in consequence of an attachment made at the instance of the decree holder, the cause of action arising on September 23rd, 1859, the date of the first attachment."

The written statement of the defendant denied (amongst other things) that there was any loss sustained by reason of the attachment, and alleged that if any loss was sustained, it was caused by the plaintiff's own act, and not through the defendant; it then proceeded to deny specifically the allegations in the plaint. The case came on for trial before the principal Sudder Ameen, and by a decree, dated 11th July, 1860, the appellant's suit was dismissed with costs. The appellant appealed from this decree to the late Sudder Dewanny Adawlut of the North-Western Provinces, when a decree was made on the 7th October, 1861, dismissing the plaintiff's appeal with costs. From this last mentioned decree the present appeal was brought.

Leith, for the appellant, contended that the decree complained of ought to be reversed, because the attachment and seizure were illegal, and had been on that ground ordered to be withdrawn by a court of competent authority; and, therefore, in the present suit, complaining of that wrong, there ought to have been a judgment entered for the plaintiff (the appellant), independently of any proof of the amount of damages thereby sustained. He cited *Bayliss v. Fisher* (7 Bing. 153).

Forsyth, Q.C., and *Melville*, for the respondent.

Sir J. W. COLVILLE now delivered judgment: (having first carefully stated the facts as above, his Lordship continued):—Upon this statement of admitted facts it appears clear to their Lordships that Dwarka Doss had, by reason of the attachment of the 23rd of September and subsequent proceedings, sustained an injury, for which he was entitled to claim substantial damages. The attachment was wrongful and irregular. The right of the respondent, under his decree, was to sell the factory pledged to him, subject to the rights of Dwarka Doss under his prior mortgage. He had no right to invade or disturb the possession of the prior mortgagee by placing peons upon the property, in order to attach the factory as a step towards the judicial sale. Under the procedure, as it existed before 1859, this could not have been done; the attachment must have been constructive. But under the new Code of Procedure, which had come into force on the 1st of July, 1859, the proper course was to issue and publish a written notice under the 235th and 239th sections of Act VIII. of 1859. For the actual seizure of the eight maunds of indigo, to which the execution was ultimately reduced, there was even less justification. The manufactured indigo was not included in the respondent's mortgage. And that it was not part of the general property in the possession of the Neoghyas, that Dwarka Doss had or claimed a lien upon it, the respondent had had ample notice in his own suit, wherein Dwarka Doss had intervened as objector, and by the proceedings of the 12th of May, 1859, touching a distress for rent which has been put in evidence in the cause. And the manner in which this wrongful attachment was carried out, the placing by the Ameen of his lock upon the door, subjected Dwarka Doss to the additional

wrong of having the contents of the godown, to which *ultra* the eight maunds of indigo the respondent made no claim, taken out of his control and dominion from the 23rd of September until the 8th of December. It is idle to say that his people ought in the first instance to have given the Ameen access to the godown, and delivered the eight maunds of indigo, or that they ought to have acted according to the directions of the Ameen, concerning the use of the two locks, supposing those directions to have been given to the peons. The case cited by Mr. Leith from Bingham's Reports (*Bayliss v. Fisher*, 7 Bingh. 153) shows that in this country a plaintiff in an action for a trespass of very similar character, may, without proving special damage, recover substantial damages. Nor can it be said that in this case there is no evidence of the malicious character which the plaint imputes to the trespass.

The plaint in this case was filed on the 25th of February, 1860. The damages claimed were all in the nature of special damages, and consisted of three items, viz., 14,000rs., "on account of loss of seventy maunds of indigo at 200rs. per maund;" 5,545rs. on account of indigo which it was alleged Dwarka Doss was prevented from manufacturing from indigo plants; and 2,250rs. on account of indigo which, it was alleged, he was prevented from manufacturing from indigo stumps.

Both the Courts below have found, and their Lordships can see in the evidence no sufficient grounds for disputing the justice of that finding, that the plaintiff has failed to establish any claim to damages in respect of indigo which, but for the wrongful attachment, might have been manufactured from either plants or stumps. The evidence shows pretty clearly that there had been no indigo plant to be manufactured, and leaves it more than doubtful whether all the stumps had not been converted into indigo before the 23rd of September; and whether, if any had then remained to be used in the manufacture of indigo, the attachment would have prevented them from being so used. The two last items of damage may therefore be dismissed from consideration.

The claim, however, to recover damages for loss on account of the manufactured indigo was disposed of by the Courts below in a different way. The Principal Sudder Ameen held that, though the plaintiff did probably, as stated by the European indigo factors, sustain some trifling loss owing to the storehouse having remained locked up, this was due "to the refusal of his agent to unlock the door on the Ameen's application, and that this resistance of a legal process on their part, joined with a disposition to break the peace, caused the loss to the plaintiff." And the Sudder Court considered that no good proof had been furnished that the plaintiff's agents were ever prevented from having free access to the godown for the purpose of turning and drying the indigo cakes; but that, on the other hand, the plaintiff, instead of entering his objections in a legitimate way to the attachment of the property, did, through his agents, contumaciously obstruct the Ameen employed to distrain. The learned judges seem to rest the first of their conclusions partly on the ground that the plaintiff ought not to have kept his lock on the godown; partly on the evidence given by the Ameen of his instructions to the peons to open his lock, whenever the plaintiff's people opened theirs.

Their Lordships think that neither Court has assigned grounds which warrant the conclusion at which both have arrived. They have already expressed their opinion that the attachment was wrongful. The proposition that a man whose possession was wrongfully invaded ought to have given effect to that invasion, because it was made under colour of legal process, by removing the lock of his own storehouse, appears to them to be untenable. The argument that the plaintiff ought to have entered his objection in a legitimate way is met by the facts that he had already entered an objection to the execution, and that, by reason of the closing of the court during the Dusserah vacation, he could neither follow up that objection, nor make any further objection to the acts of the Ameen until the holidays were over. Again, the case of *Bayliss v. Fisher* (7 Bing. 153), already referred to, shows

that even if the instructions said to have been given by the Ameen to the peons were really given (as to which there is a conflict of evidence), the plaintiff was neither bound to accept the permission to use his own property so accorded to him; nor, if he had accepted it, would he have lost his right of action. It appears, therefore, to their Lordships that the plaintiff's suit has been improperly dismissed with costs; and that he was, at the very least, entitled to a judgment for nominal damages. If it be important in India to check any tendency to resist the execution of legal process, it is hardly less important to maintain the principle that they who misuse legal process are responsible for the consequences of that misuse.

It has been argued for the respondent that the suit was properly dismissed, inasmuch as the appellant was, by the form of his plaint, limited to the three heads of special damage therein laid; and having failed to prove any such special damage, was precluded from recovering general damages for the trespass. Their Lordships, however, are of opinion that there was evidence in the cause on which the Courts below might have awarded some damages on account of the loss sustained in respect of the manufactured indigo. Nor are they prepared to allow that if this had not been the case the plaintiff could have recovered nothing. The plaint might have been more accurately drawn, but substantially it seeks damages generally, as consequent on the wrongful attachment of the factory. The principle ordinarily applied to actions of tort is that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action. Thus, in an action of slander for words actionable *per se*, when the plaintiff lays special damages, and fails to prove it, he is nevertheless entitled to such damages as the jury think right to give him. It would be otherwise if the words were not actionable *per se*. In the present case the gist of the action is not the special damage, but the unlawful attachment; and the plaintiff would not have been precluded from recovering ordinary damages for that actionable wrong, even if he had wholly failed to prove the special damage laid. Taking this view of the case their Lordships feel that it is not desirable to remit the cause for the assessment of damages in India, since no case has been made for taking fresh evidence, and the judge below would have only those materials for a judgment which are now before their Lordships. They have, therefore, determined to take the course which was taken by this committee in the case of *Le Breton v. Ennis* (4 Moo. P. C. 323), and to assess the damages themselves.

It must be confessed that the appellant has not given the best evidence that he could have given on this point. He might have proved for what the indigo had been sold, and for what it might have been sold if it had not been damaged, and had been sold at the proper time. Weighing, however, all the circumstances of the case, their Lordships feel justified in assessing the damages at 500rs.

Their Lordships have felt some difficulty about the costs in the courts below, and those of this appeal. The costs of an action in India, particularly the stamp duties payable on the proceedings, depend a good deal on the value of the thing claimed. It is accordingly the practice of the Courts in India, when a plaintiff has recovered less than he has claimed, to apportion the costs in the proportion which the amount recovered bears to that which was claimed. In the present case there are strong indications of a bad feeling between the parties, which, if it prompted the original attachment, has probably, on the other hand, induced the appellant to swell his demand beyond all reasonable bounds. The evidence affords no grounds for a claim for damages amounting to the appealable sum of 10,000rs.; and the amount actually recovered falls far short of that sum. Yet, unless the claim had been thus unduly magnified, the appellant could not have appealed to her Majesty. In these circumstances their Lordships think they must direct the costs below to be apportioned according to the ordinary course of the courts

below, and that they ought not to give to either party the costs of this appeal. In making the apportionment, the appellant will, of course, receive credit for any costs which he may have paid under the decrees reversed.

The order, therefore, which their Lordships will humbly recommend her Majesty to make is, that the decrees, both of the Sudder Court and of the Civil Court of Mirzapore, be reversed; that the appellant be declared entitled to recover damages to the amount of 500rs.; that the cause be sent back to the Sudder Court, with directions to enter judgment for the plaintiff for that sum, and to deal with the costs in both the courts below according to the practice of those courts in like cases; and that each party do bear his own costs of this appeal.

Decrees reversed without costs, with directions as to the costs below.

CRANWORTH, L.C., April 12, 13, 1866.

Ex parte BRAGINTON.

In re BRAGINTON.

14 W. R. 593; 14 L. T. 277.

Bankruptcy Act, 1861, section 159—"Rash and hazardous speculation."

BANKRUPTCY, G.—*A country banker accepted to a large amount bills, drawn upon him by a person who failed to remit other good bills according to his agreement, without any security whatever. He afterwards became bankrupt.*

Held, that his insolvency was attributable to rash and hazardous speculation, and that his order of discharge was properly made conditional on the setting aside part of his subsequent earnings for the benefit of his creditors.

This was an appeal from the District Court of Bankruptcy at Exeter. The Commissioner was of opinion that the bankrupt's insolvency was attributable to rash and hazardous speculations, and had therefore given him an order of discharge upon condition that his future earnings, beyond the sum of 100*l.* per annum, should be divided between his creditors and himself. From this order the bankrupt appealed.

The bankrupt was a country banker, and it appeared that he had entered into an arrangement with a Mr. Passmore, a trader, to accept bills drawn by him, for which Passmore was to remit other bills. The bankrupt accepted Passmore's bills, and he remitted other bills in pursuance of the arrangement, and this went on for some time.

At length a considerable amount of Passmore's bills was dishonoured, and after this happened Braginton still continued to accept bills drawn by Passmore upon him, and did so to the amount of upwards of 30,000*l.*, without any security.

Daniel, Q.C., and *Sargood*, for the bankrupt.

De Gex, Q.C., for the assignees and some of the creditors.

Daniel, Q.C., in reply.

LORD CRANWORTH, C., said that the Court had to act upon words which were necessarily of a very vague nature, viz., to determine whether the bankrupt's insolvency was attributable to rash and hazardous speculations. These words were difficult to define, and they could only be dealt with in the

vague way in which the Legislature had thrown them before us. Each case must be decided upon its own particular circumstances. Here it was clear that Braginton was not in insolvent circumstances when he entered into the speculations complained of, but the question was whether what he did was likely to lead to insolvency. So long as he confined himself to accepting such an amount of bills as he had means of his own to meet, he could hardly be blamed, even though his conduct might have been imprudent. But after the bills remitted by Passmore began to fail, they having been dishonoured to the extent of 5,000*l.*, it must be said to have been most rash and hazardous for a country banker to go on accepting bills drawn upon him by a man who had already failed to fulfil his engagements. Whatever might be the difficulty, as an abstract question of casuistry, in defining the meaning of the words "rash and hazardous speculation," there was in most cases very little practical difficulty in coming to a conclusion. The bankrupt in the present case accepted bills to the amount of 30,000*l.* or 40,000*l.* without any security whatever; and it was quite clear that he had brought himself within the terms of section 159 of the Bankruptcy Act, 1861. He had never seen a case which had been more ably and impartially and impassionately investigated by the commissioner; the only fault that could possibly be found would be that he had dealt too leniently with the bankrupt. His order was not however complained of on that ground. The petition must be dismissed with costs.

CRANWORTH, L.C., April 13, 1866.

Re THE LONDON INDIARUBBER COMPANY (LIMITED).

14 W. R. 594.

Joint-stock company—Winding up—Companies Act, 1862—Advertisement—Time running in the vacation.

COMPANY.—*The seven days required by the 2nd of the General Orders made upon the Companies Act, 1862, may be counted in the vacation.*

In this case, which has been already reported ([1866] E. R. A. 651), the winding up petition was, in pursuance of the Lord Chancellor's order of the 24th March, advertised, the advertisement being worded in a special manner to meet the peculiar circumstances of the case, particularly the fact that the petition had been heard before the advertisements were published.

After the expiration of seven days from the publication of the advertisements, application was made to the registrar to draw up the order for winding up the company under the supervision of the Court. He objected to do so on three grounds—(1) because the form of advertisement had not been approved by the Court; (2) because the Court had not fixed the date of the order; (3) because he considered that the seven days could not be counted during the vacation, but only when the Court was sitting.

Westlake, for the company, the petitioners, now mentioned the matter.

LORD CRANWORTH, C., overruled all the objections, and directed the order to be drawn up as of this day's date.

LORDS JUSTICES, April 17, 1866.

FERRIER v. ATWOOL.

14 W. R. 597; 14 L. T. 278; 12 Jur. N.S. 365: affirming, [1866] E. R. A. 2847; 14 W. R. 582.

Practice—Production of documents, Alleged partnership.

DISCOVERY.—Where the bill alleged a partnership between the plaintiff and defendant, the existence of which was entirely denied by the answer, the defendant was ordered to produce books and accounts, which, by his affidavit, he stated related exclusively to his own business, that being the business in which the partnership was alleged to exist.

This was an appeal motion from an order made by Vice-Chancellor Wood, for production by the defendant of certain documents, including the accounts of the business carried on by him, comprised in the second schedule to his answer. The question in the suit was whether or no a partnership in the said business existed between the plaintiff and the defendant. The plaintiff alleged the existence of a partnership; the defendant denied it altogether. The defendant, by his answer, did not swear that the documents did not in any way relate to the matters in question in the suit, but that the documents were exclusively his own, and related to his own business exclusively. It appeared that a partnership had existed between the plaintiff and the defendant, prior to the year 1859, and had then come to end, according to the defendant's contention; the plaintiff insisting that it had continued after that date.

*B. Hardy (Willcock, Q.C., with him, for the appellant, the defendant.—*This case comes within the exception laid down by Vice-Chancellor Knight Bruce, in his judgment in *Combe v. Corporation of London* (1 Y. & C. Ch. 650, 651). Consistently with the defendant's statement the documents cannot contain anything strengthening the plaintiff's case, or weakening the defendant's. *Harris v. Harris* (4 Ha. 179), referred to by Vice-Chancellor Wood, differs materially from the present case. The defendant's oath ought to be conclusive, unless the plaintiff shows a probability that something material will be disclosed by these documents. This he has not done.

Rolt, Q.C., and Bird, for the plaintiff, were not called on.

*KNIGHT-BRUCE, L.J.—*Ascribing to the defendant every desire to tell the truth; ascribing to his answer sincerity; yet the very nature of the dispute renders it impossible to bind the plaintiff by the defendant's view of the nature of the documents in question. It is reasonably possible that these documents may tend to assist the plaintiff's case in a way which the defendant does not suspect. I think the present case comes within the authority of *Combe v. Corporation of London*, and that the order of the Vice-Chancellor is right.

*TURNER, L.J.—*From the nature of the case I think it is possible that the mode in which the accounts were kept after 1859 may be material to the decision of the matters in question in this suit. This is not a case where the defendant's statement is enough. This motion must be refused, but the costs must be dealt with by the Vice-Chancellor, and the present order will be without prejudice to any application to the Vice-Chancellor for liberty to seal up such parts (if any) of the documents as do not relate to the matters in question in this suit.

LORDS JUSTICES, April 17, 1866.

Re KAYE.

14 W. R. 597; L. R. 1 Ch. 387; 14 L. T. 388; 12 Jur. N.S. 350.

Practice—Infants—Guardian—Discretion of judge—Married woman as guardian.

INFANT.—In the appointment of guardians of infants the Court is unwilling to interfere with the exercise of the discretion of the judge of the Court below.

But where a Vice-Chancellor had appointed a married woman sole guardian, this afforded a sufficient ground for varying his order.

This was an appeal motion from an order made by Vice-Chancellor Stuart in chambers, appointing Mrs. Boothroyd, a married woman, sole guardian of four infants, the children of Henry Kaye deceased. Mrs. Boothroyd was a sister of the father, and the appellant was a Mrs. Hurst, the maternal grandmother of the infants.

The father died on the 31st January, 1865. He had been, till within a few years before his death, a journeyman workman, but came into possession of a considerable sum of money. He left his wife, Susey Kaye, surviving him. By his will he gave his wife a life interest in his property, and after her death he bequeathed it among his children equally at twenty-one; but there was no gift over in case none of these children should live to attain that age. The will contained no appointment of guardian of the children.

In November, 1865, the mother Susey Kaye died. She made a will whereby she affected to appoint her mother, Mrs. Hurst, and a Mr. Brownbridge, guardians of her children.

On the 21st December, 1865, a summons was taken out in Vice-Chancellor Stuart's chambers by Mr. and Mrs. Boothroyd and Mr. and Mrs. Atkinson (Mrs. Atkinson being another sister of Henry Kaye), for their joint appointment as guardians of the infants, and for maintenance.

This was opposed by Mrs. Hurst, but the Vice-Chancellor made an order in chambers appointing Mrs. Boothroyd sole guardian, and allowing 80*l.* a year, the full income of the infants' prospective property, for their maintenance. The order contained no direction for the education of the infants.

There was contradictory evidence as to the fitness of the Boothroyds and the Atkinsons, and of Mrs. Hurst and of Mr. Brownbridge, whom Mrs. Hurst desired to have associated with herself in the guardianship. It appeared, however, that, during the lifetime of the father, the children were frequently left under the care of Mrs. Hurst during the temporary absence of their father and mother; and also that the mother had expressed a very decided dislike to the notion of her children coming into the care of the Atkinsons or the Boothroyds.

Bagshawe, for the appellant, contended that the appointment of a married woman as sole guardian was without precedent. He referred to *Re Austin* (13 W. R. 332, 761), where a mother was appointed guardian; but, she having married again, her second husband was associated with her in the guardianship. He urged the appointment of Mrs. Hurst as guardian, and that Mr. Brownbridge should be associated with her.

Buchanan, contra.—There is nothing in the evidence to show Mrs. Boothroyd's unfitness. *Primâ facie* the guardian should be a person *ex parte paternâ*, especially where, as here, the property came from that side. At any rate the appointment is a matter of discretion, and the Court would be very unwilling to interfere with that of the Vice-Chancellor.

Bagshawe, in reply.

KNIGHT-BRUCE, L.J.— If the matter had been originally before us, I should have thought that Mrs. Hurst and Mr. Brownbridge were the most fit and proper persons to be appointed guardians. The exercise of the Vice-Chancellor's discretion ought not, however, to be interfered with, except for a substantial reason. In this case the objection to appointing a married woman alone has not, I think, been surmounted. On the whole, the best thing for the infants seems to be to appoint as their guardians their grandmother and Mr. Brownbridge, they giving proper undertakings.

TURNER, L.J.—Probably the Vice-Chancellor had not the assistance of counsel when the matter was before him; but on the evidence, and the facts as they stand, I collect that his opinion was against the appointment of Mrs. Atkinson. This is a consideration of some importance in its bearing on the case, because it is evident that Mrs. Atkinson and Mrs. Boothroyd have been acting together in this matter, and anything bearing upon the expediency of appointing the one must bear also upon the expediency of appointing the other. It seems clear that the father put confidence in Mrs. Hurst, as the children were constantly left in her care during his lifetime; he seems to have preferred her to his own sisters. Then we have the mother's will; and although there was no legal power in her to appoint a guardian, yet the Court, especially in a case where, as in the present, there was an indication of the father's wish, would have regard to the expressed wishes of the mother. The best course will be to appoint Mrs. Hurst and Mr. Brownbridge guardians; but some directions ought to be given about the education of the children. There must be an undertaking to send the eldest daughter to a respectable school; and the other children must be sent to school when they are of a proper age. The paternal aunts must have reasonable access to the children at all reasonable times, and upon reasonable notice. The costs, both here and before the Vice-Chancellor, will be paid out of the capital of the property.

Wood, V.C., Feb. 14, 17, March 6, 1866.

WILTSHIRE v. MARSHALL.

14 W. R. 602; 14 L. T. 396.

Contract—Undue influence—Habitual and excessive drunkenness—Duress.

CONTRACT, A.—*A contract unreasonable in itself, entered into by an habitual drunkard when in a state of excitement from excessive drinking almost amounting to madness, with a person who at the time had him in complete subjection, will be set aside. It is not necessary in such a case to prove actual madness.*

This was a suit to set aside a contract for the purchase of the lease of a house, 25, Beach Terrace, Littlehampton, and the furniture therein, on the ground that the contract had been obtained from the plaintiff by undue influence on the part of the defendant, when the plaintiff was in a condition of mind in which he was incapable of managing his own affairs. The bill also prayed, in the alternative, that if the contract should be held to be binding, it should be declared to comprise the coach-house and stable attached to the house, and that the defendant might be decreed to execute a conveyance accordingly. The plaintiff, who was a man given to long and violent fits of drunkenness, during which he was incapable of managing any business of weight, went down to Littlehampton and engaged a lodging at the defendant's house. While there he indulged in one of these drunken outbreaks, during the continuance

of which the defendant, as was alleged, held him down for some hours, and induced him to sign the contract now sought to be set aside, which was for the purchase of the lease of the defendant's house in which he had secured the lodging. The contract was drawn up by the defendant.

Shortly afterwards the defendant told the plaintiff that he was going to London, and thereupon, apparently without any reason, the plaintiff went with him. On arriving in town they both went to the plaintiff's bankers, and the plaintiff drew 12,000*l.*, the amount of the purchase-money for the defendant's house under the alleged contract, and shortly afterwards paid it to the defendant. According to the defendant's statement the plaintiff had offered the defendant the 12,000*l.* for his "place." The plaintiff alleged that if his offer was worth anything at all, it was meant to include the stables attached to the defendant's house, and which were then held under the same lease. In confirmation of this view evidence was given that the plaintiff had called on the defendant's solicitors with reference to the purchase, and while waiting at their office had written to his own solicitors a note referring to the alleged contract, in which occurred the words "in error the stables not included in the bargain." Evidence was given showing that the defendant, when under the influence of excessive drinking, was little short of a madman, though at other times a man of education and of some refinement. The defendant brought in evidence to show that the plaintiff at the time of the transaction in question was not too incapable for the shopkeepers in Littlehampton to receive orders from him. The defendant, on receiving the purchase-money from the plaintiff, applied it in payment of a mortgage debt secured on the house in question, and part of the prayer of the bill was that the plaintiff might be allowed to follow the money into the hands of the mortgagees, and to stand in their place. There was also a question as to the value of the house with and without the stables, the plaintiff, who drove a pony-chaise, especially insisting on the improbability of his wishing to buy a house without stables.

Rolt, Q.C., and *Caldecott*, for the plaintiff.—This was no contract, and, if so, no subsequent acts could make it one, and therefore they are unimportant.

If there was a contract the stables are included. The plaintiff was in such a state that the *onus* lies on the other side to show that he was capable of entering into a contract. The evidence shows a continuous state of disordered mind and drunkenness, not simply an occasional freak. The defendant knew he was dealing with a madman. The plaintiff made no inquiry as to the extent of the interest the defendant had in the property, not even whether it was freehold or leasehold.

Giffard, Q.C., and *A. G. Marten*, for the defendant.—As regards value, which is an important ingredient, the contract is not unreasonable. There is no such thing as equitable insanity as distinguished from that at law, and at law a man cannot aver his own insanity, which must be first found by inquisition. The issue is this, was the plaintiff capable of contracting; and, if not, was the defendant aware that the plaintiff was incapable? There has been no commission of lunacy respecting the plaintiff, and he is only incapable when under the influence of drink. His memory is now singularly accurate as to the state of mind which he was in at the time of the contract. He was not incapable of transacting business with his banker. This was a proper case for a Court of law: *Cooke v. Clayworth* (18 Ves. 16); *Price v. Berrington* (3 M. & G. 486); *Neill v. Morley* (9 Ves. 478); *Molton v. Camrouz* (4 Ex. Rep. 17); *Elliott v. Ince* (5 W. R. 482, 465; 7 De M. G. 475); *Beavan v. M'Donnell* (9 Ex. Rep. 309); *Osmond v. Fitzroy* (3 P. Wms. 129).

Rolt, Q.C., in reply.—The issue is not as stated by defendant, viz., was there or was there not such insanity as would justify the finding of a verdict of insanity? but if one party seeks an advantage from the condition of the other by drawing him into a contract which on the face of it is unreasonable, the Court will relieve him, even though there be no legal incapacity: *Neill v. Morley* (*ubi supra*), *Cooke v. Clayworth* (*ubi supra*). The question is, has

the defendant accepted the plaintiff's offer, knowing his state. The plaintiff is admitted to be a habitual drunkard. During the period in question he held one continuous drunken bout. The contract is in itself so absurd that no man could think the person who made it was in his right senses. No one was present at the time of the contract except the plaintiff and defendant. We have made out legal incapacity, or, at any rate, such incapacity as will induce the Court to declare the contract void.

March 6.—WODO, V.C., in giving judgment, said that this was a most singular case. The defendant had contended that it must be shown that the plaintiff had been drawn into drunkenness for the particular purpose; and that he ought to be left to his rights at law. *Neill v. Morley* and *Beaven v. M'Donnell* were beside the present case. The case of *Cooke v. Clayworth* showed the just limits to which the Court might insist on upholding the contract. The alleged contract was not one which the Court could allow to stand.

His Honour agreed with the defendant that value was an important ingredient in the question of the reasonableness of the bargain, and he should have thought that if the stables had been included, the bargain would not have been unreasonable. There could be no question as to the plaintiff's habitual drunkenness, but he was not a man of unsound mind, though his mind was one which was easily worked upon. His Honour then reviewed the circumstances of plaintiff's arrival at Littlehampton, and of the night in question, and was of opinion that defendant's own statement showed his influence over the plaintiff. The use of the word "place" in the alleged offer would naturally include the stables, in fact everything that was there. There had been no stipulations as to title, and therefore the defendant had no right to receive the money, or to pay it to his mortgagees. This was not a contract, which, if executed, ought to be upheld.

His Honour then went into detail through the evidence, which showed the way in which the defendant, at the time of the alleged contract, had the plaintiff completely under his management, away from the advice of his solicitor; and said that, although the plaintiff was perfectly sane on ordinary matters, it was the nature of the act which made the present contract incomplete; that it was obtained by undue influence; and that the plaintiff had a clear right to stand in the place of the mortgagees. He then pronounced a decree in accordance with this view. Defendant to pay costs up to the hearing.

WOOD, V.C., March 13, 1866.

Re SAVILLE'S TRUSTS.

14 W. R. 603.

Power to appoint among "relatives"—Time of ascertaining the class.

WILL.—A testator gave a legacy to his "relatives" in such shares, &c., as his wife should appoint. She appointed part to children of testator's illegitimate brother.

Held, that "relatives" are legitimate relatives, where there is nothing on the face of the will itself to lead to a different conclusion.

Held, also, that the class of relatives, who were to take the share which was badly appointed, was to be ascertained at the death of the donee of the power, and not of the testator.

The testator in this matter by his will bequeathed a sum of 1,380*l.*, in the events which happened, to his "relatives," and those of his wife, "in such parts, shares, and proportions" as she should appoint, nevertheless in the proportions following, that was to say, two-thirds thereof amongst his own relatives, and the remaining one-third amongst those of his wife.

The wife appointed certain sums to the children of testator's elder brother, whom testator had always treated as, and considered to be, legitimate, but who, it was afterwards discovered, had been born before the marriage of his father and mother.

Cutler, for the petitioners, in support of the appointment, argued that the testator, who had always thought that his brother was legitimate, must have included the brother's children in the term "relatives." There was no decision on the meaning of the word "relatives." The decisions on the words "relations," &c., only showed that "children" *prima facie* signified legitimate children. "Relations" need not be next of kin: *Grant v. Lynam* (4 Russ. 292); *Wilkinson v. Adam* (1 V. & B. 422); *Dilley v. Matthews* (13 W. R. 676); *Beachcroft v. Beachcroft* (1 Madd. 431); *Re Herbert's Trusts* (8 W. R. 660; 1 J. & H. 121).

Wood, V.C., after referring to *Dover v. Alexander* (2 Hare, 275), said that he found nothing on the face of the will to show who were meant by "relatives." The law knew but of one set of relatives. Therefore the word could not possibly include the illegitimate children.

The appointment having thus been held to be bad, the next question was who were the relatives to take the badly appointed share.

Rolt, Q.C., *Bristowe*, and *Hamilton Humphreys*, for respondents, argued that the time for ascertaining the class of "relatives" was the death of the donee of the power, which was the period of distribution: *Finch v. Hollingsworth* (3 W. R. 589; 21 Beav. 112); *Pope v. Whitcombe* (3 Mer. 689) (the report of which has been corrected in Sugd. Powers, 660, 8th ed.); *Brown v. Higgs* (4 Ves. 708; 2 Sugd. Powers, 268, 6th ed., 661, 8th ed.).

J. T. Humphreys for the trustees of the will.

Wood, V.C., held that the wife had a power of apportioning, but not of exclusive appointment, and that therefore the class was to be ascertained at the death of the donee of the power.

His Honour allowed the costs of a petition which had been prepared by one of the respondents to the present petition for the purpose of ascertaining the title to the 1,380*l.*, but which, on hearing that the present petition was to be presented, they had abandoned.

Wood, V.C., March 7, 8, 19, 1866.

CARTLEDGE v. RADBOURN.

14 W. R. 603; 14 L. T. 187.

Markswoman—Fraudulently obtained execution of deeds—Heir-at-Law.

FRAUD AND MISREPRESENTATION.—*The plaintiff, a markswoman, was heiress-at-law to a person who died seised of or entitled to real estate. One of the defendants set up a will of the deceased, which will was, as regarded the personalty of the deceased, pronounced a forgery, but which, as regarded the realty, was never impeached at law. The plaintiff was afterwards persuaded*

to execute deeds conveying away all her interest in the deceased's realty for an inadequate consideration. She subsequently filed her bill, praying that the deeds might be set aside on the grounds that they were obtained by fraud, that they were never explained or read over to her, and that she was, at the time she executed them, in ignorance of her title to any portion of the deceased's estate.

Held, that the Court could order the deeds to be set aside, this case not being at all analogous to the cases of heirs coming to the Court under circumstances of this kind, and asking that mere terms of years, or dry legal estates, should be set aside in order to allow the heirs to proceed at law.

This was a motion for decree.

The bill was filed by Hannah Cartledge, a widow, for the purpose of obtaining a declaration that the execution of certain indentures by her had been obtained by fraud and misrepresentation; and an order either that the said indentures might be delivered up to be cancelled, or that a re-conveyance of the property comprised in them should be made to the plaintiff, or as she should appoint, free from incumbrances created by the defendants or any of them.

The defendants were Sarah Radbourn, George Butler, Joseph Aldridge, Frances Mary Lowe, Alice Lowe, Eleanor Lowe, and William Williams.

The plaintiff's case was shortly as follows:—She was the heiress-at-law of one John Jackson, of Stapleford, Notts, deceased, who died January 26th, 1854, a bachelor, intestate, and possessed of considerable real and personal property. The plaintiff was an illiterate person, being unable either to read or write. Her relationship to Jackson was remote, and for a long time after his death she was ignorant of the facts that he had died intestate and that she was his heiress-at-law.

The defendant Sarah Radbourn had been Jackson's housekeeper for many years before his death. Immediately after his death she took possession of the available portion of his personalty and of the deeds relating to his realty. These latter she handed over to the defendant Williams, who had been Jackson's solicitor. She then set up an instrument which she pretended was Jackson's will, and which purported to leave her all Jackson's property, and to make her his sole executrix.

The validity of this instrument was contested by Jackson's sole next of kin, one Searson, in the Prerogative Court of the Archbishop of York; and on 12th February, 1857, it was pronounced a forgery by the Chancellor of the diocese. The defendant Radbourn and others were thereupon indicted for a conspiracy to forge Jackson's will, and tried at the York assizes, on March 16th, 1857. The defendant Radbourn and two of the other accused persons were found guilty of the misdemeanour, and sentenced to an imprisonment of two years which they underwent.

The defendant Williams acted as the defendant Radbourn's attorney and solicitor in the suit respecting the will, and on the trial of the indictment and otherwise. Soon after Jackson's death he had taken a house for her near his own residence, and after her imprisonment he took her to live in his own house, where she continued to live.

Previously, however, to this time the execution by the plaintiff of one of the deeds now sought to be set aside had been procured by the defendant Williams, under the following circumstances:—

The plaintiff was sent for by the defendant Williams, whom up to that time she did not know, in July, 1856, and questioned by him as to her relationship to Jackson. About three weeks afterwards he again sent for her and gave her 5*l.*, and procured from her all the family papers and memoranda in her possession. On September 12th, 1856, he again sent for her, and gave her another small sum of money, and persuaded her to affix her mark to a document which was never explained or read over to her.

The execution of the other two indentures, which were the subject of the suit was obtained after the liberation of the defendant Radbourn, and under the following circumstances:—

On the 19th September, 1859, the defendant Butler, who was then claiming to be Jackson's heir-at-law, called on the plaintiff and requested her to go with him to the office of a solicitor named Briggs, she accordingly went with him and there found the defendants Radbourn and Williams, Mr. Briggs, and another solicitor named Wood. The defendant Williams was the defendant Radbourn's solicitor, Briggs was Butler's solicitor, and Wood attended at the defendant Williams's request. The plaintiff had no professional adviser, and was in fact wholly unprotected. The deeds were then produced by the defendant Williams, who informed the plaintiff that she must sign them, and that they were all right. The plaintiff, being entirely ignorant of the nature and effect of her acts, as well as of her rights, put her mark to the deeds according to the orders and directions of the defendant Williams. The deeds were not read over or explained to her. The defendants Radbourn and Butler also executed the deeds, and Wood attested the execution. This was the first time that the plaintiff met or had any communication with the defendant Radbourn in reference to Jackson's affairs. After the deeds had been executed the defendant Williams took possession of them. The plaintiff first became aware of the purport of the deeds she had executed some short time after June 29th, 1864, on which day an order was made by Vice-Chancellor Wood in a creditor's suit instituted against Searson, who had taken out letters of administration to Jackson's estate, and to which the plaintiff, as found to be Jackson's heiress-at-law, had been made a party by a supplemental order. By the order of June 29th, 1864, the defendant Williams was directed to deliver to the plaintiff's solicitor the deeds and muniments of title then in his possession relating to Jackson's real estate. The defendant Williams at first refused to give up the three indentures executed by the plaintiff, but ultimately he gave them up.

The indenture of the 12th September, 1856, was expressed to be made by the plaintiff of the one part and the defendant Radbourn of the other part. It recited the alleged will of Jackson, the contest concerning its validity then going on, that the alleged will was very inartificially prepared and worded, and that doubts existed whether the defendant Radbourn took beneficially or as trustee for the heir-at-law; that the plaintiff was the heiress-at-law, and that whatever might be the result of the proceedings adopted or to be adopted as to the genuineness or otherwise of the will, she, the plaintiff, was satisfied, and believed that Jackson and his sister had adopted the defendant Radbourn as their own, and prevailed on her to live with them on the understanding that they should leave her all they had, and, therefore, the plaintiff had, in consideration of the premises, and to avoid expense and litigation, and in consideration of the sum of 800*l.*, to be paid or secured by mortgage of a competent part of the real estate, agreed to convey all her interest to the defendant Radbourn. The operative part of the deed was a covenant by the plaintiff to convey and assure, according to the agreement therein recited, and a covenant by the defendant Radbourn to pay the plaintiff 800*l.*, or execute a mortgage for that amount with interest at 5*l.* per cent., such mortgage to contain a covenant on the plaintiff's part not to call in the principal within fourteen years if the interest should continue to be paid.

The first indenture of the 19th September, 1859, was expressed to be made between the plaintiff of the first part, the defendant Butler of the second part, the defendant Radbourn of the third part, and the defendant Aldridge of the fourth part. It recited, among other things, the trial and sentence of the defendant Radbourn, and purported to be a complete conveyance of all the plaintiff's interest in the estate of Jackson, except in a certain portion, which was purported to be conveyed to Aldridge in trust to execute a proper mortgage to the plaintiff for the sum and in the manner mentioned in the agreement.

The other deed of the 19th September, 1859, was expressed to be made between the defendant Radbourn of the first part, the plaintiff of the second part, the defendant Butler of the third part, and James Lowe, as dower trustee for the defendant Butler, of the fourth part. It purported to be a conveyance of a portion of the real estate of Jackson to or for the benefit of the defendant Butler.

The defendant Butler had become insolvent, and James Lowe had died, leaving the defendants, the three Lowes, his heiresses-at-law. James Lowe was a mere nominee of the defendant Williams, and never executed the last-mentioned deed.

The value of the whole of Jackson's real estate was stated to be about 17,000*l.*; and the value of the portion thereof purported to be conveyed to the defendant Butler by the second deed of the 19th September, 1859, was about 4,000*l.* The intended mortgage to the plaintiff was never executed.

The defendant Williams stated in his answer that he believed Briggs acted as the plaintiff's solicitor in the matter of the execution of the deeds and otherwise generally. He further stated that he believed, but that he could not positively say, that the deeds were read over to the plaintiff before her execution of them. He offered evidence showing that he had acted *bonâ fide* in the matter throughout.

Willcock, Q.C., and *W. Morris*, for the plaintiff, were not called upon.

Osborne, Q.C., and *Bunting*, for the defendants Radbourn and Williams.—There has been no proceeding at law for the purpose of proving Jackson's will not to be valid *quâ* the real estate. The plaintiff has been found to be Jackson's heiress-at-law in a creditor's suit only, and that is not proper evidence as against the defendant Radbourn that she is such heiress. If the will is valid (and it is not shown to be invalid), and the plaintiff does not fill the position of Jackson's heiress-at-law, the Court cannot say that this arrangement is tainted with fraud, and should be set aside. There is too great an uncertainty in the title of the plaintiff to allow the Court so to say. They cited *Gordon v. Gordon* (3 Swans. 400); *Wright v. Wilkin* (4 De G. & J. 141); *Jones v. Gregory* (12 W. R. 193; 2 D. J. S. 83).

H. J. Hunter, for the defendants the Lowes, asked for costs.

G. Murray, for the defendant Butler's assignee, disclaimed.

Wood, V.C., said that the plaintiff's claim was made undoubtedly on the ground that, being an heiress-at-law entitled to real estate, she was induced to sign deeds disposing of the real estate without proper advice, and while she was ignorant of her rights and of what she was doing. Mr. Osborne had said that it was not proved that the document which purported to be Jackson's will was invalid as to the realty; and that if it was valid *non constat* that the plaintiff had not had a good bargain. Again he said that the plaintiff had not been properly shown to be Jackson's heiress-at-law. The answer to both these objections was that the bill alleged that the defendants treated her as the heiress. The recitals in the deeds sought to be set aside proved of themselves that this allegation in the bill was true. Nor was this the whole case of the plaintiff. She might well say, "You have embrangled me with deeds of which I know nothing. I am a markswoman, and you have by misrepresentation procured my execution of deeds which were never read over or explained to me. I wish to be put in the position in which I should have been if I had not executed those deeds." This was not at all like the case of an heir coming to ask the Court to set aside terms of years or a mere dry legal estate in order that he might go to law; but the quite different case of an illiterate person fraudulently and by misrepresentation induced to execute deeds, the nature of which was never explained to her. [His Honour went through the evidence and came to the conclusion that the fraud had been made out. He commented on the fact that if the defendant Williams really thought Briggs was the plaintiff's solicitor, it was his duty to have communicated with Briggs on the

subject of the deeds as affecting the plaintiff's interests, just as he did communicate with Briggs on the defendant Butler's interests. His Honour also expressed his regret that Wood, who was called in to attest the execution, did not inquire whether the plaintiff, whom he saw to be a markswoman, had had the deeds read over and explained to her.]

The following were the minutes of the decree.—Declare that as against the plaintiff the indenture of the 12th September, 1856, and the two indentures of the 19th September, 1859, are fraudulent. Declare that the parties who took legal estates thereunder are trustees of such estates for the plaintiff, and direct re-conveyances, the plaintiff, at the expense of the defendants, to execute any such instruments as the judge in chambers shall direct for releasing the mortgage or charge in her favour, and the covenants therein contained. The plaintiff to pay the costs of the defendants the Lowes, and to have them and her own costs, including the costs of re-conveyances, &c., from the defendants Radbourn and Williams.

Wood, V.C., April 19, 1866.

CAMPBELL v. JOYCE.

14 W. R. 605; L. R. 2 Eq. 377; 14 L. T. 353.

Practice—Taking amendments off the file after plea left unanswered for three weeks—Laches.

Where defendants, who are entitled to an order of course for dismissal of the bill against them, do not apply for the order, and the plaintiff amends his bill, retaining them as defendants, the defendants' laches will not disentitle them to have the bill dismissed, though it will disentitle them to their costs.

This was a simple question of practice.

Two of the defendants in this suit had been adjudicated bankrupts since the institution of the suit, and had put in a plea of bankruptcy to the bill. The plaintiff had not set down the plea for argument within three weeks from its being filed, but had obtained leave to amend after the expiration of the three weeks. The amended bill introduced new averments respecting these defendants, who were still retained as defendants.

Giffard, Q.C., and *Druce*, for the bankrupt defendants, now moved to have the orders for leave to amend discharged, and the amendments taken off the file. Under C. O. xiv. r. 17, these defendants were entitled to an order of course for the dismissal of the bill against them after the expiration of the three weeks; and, therefore, it was clearly irregular to give leave to introduce these amendments. If the plea had been argued, the Court would not have given leave to amend.

E. K. Karlake, for the plaintiff, resisted the motion. He contended that these defendants, by not having applied for the order of course for dismissal of the bill, had waived their right to do so, and had thus allowed the plaintiff to suppose that they would meet him on the amended bill. The plaintiff had made out a case against the said defendants, which would be good against them notwithstanding their bankruptcy. He would be put to the expense of filing a fresh bill if this order were granted. These defendants had, by their delay, disentitled themselves to the order now asked for.

Wood, V.C., said that the proceedings had been irregular, and that he must discharge the order to amend, and dismiss the amended bill as against the bankrupts, with costs of the old bill up to the time of the amendments,

as if the defendant's plea had been allowed on argument as a plea to the whole bill. These defendants must, notwithstanding their *laches*, be in the same position as they would otherwise have been, except that they must, on account of their *laches*, be refused the costs of this motion.

Wood, V.C., April 19, 20, 1866.

SMITH v. THE REESE RIVER SILVER MINING COMPANY.

14 W. R. 606; L. R. 2 Eq. 264; 14 L. T. 283; 12 Jur. N.S. 616.

Motion to restrain action for a call on shares—Misrepresentation.

COMPANY.—Where a person has been induced to take shares in a company on the faith of representations contained in their prospectus, which afterwards turned out to be false, he will be entitled to an interim injunction to restrain proceedings at law to enforce a call.

This was a motion to restrain proceedings at law to enforce a call of 1l. a share on the shares held by the plaintiff in the defendants' undertaking, on the ground that he had been induced to purchase the shares by the misrepresentations contained in the original prospectus of the company. This prospectus set forth that the company had contracted to purchase a certain very valuable mineral property of fifty acres, that the vendor had made a large fortune from working adjoining mines, and that he was willing to receive the whole of the purchase-money in paid-up shares of the company.

The directors alleged that they had issued this statement believing it to be true, but it did not appear that they had, previously to issuing it, taken any steps to ascertain its truth; and, after the plaintiff had had the shares in question allotted to him on his application, and had paid the necessary deposit, it turned out that the representations as to the contract having been entered into, and as to the value of the property, were untrue.

Rolt, Q.C., and *Eddis*, for the plaintiff, cited *Rawlins v. Wickham* (7 W. R. 145; 3 De G. & J. 319).

Roxburgh and *Buchanan*, for the defendants, contended that there had been no misrepresentation, as the statements in the prospectus were made honestly in the belief that they were true.—[Wood, V.C.—It has been decided that a representation, made without knowledge of its truth, is not made honestly.] The contract between plaintiff and the defendants was to be construed by the articles of association, of which the plaintiff had notice, and which show that the company was not merely formed for the purpose of buying the particular property mentioned in the prospectus, but for the general purpose of purchasing and working mines: *Re Hop and Malt, &c., Company; Ex parte Briggs* (1 L. R. Eq. 483; 10 Sol. Jour. 359). If this order is granted, the directors will not be able to enforce any calls, and it will stop all their operations. The amount of the call ought to be brought into court.

Rolt, Q.C., contended that under the circumstances the company had no right to ask for the money to be brought into court.

Wood, V.C., said that the representations as to the contracts, as to the value, and as to the vendor's profits, contained in the prospectus, were distinct and positive, and that they had been shown to be false. It was only after the promoters had got their shareholders that they thought it their duty to examine into the truth of the representations. The plaintiff was bound by the articles of association, but they would only have told him of the alleged contract, and

that the directors had power to rescind it. He was entitled to rely on the truth of the representations made in the prospectus. His Honour granted the injunction, and refused to order the money into court.

[IN THE QUEEN'S BENCH.]

April 17, 1866.

Ex parte PEPPERCORN.

14 W. R. 606. For proceedings in the Common Pleas, see [1866]
E. R. A. 1657.

23 & 24 Vict. c. 127. s. 10—*Admission of attorneys—Certificate of examiners.*

SOLICITOR.—*A stewardship of manor is an office within s. 10 of 23 & 24 Vict. c. 127.*

R. E. Turner moved for an order to the examiners appointed to examine persons desirous to be admitted attorneys to grant a certificate to the applicant, *Walter Peppercorn*.

The facts of the case were as follows:—*Mr. Peppercorn* was, in the year 1861, articulated as clerk to a firm of attorneys. Shortly after he was so articulated, his father, a gentleman occupying the office of steward of the manor of Headington, died. Upon the death of the father the son succeeded him as steward of the manor. The manor belonged to one of *Mr. Peppercorn's* family, and the office of steward had always been held by some one of the family. *Mr. Peppercorn* appointed a deputy to act for him as steward, and was only absent from his master's office three times for the purpose of his office as steward. The fees of the manor court were divided between *Mr. Peppercorn* and the deputy.

23 & 24 Vict. c. 127, s. 10, requires that no person bound by articles of clerkship to any attorney shall hold any office other than that of clerk to such attorney, during the term of service mentioned in such articles, and before admission he must prove he has not done so by affidavit.

The examiners, upon the above circumstances, refused to grant their certificate, although they found *Mr. Peppercorn* fit and capable to act as an attorney.

COCKBURN, C.J.—I do not see how we can make this order. *Mr. Peppercorn* has clearly held an office within the meaning of the words of the statute. The statute gives us no discretionary power. We sympathise with *Mr. Peppercorn*. His is a hard case, and one probably never contemplated by the Legislature.

BLACKBURN, LUSH, and SHEP, JJ., concurred.

Order refused.

[IN THE COMMON PLEAS.]

April 16, 1866.

HIGGS v. MAYNARD.

14 W. R. 610; H. & R. 581; 14 L. T. 332; 12 Jur. N.S. 705.

Negligence—Inference of negligence from the accident itself.

NEGLIGENCE. A.—*The defendant's window was broken by a ladder falling against it from the inside of the building, but it was not shown how the ladder came to fall. The plaintiff was lawfully under the window, and a piece of the falling glass stuck in his eye. The defendant was a coffee roaster, but it was not shown in what way the room, of which the window was broken, was used:—Held, that the plaintiff was rightly non-suited in an action against the defendant for negligence, inasmuch as the ladder was not shown to be connected with the defendant's business, or with the management of his household, and therefore there was no affirmative evidence of negligence by him or his servants.*

Declaration—for that the defendant so carelessly &c., managed a ladder, in the course of removing the same near to certain premises in which the plaintiff was then employed, that the said ladder was driven through a certain glass window, parcel of certain other premises, whereby the glass thereof was broken and was driven into the eye of the plaintiff, whereby, &c.

2nd count—for that the defendant projected certain broken glass against the plaintiff, whereby the same was driven into the eye of the plaintiff, &c.

Plea—not guilty, and issue thereon.

The facts proved at the trial before Byles, J., at Westminster, were as follows:—

The plaintiff was in the employment of a firm whose premises were separated from those of the defendant by a passage, and on the day of the accident he was, in the course of his duty, at work in this passage. On hearing the noise of one of the defendant's windows being smashed above his head he looked up, when a fragment of falling glass stuck in and deprived him of the sight of one of his eyes. The defendant used his premises for roasting coffee, but it was not proved for what purpose the room of which the window was broken, and which was at the top of the building, was used. The floor below it was used as a warehouse, and the communication between the two floors was by means of a trap-door, and this trap-door was directly below the window that was broken. The window itself was a swinging window, moving on a pivot, and the pane of glass was broken by a ladder falling against it from the inside, but there was no evidence to show what caused the fall of the ladder. On these facts the plaintiff was non-suited.

Keane, Q.C., now applied for a rule to set aside the non-suit and enter the verdict for the plaintiff. The ladder was inside the house, and, therefore, presumably under the defendant's care; *prima facie* it belonged to him, and it is for him to show how the accident happened; and if he cannot exonerate himself by doing so he must be held liable. In *Byrne v. Boadle* (12 W. R. 279; 2 H. & C. 722), the fact of the barrel of flour falling into the street from a window over the defendant's shop, was held to throw on him the *onus* of proving that the accident was not caused by his negligence. And so the falling of a bag of sugar from a crane in the docks was held to afford reasonable evidence of negligence in the absence of any explanation by the defendants: *Scott v. The London Dock Company* (13 W. R. 99, 34 L. J. Ex. 17; in error 13 W. R. 410, 34 L. J. Ex. 220).

ERLE, C.J.—This rule must be refused. It is clear that the party

complaining of a wrong must give affirmative evidence of it. An accident in the ordinary course of a man's business may raise a presumption of negligence; but you do not connect the ladder with the defendant's trade, by showing that it was used in it, nor do you connect it with the management of his household.

KEATING, J.—The case of *Scott v. The London Dock Company* is very distinguishable, because it was there shown that the bag of sugar, by some means or other, escaped from the chains used in raising goods to the defendant's warehouse, and fell; so that there was *prima facie* evidence of negligence.

MONTAGUE SMITH, J., concurred.

BYLES, J.—At the trial I thought it was not shown that the defendant or his servants had anything to do with the ladder.

Rule refused.

[IN THE COMMON PLEAS.]

April 17, 1866.

COOPER AND ANOTHER v. LANDS.

14 W. R. 610; 14 L. T. 287.

Ejectment—What title plaintiff must prove—Attornment.

EJECTMENT. E.—*Defendant, an uncertificated bankrupt, purchased premises which he had occupied, and which he continued to occupy for the purposes of his business. These premises were conveyed to A., in trust for the defendant, by a deed which recited that the legal estate was outstanding in a third person. Subsequently A., on the order of the Court of Chancery, conveyed the premises to the plaintiffs, the assignees appointed under the defendant's bankruptcy. After this the plaintiffs' attorney took possession of defendant's goods, and threatened to turn him out of the premises unless he signed an attornment to the plaintiffs, which he accordingly did:—Held, that plaintiffs had sufficient title to enable them to maintain the action.*

This was an action of ejectment brought to recover possession of one-third part of a house, No. 181, High-street, Camden Town, consisting of the ground floor.

In 1855 the defendant was carrying on the business of a boot and shoe maker in the above premises under the name of White, and whilst so doing had an action brought against him by one Rooksby. In that action Rooksby got judgment, and the defendant was arrested; he was adjudicated a bankrupt on the 3rd April, 1855, and the plaintiffs were appointed creditors' assignees. The defendant never obtained a certificate.

In 1851 the defendant had obtained a lease of the premises in question for a term of nine years at a ground rent of 30*l.*, and at the expiration of that term, being anxious to purchase the premises, and desiring to secure them for his own benefit, he being an uncertificated bankrupt, he induced an acquaintance, Mr. Barnes, to take the conveyance as his trustee. This conveyance showed the legal estate to be outstanding in a third person. A declaration of trust was subsequently prepared, and the purchase was completed in June, 1860.

The defendant continued to occupy the premises from 1860 until January, 1864, when the circumstances under which the defendant held the premises became known to the plaintiffs, and proceedings were taken in the court of

chancery in order to compel Barnes to convey his interest in the said premises to the plaintiffs as creditor's assignees. These proceedings resulted in a conveyance being prepared and executed without the defendant's knowledge, dated in July, 1865, whereby Barnes conveyed all his freehold interest in the said premises to the plaintiffs.

On the 20th September two men were sent down by the plaintiffs' attorney to the defendant's premises in order to take possession of his shop and stock-in-trade, and while they were in possession the plaintiffs' attorney arrived and threatened to remove all the defendant's goods from the house unless he signed an attornment to the plaintiffs. Thereupon the defendant signed a document of which the following is a copy:—

"To Mr. Charles E. Lewis, of 24, Old Jewry, London, Solicitor for the Assignees of Thomas Lands, a Bankrupt.

"I hereby attorn tenant to you of the house, shop, and premises, No. 181, late 86, High-street, Camden Town, in the county of Middlesex, and agree to become weekly tenant of such premises, to be held of you, and at the rent of ten pounds per week, commencing from Saturday, the 23rd day of September, 1865, and payable every Saturday following, subject to one week's notice to quit.—Yours obediently,

"THOMAS WHITE."

"22 Sept. 1865.

Rent was subsequently demanded of him, and on his refusing to pay possession was taken of his goods, and this action was brought to recover possession of the shop.

The case was tried before Byles, J., at the Middlesex Sittings, on the 7th February, 1866, when a verdict was found for the plaintiffs.

Folkard now moved, on behalf of the defendant, for a rule *nisi* for a new trial, and contended (1) that the plaintiffs had no legal estate, since under the deed of June, 1860, the legal estate was outstanding in a 3rd person; (2) that the plaintiffs proved no legal tenancy under the attornment, inasmuch as the defendant did not receive possession from the persons to whom he attorned: *Cornish v. Searell* (8 B. & C. 471); (3) that the attornment was not sufficient in law to support a tenancy: *Evans v. Mathias* (7 E. & B. 590); and (4) that, since there was evidence of fraud in the mode in which the attornment had been procured, that question should have been left to the jury.

ERLE, C.J.—I am of opinion that there should be no rule in this case. I think that the fact of the defendants having attorned to the plaintiffs shows sufficient title to enable them to recover under the circumstances of this case. There would unquestionably have been a good title in the plaintiffs if the deed of June, 1860, had not recited a legal estate in a person who could not be found. The defendant, by the document of September 20th, admits to the plaintiff that he will go out at a week's notice, and this will give a good title to the plaintiffs.

BYLES, J.—I am of the same opinion.

KEATING, J.—I am of the same opinion. No doubt the fact of the attornment could not estop the parties to it from explaining the circumstances under which it was brought about. In the present case Barnes held the property in trust for the defendant, and Barnes was compelled by the Court of Chancery to convey to the plaintiffs to whom the defendant attorned, and I think, therefore, that the plaintiffs had sufficient title to enable them to maintain this action.

SMITH, J.—I am of the same opinion. The effect of an attornment usually is to prevent the party from disputing the title of the person to whom he attorns. I think, therefore, that the defendant cannot dispute the plaintiffs' title, and that the verdict was right.

Rule refused.

[IN THE COMMON PLEAS.]

April 18, 1866.

AXFORD v. PRIOR.

14 W. R. 611.

Negligence—Unfenced hole—Innkeeper—Guest.

NEGLIGENCE. B.—*The plaintiff went to a public-house by appointment to meet a friend, and, as his friend had not arrived, walked into the parlour, and there fell through a hole in the floor, which was being repaired. As far as appeared, his only object in coming to the house was to meet his friend. In an action against the landlord for negligence in not fencing the hole, and in which the plaintiff alleged that he was in the house as a guest, the jury found for the plaintiff.*

The Court refused a rule to enter a nonsuit, which was asked for on the ground that there was no evidence, either of negligence on the part of the defendant, or of the plaintiff being in the house as a guest.

Declaration.—That before and at the time of committing the grievance hereinafter mentioned the defendant was possessed of a public inn, and the plaintiff was lawfully in the said inn as a guest, and the floor of a certain part of the said inn, over which the guests of the said inn lawfully passed, had been removed, and a large hole made therein by the defendant; yet the defendant wrongfully left the said hole unfenced and uncovered, and in such a dangerous state that the plaintiff, who was lawfully in the said inn as such guest as aforesaid, and lawfully passing over the said floor, by and through the negligence, &c., of the defendant in that behalf, fell through the said hole and was permanently injured, &c.

Pleas.—1. Not guilty.

2. That the plaintiff was not lawfully in the said house as a guest as alleged.

3. That the guests of the said house did not lawfully pass over the floor of the said part of the said inn, nor was the plaintiff lawfully passing there as alleged.

Issue on these pleas.

At the trial before Byles, J., at Westminster, the jury found a verdict for the plaintiff with 30*l.* damages.

The facts were as follows:—The defendant was the proprietor of the City of Norwich Inn, Norfolk Street, Park Lane. The defendant, who was a stranger to the house, came there in the middle of the day to meet a friend by appointment, and, as his friend had not arrived, waited there for him; but he did not order any refreshments, and it did not appear that he had any other motive for staying in the house than that of waiting for his friend. Part of the floor of the parlour of the house had been taken up, leaving a hole about four feet square, and the carpenter was still at work upon it. The plaintiff walked from the bar into the parlour, the door of which was open, and fell down the hole, which he swore he did not see. There was no one else in the parlour but the carpenter who was at work there. It did not appear that the plaintiff spoke to anyone in the house, though there was some contradictory evidence as to whether he had been warned not to go into the parlour.

Hawkins, Q.C. (Murphy with him), moved for a rule to enter a nonsuit or a verdict for the defendant, on the ground that there was no evidence of negligence on the part of the defendant, nor any evidence that the plaintiff was in the house as a guest, or for a new trial on the ground that the verdict was against the weight of evidence.

The COURT¹ refused the rule, saying that there was no ground for a nonsuit, and that, as the judge who tried the case was not dissatisfied with the verdict, they would not be justified in interfering with it.

Rule refused.

[IN THE PRIVY COUNCIL.]

Feb. 16, 1866.

DUTHIE v. BUTLER.*

14 W. R. 617.

Practice—Appeal restored—Order V. of the Orders in Council of June 13th, 1853.

COLONY. C.—*Circumstances under which the time limited for prosecuting an appeal before her Majesty in Council by the fifth order of the Orders in Council of June, 1853, was extended, and a certificate dismissing the appeal set aside.*

This was a petition praying that a certificate dismissing this appeal might be set aside, and the appeal restored.

The material facts, as stated in the appellant's petition, were as follows:—The appellant was registered as the owner of a certain ship called the *Indiaman*, but was in reality, as he alleged, only owner of thirty-two shares in the said ship, the residue belonging to one George Robinson. The respondent brought an action against the appellant, as owner of the said ship, in the Supreme Court of Hong Kong, to recover damages for an alleged unlawful sale of a cargo. In this action a verdict was found for the respondents (the plaintiffs below) for the sum of 2,646l. 6s. The defendant subsequently obtained a rule calling on the plaintiffs to show cause why the verdict should not be set aside, and a nonsuit entered, but on the 16th of January, 1865, the Court discharged the rule, and the petitioner received leave to appeal to this Board. Security for costs, &c., was given by the defendant in the usual way, and the record transmitted to the registrar of the Committee.

In November, 1864, George Robinson became sole owner of the said ship. In July, 1865, the petitioner, being in pecuniary difficulties, entered into a composition deed with his creditors, and by reason of his embarrassments he alleged that he was unable to prosecute this appeal within six months after the arrival of the record in England, and that the appeal had consequently been dismissed under Rule 5 of the Orders in Council of June 13th, 1853. By this order it is provided:—"That a certain time be fixed within which it shall be the duty of the appellant or his agent to make such application for the printing of the transcript, and that such time be within the space of six calendar months from the arrival of the transcript and the registration thereof in all matters brought by appeal from her Majesty's colonies and plantations east of the Cape of Good Hope, or from the territories of the East India Company, and within the space of three months in all matters brought by appeal from any other part of her Majesty's dominions abroad, and that in default of the appellant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively, the appeal shall stand dismissed without further order, and that a report of the same be made to the Judicial

(1) Erle, C.J., Byles, Keating, and Smith, JJ.

* Present—Knight-Bruce, L.J., Turner, L.J., Sir J. W. Colville, and Sir E. V. Williams.

Committee by the registrar of the Privy Council at their Lordships' next sittings."

No appearance had been entered by the respondents.

E. G. Gibson for the petitioner.

Judgment.—Their Lordships, under the circumstances, directed the appeal to be restored.

Order granted.

ROMILLY, M.R., April 21, 1866.

Re LEARMOUTH.

14 W. R. 628.

Bankrupt—Right to keep up policy in which assignees have disclaimed interest—Title to fund.

BANKRUPTCY. INSURANCE.—*A bankrupt, after his bankruptcy, kept up the premiums of certain policies of insurance which he had mortgaged previous to his bankruptcy, and the premiums on which he had covenanted to keep up, and in which the assignees had disclaimed any interest, fulfilling also the condition on which he had obtained his discharge:—Held, that his representatives were entitled to the residue of the moneys payable under the policies after payment of the mortgage debt due on them.*

This was a petition for payment out of court of a sum of money, which had been paid into court by a mortgagee of certain policies of insurance, after deducting his principal interest and costs.

The mortgagor of the policies, subsequently to the mortgage, became bankrupt, and the assignees refused to pay the premiums and keep up the policies, and disclaimed all interest in them. The bankrupt mortgagor obtained his order of discharge, undertaking to pay a certain yearly sum towards the liquidation of his debts; this sum had been regularly paid. He also kept up the policies of insurance by paying the premiums.

On the death of the mortgagor the mortgagee received the amount due on the policies, and, after deducting the amount due on his mortgage, paid the balance into court. The representatives of the deceased mortgagor presented a petition, asking that the fund might be paid out to them. The assignees under the bankruptcy opposed the application, and claimed the fund for the creditors under the bankruptcy.

Gardiner, in support of the application.

C. Barber for the creditors' assignees.—The bankrupt, by the 154th section of the Bankruptcy Act of 1861, is not bound to pay the premiums on a policy.

Saunders v. Best (17 C.B. N.S. 731; 13 W. R. 160), *Drysdale v. Piggott* (8 D. M. G. 546; 4 W. R. 773), Bankruptcy Act, 24 & 25 Vict. c. 134, s. 154, were cited.

LORD ROMILLY, M.R.—The petitioners, the representatives of the deceased mortgagor, are entitled to the fund.

ROMILLY, M.R., April 24, 1866.

AYLWARD v. SHRIMPTON.

14 W. R. 628.

Summons to vary chief clerk's certificate—Mortgaged property in custody of mortgagor—Sale—No right to set-off against mortgage debts.

MORTGAGE.—A mortgagor of certain property had continued to retain control of the same, which was seized by the landlord for arrears of rent due from the mortgagor. An inquiry had been directed in the suit as to what part of the mortgaged property had been sold by the mortgagee, and a direction that the property sold by him should be set-off against his mortgage debt.

The chief clerk had found that the part of the property in question had not been sold by the mortgagee. His finding was upheld by the Court.

This was a summons to vary the chief clerk's certificate with respect to certain matters in the suit, on the ground that the finding was not according to the evidence.

The defendant had a bill of sale of certain property which the sheriff had taken in execution, and had by such bill of sale assigned to the defendant on his discharging the amount due under the execution. The plaintiff had also mortgaged to the defendant all the property in and about a certain farm, including the crops, &c., for 200*l.*, and also executed an agreement to assign to the defendant his (the plaintiff's) lease of the farm.

The defendant entered into possession of the farm, but not of the farmhouse, the plaintiff continuing to occupy the house. The plaintiff had obtained leave in this suit to redeem the mortgage for 200*l.*, and an inquiry was directed as to what part of the property, comprised in the mortgage, had been sold by the defendant, and the proceeds of such part as had been sold by him were to be reckoned in discharge of the mortgage debt. The chief clerk by his certificate found that no portion of the property comprised in the mortgage except a horse had been sold by the defendant, and that there was a balance due to him for principal and interest. The plaintiff contended that some furniture included in the mortgage, which had been sold under a distraint for rent, by the landlords of the farm, should also be set off against the defendant's claim under the mortgage, on the ground that the furniture was in his possession at the time of the sale, through his agent, whom he had told to take possession thereof.

Selwyn, Q.C., and *Speed*, resisted the application on behalf of the defendant.

LORD ROMILLY, M.R.—The plaintiff had possession of the house, and therefore of the furniture in the house, and the landlord selling it under a distraint, it cannot be said to have been sold in reduction of the mortgage debt. The summons is dismissed with costs.

KINDERSLEY, V.C., April 18, 1866.

HOPPER v. CONYERS.

14 W. R. 628; L. R. 2 Eq. 549; 12 Jur. N.S. 328.

Lien—Solicitor—Purchase with client's money—Deposit of client's deeds.

MORTGAGE. SOLICITOR.—C., the confidential solicitor of Messrs. H., purchased an estate for himself, and borrowed 3,000*l.* on the deposit of their

title deeds, which he applied in part payment of the purchase-money. He afterwards repaid the 3,000l. to the parties from whom it was borrowed, out of mortgage moneys belonging to Messrs. H., which he received for them. Messrs. H. knew nothing of the purchase by C., or the borrowing or repayment of the 3,000l., and C. paid the interest on the mortgage money for seven years till his death, on the representation that he had invested it on real security. On bill filed against his representatives by Messrs. H., Held, that there was a lien for the 3,000l. on the estate purchased by C.

This bill was filed to enforce a lien on the Winhill estate at Great Driffield, Yorkshire, purchased by the solicitor of the plaintiffs, on his own account, and partly paid for with money borrowed on the security of their title deeds, without their knowledge. The plaintiffs, James Hopper and Thomas Hopper, were the executors and trustees of the will of George Hopper, dated 28th April, 1837, in which year he died. The testator was possessed of a mortgage term for 1,000 years, in premises of Witham and Ottringham, in Yorkshire, to secure 1,700l. and interest; and the plaintiffs, on 4th March and 1st December, 1853, advanced to the mortgagors (Robert Wright and Mary his wife), further sums of 800l. and 600l. (in all 3,100l.), on a mortgage in fee of the same premises. Edmund Dade Conyers was confidentially employed by them as their solicitor, and he received notice in October, 1855, from the mortgagors' solicitor, that the mortgage would be paid off on 6th April, 1856. Meantime he had himself contracted with Richard Jennings to purchase from him, for 4,200l., an estate at Winhill, Great Driffield, Yorkshire, the terms of the contract being to complete on 6th April, 1856. In April, 1856, Conyers received notice from the mortgagors' solicitors that they should not have the money ready, and as he had been depending upon it to meet the instalment of his purchase-money, he stated to them that the delay would be very inconvenient, and he should be obliged to borrow the money. He then went to his bankers, Messrs. Bower & Co., at Driffield, and borrowed from them 3,000l. at bankers' interest, on a deposit of plaintiffs' title deeds of the mortgaged property, but there was no evidence to show what statement (if any) he made to the bankers. On 10th May the mortgage money was paid to Conyers, and he, with it, repaid the debt to the bankers, got back the deeds, and prepared a reconveyance from the plaintiffs, which he produced to them, and got them to execute, stating that he had received the mortgage money and reinvested it on real security. He made no other communication to them, and they swore that they were perfectly ignorant of the fact of his purchase of the Winhill estate, and of his borrowing the money from his bankers on the deposit of their deeds, and repaying them with the mortgage money.

In May, 1860, Conyers mortgaged the Winhill estate to Emma Piercy for 3,000l., which mortgage was still subsisting. From that time until the death of Conyers, on 8th October, 1863, he continued to pay the interest to the plaintiffs regularly, as if the mortgage-money had been laid out on mortgage as he had represented, and the true nature of the transaction was not discovered till his death. As he died in embarrassed circumstances a creditors' suit was instituted in Vice-Chancellor Stuart's court, and the usual decree made; whereupon this bill was filed against his widow and executrix, for the purpose of recovering the 3,000l. paid to the bankers out of the Winhill estate, by a declaration that there was a charge on it for 3,000l., and by sale, &c., in the usual way. The bill also asked for a receiver.

Glasse, Q.C., and Newton Stuart, appeared for the plaintiffs, and referred to *Lewin on Trusts*, 4th edit., 585; *Taylor v. Plumer* (3 M. & S. 562-73), *Pennell v. Deffell* (1 W. R. 499; 4 D. M. G. 372), *Denton v. Davies* (18 Ves. 499), *Small v. Attwood* (2 Y. & J. 512; s. c. 6 Cl. & Fin. 232).

Fry, for the defendant, contended that there had been a loan of the 3,000l., and therefore that it was a single contract debt. Conyers was employed generally as confidential solicitor, and had a general power to do as he saw fit

with the monies in his hands, and therefore, there being no specific trust attached to this money, it was only a simple contract debt: *Lench v. Lench* (10 Ves. 511), *Frith v. Cartland* (18 W. R. 498; 2 H. & M. 417).

Without hearing a reply,

KINDERSLEY, V.C.—I think the plaintiffs are entitled to a decree. I will consider the case as if Conyers were now alive; but, in fact, the question is between the plaintiffs and his general creditors, who can stand in no better situation than he could have done. The facts are not in controversy. Mrs. Conyers is only doing her duty in endeavouring to lead the Court to the conclusion that there is no lien, and putting forward the case most adverse to the plaintiffs; and she contends that the money was borrowed from the plaintiffs; but it appears to me that was not so; and, therefore, whether they are entitled to such a lien or not, they cannot fail on the ground of loan, for they knew nothing of the transaction whatever. If, when the money was repaid by the mortgagors, Conyers had applied it in purchasing the Winhill estate for himself, and it had been shown that that very money went towards the purchase, I have no doubt that the plaintiffs would have a lien as against Conyers. But that was not exactly so, for Conyers had informed one of the Hoppers, as appears by their evidence, that the mortgage money was about to be repaid, and that he would reinvest it in a mortgage of real estate. That is exactly in accordance with the *res gestæ*, and Conyers wished his clients so to understand it, and that is uncontradicted; and I see no reason to distrust it. Conyers was to receive the money as agent, and make a proper investment in real estate. Having contracted to purchase the estate he was naturally anxious to get the money to pay for it, but he never asked the plaintiffs' leave, but simply communicated to the mortgagors' solicitors that he should be obliged to borrow the money, not saying on whose account; and he did so; and what is most material, on the deposit of the title deeds of that very property mortgaged. It does not appear that any communication as to the ownership of the property was made to the bankers, but he received the money from them, which he could only have a right to do as the plaintiffs' money, and he applied that very money in part-payment for the Winhill estate. The plaintiffs' title deeds were wrongly made security to the bankers for 3,000*l.*, and part of the mortgage money, when received, was applied to repay that very money so borrowed; so that only question really is whether the intermediate transaction, the borrowing and repayment, makes any difference as to the plaintiffs' right to a lien. I think it does not, by reason that the money was borrowed on the security of the deeds of the clients; for if it had been borrowed only on his security it would have been a debt due from him to the bankers, in which case the plaintiffs could not have succeeded. As it is they are entitled to a declaration that there is a lien on the Winhill estate for 3,000*l.* There must be a receiver.

KINDERSLEY, V.C., April 18, 1886.

SHERIFF v. BUTLER.

14 W. R. 629; 14 L. T. 510; 12 Jur. N.S. 329.

Joint-stock company—Winding-up—Liability of trustee to pay calls personally.

COMPANY. M.—*Certain old shares in a subsisting bank being in the name of one of two trustees, he received a circular asking him whether he would*

take new shares in respect of such old shares. The *cestui que trust* (a married woman, tenant for life without power of anticipation), urged him to take them, and herself sent to the bank the form filled up by him.

In the suit a call as to the old shares was directed to be paid out of the estate, but as to a call on the new shares:—Held, that he could not be indemnified.

The bill was filed by one of two trustees of a marriage settlement of Mr. and Mrs. Cumpston against his co-trustee and the *cestuez que trustent*, asking the direction of the Court in respect of a call on certain new shares, allotted in respect of old shares, in the Leeds Banking Company, now in course of winding-up.

The trusts of the settlement were to Mrs. Cumpston for life without power of anticipation, remainder to such uses as she should appoint; and, in default, that her husband should have 500*l.* a-year. Part of the property settled consisted of fifty-five old shares in the Leeds Bank, and these were transferred into the name of the defendant Butler (one of the trustees) alone.

In June, 1864, a circular was sent to him requesting to know whether he would take new shares, to eleven of which he was entitled in respect of the fifty-five old ones already held by him, and with it was sent the printed form of application to be filled up and returned. He took no notice of this, but Mrs. Cumpston earnestly requested him to accept the proposal, and he having filled up the form gave it to her, and she sent it to the bank. Butler then applied to the plaintiffs to concur in selling out part of the trust fund to meet a call which had been made; but he filed this bill, and an inquiry was directed as to the circumstances under which the new shares were purchased, &c.

Under orders in chambers 6,050*l.* out of the trust funds had been applied in paying calls on the old shares, and the only question was with respect to a call of 1,540*l.* now made in respect of the new shares.

Darby, for the plaintiff, submitted the question.

Glaspe, Q.C., and Dunning, for the defendant Butler, said this case was an extremely hard case, and contended that inasmuch as an order had already been made for payment out of the trust fund of a call on the old shares, and inasmuch as the eleven new shares were allotted in respect of the old shares, they must be considered as an accretion on the old shares, and the same principle must be applied. The legal liability as between him and the bank could not be contested; but if the affair had turned out profitable, and he had not taken the new shares, he would have been liable for a breach of trust. Nothing could be decided now on the question of the non-liability of Mrs. Cumpston: *Clive v. Carew* (7 W. R. 433; 1 J. & H. 199), followed by this Court in *Pemberton v. McGill* (8 W. R. 290).

Baily, Q.C., and Bovill, for Mrs. Cumpston, were not called upon.

KINDERSLEY, V.C.—It is impossible to decide that Mr. Butler is entitled to be indemnified in respect of this call. I have no hesitation in saying that if there had not been the restraint on anticipation, Mrs. Cumpston's life interest must have been liable; but as there is such restraint, it is not. Neither can I direct payment out of the *corpus*; for that does not belong to her; if it did, it would be available. Therefore it is impossible, either out of income or *corpus*, to indemnify Mr. Butler. It is very unfortunate for him under the circumstances.

Costs by arrangement out of the estate.

STUART, V.C., March 20, 1866.

MILLS v. TRUMPER.

14 W. R. 630; L. R. 1 Eq. 671; 14 L. T. 220; 12 Jur. N.S. 220: reversed, [1869] E. R. A.; 17 W. R. 428; L. R. 4 Ch. 320; 20 L. T. 384 (L.JJ.).

Apportionment—11 Geo. 2, c. 19, s. 15.

APPORTIONMENT.—*A tenant for life in an estate pur autre vie, and who subsequently purchased the remainder in fee, granted parol demises to yearly tenants, one of whom was entitled to an estate of inheritance in the lands on the death of the tenant for life.*

On the tenant for life dying between the two half-yearly periods for payment of rent:—Held, that his executors were entitled to an apportionment.

By indentures of lease and release, dated the 27th and 28th July, 1811, certain hereditaments in the county of Monmouth, held on a lease for lives under the Duke of Beaufort, were released to trustees upon trust to permit W. W. Trumper to receive the rents and profits for his life, remainder on certain trusts for the benefit of his wife and children, with remainder to the defendant Thomas Trumper and his heirs on attaining the age of twenty-four years. All the *cestui que vie* having died, W. W. Trumper, on 11th May, 1818, renewed the lease for three further lives, for the benefit of those entitled under the indentures of July, 1811, and in 1819 purchased the land.

By a deed of the same year W. W. Trumper conveyed the land (subject to the estates still subsisting) to the use of one James Davies, his heirs and assigns, in trust for the said W. W. Trumper, his heirs and assigns, to be conveyed and disposed of as he or they should direct. The lands consisted of two farms, known as the "Lower Grounds," and "The Greige" respectively (let to two tenants, Jones and Watkins), and of a third farm called "The Lawns," let to the defendant Thomas Trumper by a parol demise and as yearly tenant, with rent payable on the 2nd February and the 2nd August.

On the death of W. W. Trumper, on 23rd December, 1859, and between the two half-yearly periods of payment the defendant Thomas Trumper became entitled to an estate of inheritance in the three farms. He received the rents for the two farms let to Jones and Watkins, but claimed not to be liable to an apportionment in respect of them, or in respect of the farm held by himself.

Malins, Q.C., and *Blackman*, for the plaintiff, argued that the case clearly came within the 11 Geo. 2, c. 19, s. 15.

Greene, Q.C., and *J. Pearson*.—W. W. Trumper was a tenant for life in an estate *pur autre vie* only, and this Act did not provide for such a case. He could not claim under the subsequent Act of 4 & 5 Will. 4, c. 22, as the leases were parol only: *In re Markby* (4 Myl. & C. 485). Here W. W. Trumper, although a tenant for life under the deeds of 1811 and 1818, had purchased the lands, and the interest of the lessees could not be said to determine with his life: *Ex parte Smyth* (1 Swanst. 337). The words of the Act were, "Where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable upon any devise or lease of lands, tenements or hereditaments which *determined at the death* of such tenant for life, the executors or administrators of such tenant for life may, in an action on the case, recover," &c.

STUART, V.C., said that he thought the case clearly came within the Act, and declared the plaintiff, as executor, entitled to an apportionment of the rent which accrued from the 2nd August, 1859, to the testator's death in December of the same year, in respect of all the lands comprised in the lease renewed in 1818.

Wood, V.C., March 15, 16, 1866.

AINSWORTH v. BENTLEY.

14 W. R. 630.

Agreement not to publish a magazine of a certain kind—Restraint on trade—Injunction.

CONTRACT E. INJUNCTION.—*An agreement by a publisher not to publish in future a magazine of a particular description, is analogous to an agreement by a tradesman not to deal in a particular article, and, like this latter agreement, is not void as a too general restraint on trade.*

On an interlocutory application for an injunction to restrain the breach of such an agreement by the publication of a certain named magazine, or any other magazine coming within the description contained in the agreement, the publication of the named magazine only will be restrained.

On an interlocutory application for an injunction to restrain the publication of a magazine, the Court will not take so harsh a step as to suspend the publication altogether until the hearing of the cause.

The argument that a person, by offering to accept a certain sum of money as the price of his abstaining from taking proceedings, has shewn that the harm he anticipates is not irremediable, and that therefore he ought not to apply for an injunction, does not go far with the Court.

This was a motion for injunction to restrain the publication of a magazine in breach of an agreement that had been entered into between the parties to the suit.

The plaintiff was the well-known writer, William Harrison Ainsworth, and the defendants were Richard Bentley, the publisher, and his sons, George and Frederick Bentley. Notice of the motion, however, had been served upon the defendant Richard Bentley alone, as it had been ascertained that the younger defendants had no share whatever in the publishing business of their father, but acted in his service as salaried clerks only.

The agreement in question was dated November 2nd, 1854, and was made on the occasion of the purchase by the plaintiff from the defendant Richard Bentley of an established magazine called *Bentley's Miscellany*. The agreement was entered into between all the defendants, who were therein described as "of New Burlington Street, publishers," and the plaintiff, and the material parts thereof were as follows:—

"It is agreed between and by the parties hereto, that the said Richard Bentley, or his sons George Bentley and Frederick Bentley, shall not publish, carry on, or conduct any periodical of a like nature to *Bentley's Miscellany*, such restriction not to include scientific or professional periodicals, nor a quarterly review, from the date of these presents. And the said Richard Bentley, or his sons, shall publish the said magazine for the said William Harrison Ainsworth for the sum of 100*l.* per annum, to be paid quarterly, so long as it shall be agreed between the parties that the same shall be published by the said Richard Bentley or his sons; either party giving to the other three months' notice in writing to discontinue this arrangement for the publication of the magazine."

The arrangement for the publication of the magazine by the defendant Richard Bentley had some time since been discontinued, after three months' notice in writing, as provided for in the agreement.

The bill stated that in December, 1865, the defendants contemplated the purchase of an established magazine, called *Temple Bar*. This magazine was thus described in the bill:—"The *Temple Bar* Magazine is neither a scientific nor professional periodical, nor a quarterly review, but is a periodical similar

in all respects to the said magazine called *Bentley's Miscellany*, excepting only that in the former illustrations are introduced, but no illustrations are given in the latter; but the articles in each are similar in their leading characteristics, and the arrangement of the articles in the two magazines is similar, and the proportion of poetical articles and prose articles, though they vary in each from time to time, has been on the whole nearly the same; as also has been the proportion of articles of fiction and essays, and articles of an historical, biographical, or critical character."

The plaintiff, on hearing of the intention of the defendants to purchase and publish *Temple Bar* reminded them of the agreement, and warned them that their intention, if carried into effect, would be an infringement of it. The defendant Richard Bentley thereupon offered the plaintiff 100*l.* if he would withdraw his opposition to the intended purchase and publication. The plaintiff at first demanded 160*l.*, but ultimately agreed to take the 100*l.* so offered him, on condition that his waiver of the clause in the agreement should be limited to *Temple Bar*, and that the name of Bentley should not be used or connected with the name of that magazine. A release was drawn up, but as the terms thereof amounted to an unconditional and complete waiver of the agreement, the plaintiff refused to execute it, and the negotiation between the parties came to an end. The defendant Richard Bentley completed the purchase of *Temple Bar*, and published the February number thereof with his name printed on the cover.

Under these circumstances the bill was filed, and it prayed that the defendants, their servants, workmen, and agents, might be restrained by the injunction of the Court from carrying on, conducting, and publishing the said *Temple Bar* Magazine, and from carrying on, conducting, or publishing any periodical of a like nature to *Bentley's Miscellany*, and not being a scientific or professional periodical, or a quarterly review.

The evidence of literary men and publishers was given on the part of the plaintiff, shewing their impression of the very great similarity between *Temple Bar* and *Bentley's Miscellany*, as the latter was at the date of the purchase. Similar evidence was tendered by the defendants to show that the two magazines, though compounded of the same materials, yet being compounded of them in different proportions, and also being of different prices, (the price of *Bentley's Miscellany* being half-a-crown, and that of *Temple Bar* being one shilling,) would, in the view of persons habitually and professionally conversant with such matters, be considered to be not at all of a similar kind.

W. M. James, Q.C., and Bedwell, for the plaintiff.

Rolt, Q.C., Giffard, Q.C., and A. Rumsey, for the defendants, contended that the real meaning of the agreement was that the defendant Richard Bentley should not publish any magazine called, like the miscellany, after his own name, such as "*Bentley's Magazine*," or "*Bentley's Monthly*," or some name of that sort; this explained the introduction of the sons into the agreement; they had no share in the business, but their name was Bentley, and it was feared that their names might be used. The defendant Richard Bentley had not originated a new magazine only colourably differing from *Bentley's Miscellany*, but had purchased an established periodical. The plaintiff had himself estimated the damage likely to be done to him at 160*l.*: it was not, therefore, irremediable, and the Court would not grant an interlocutory injunction restraining the publication of *Temple Bar*. Should it do so, the harm to the defendants might be irremediable; for, if a periodical of this sort failed to appear for a month, its circulation would probably fall off altogether.

The agreement was a restraint on trade, which would not be allowed. Magazine publishing was a trade of itself, and if a man carried on two trades, that was no reason why one of them should be restrained. Besides, it was a restraint unreasonable as to time, for it was not limited to the continuance of *Bentley's Miscellany*, and a contract of this sort, not being divisible, would

not be cut down. The agreement not to publish a magazine like *Bentley's Miscellany* was closely connected with the undertaking to be the publishers of *Bentley's Miscellany*, and both agreements fell together.

The agreement was void for uncertainty. And if not, the words "of a like nature" might have many interpretations, and they ought to be construed in the strictest possible manner between professional men like the parties to this suit. The difference of price alone showed that one could not interfere with the other, as they appealed to entirely different classes of readers.

The following cases were quoted during the arguments of counsel:—*Morris v. Colman* (18 Ves. 437), *Barfield v. Nicholson* (2 Sim. & St. 1), *Horner v. Graves* (7 Bing. 735), *Green v. Price* (13 M. & W. 695), *Mallan v. May* (11 M. & W. 653), *Avery v. Langford* (2 W. R. 615; Kay, 663), *Archer v. Marsh* (6 Ad & E. 959).

WOOD, V.C., said that he thought the proper thing to be done on the present application would be to prohibit the defendant Richard Bentley from publishing *Temple Bar* with his name thereon until the hearing of the cause. As to the merits of the case, to his mind they were very manifest. The defendant Richard Bentley never could have thought that his undertaking not to publish a magazine of a like nature to the miscellany would cease as soon as he might cease to be the publisher of the *Miscellany* for the plaintiff. The two clauses in the agreement as to the restraint and the publication were totally distinct; and the whole correspondence between the plaintiff and the defendant Richard Bentley shewed that they were considered by them both to be so. The manifest interest and scope of the agreement that the defendant Richard Bentley and his sons should not publish a magazine of a like nature to *Bentley's Miscellany*, was not merely that they should publish no magazine called, as the *Miscellany* was, by their name of Bentley, but that they should in no way whatever interfere with the plaintiff's interest.

The chief defences that had been raised were—first, that the agreement was illegal, as being too general a restraint of trade; and, secondly, that the agreement was so vague and uncertain that the Court could not restrain an infringement of it. As to the first defence, it had never been decided that a person could not be compelled to observe and keep an undertaking not to sell or deal in a particular article of trade. On the contrary, it had often been held that the proprietor of an article might dispose of it to another, and legally bind himself never again to deal in that article, or in any article professing to be similar to or identical with it. This was the case here. Mr. Bentley had disposed of his *Miscellany* to the plaintiff, and had undertaken to publish nothing of the kind afterwards. By being bound to abide by that agreement he would be no worse a publisher than he was before; he would only be precluded from publishing anything of a particular kind.

The case of *Barfield v. Nicholson* (*loc. cit.*) was very strong in the plaintiff's favour, and it pointed out what should be the form of the injunction to be given. In that case the bill was filed to restrain the defendants from printing and publishing a work entitled "The Practical Builder," or any other work prejudicial to the sale of "The Architectural Dictionary," a work belonging to the plaintiff. The Vice-Chancellor granted an interlocutory injunction in the words of the prayer of the bill; which might have been quite right at the hearing; but Lord Eldon, on appeal, cut down the injunction to the publication of the particular work mentioned in the bill.

As to the second defence that the agreement was uncertain, no person reading the agreement and wishing to understand it could fail of doing so. The description of the magazine to be prohibited should be read with the exception. It would then be plain that the similarity contemplated by the parties could not be confined to identical proportions of the same ingredients, that, *e.g.*, a larger dose of fiction in the one than in the other would do away entirely with the similarity between them. As to the difference in price

between *Temple Bar* and *Bentley's Miscellany*, when it was recollected that the plaintiff's fear was that Mr. Bentley should throw his experience and energy into some rival publication, the difference in price would be an argument in the plaintiff's favour rather than against him, as the public would have all the benefit of Mr. Bentley's experience and energy for a shilling instead of half-a-crown.

As regarded the argument that the plaintiff had offered to take 160*l.* as the price of his rights, and, therefore, had shown that he did not consider the probable harm that would be done to him as irremediable, and consequently had no right to ask for an injunction, that argument would not go far with the Court. A person might be willing to forego his rights and so avoid litigation; but after the litigation, which he had shown himself anxious to avoid, had begun, the circumstances were altered, and he surely should be allowed to insist on his rights to the utmost.

There would be great hardship in stopping the ensuing number of *Temple Bar*, and that would not be done, the name of "Bentley," however, must not be used on that number. The following would be the minutes of the order:— "That the defendant Richard Bentley, his servants, &c., be restrained from carrying on, &c., the said *Temple Bar Magazine*, but the order to be without prejudice to the publication of the said magazine until the hearing of the cause, so as the name of Bentley does not appear either in the title-page or in any other part of the said publication, or in any advertisement of the said publication, and this order to be without prejudice to the right (if any) of the plaintiff to damages or profits in respect of any publication of the work.

[IN THE COMMON PLEAS.]

April 24, 1866.

WILSON, *appellant*, v. THE LOCAL BOARD OF HEALTH FOR THE BOROUGH OF KINGSTON-UPON-HULL, *respondents*.

14 W. R. 638.

Justices—Conviction—26 & 27 Vict. c. 32, ss. 7, 8—Schedule, Kingston-upon-Hull—Pit-note—Coals otherwise dealt with—Meaning of—Ejusdem generis.

LOCAL GOVERNMENT.—*The appellant bought coals at a pit, and conveyed them in his own keel to Hull, where they were transferred into a steam vessel also belonging to the appellant for the purpose of being used by him:—Held, that this amounted to "a dealing" with the coal so as to render the appellant compellable to shew a pit note under section 7, and to pay a tax under section 8 of 26 & 27 Vict. c. 32, schedule Kingston-upon-Hull.*

This was a case stated for the opinion of the Court by the stipendiary magistrate of Kingston-upon-Hull, under the Act 20 & 21 Vict. c. 43.

It was a information preferred under section 7 of the Act 26 & 27 Vict. c. 32, schedule Kingston-upon-Hull, charging the appellant with unlawfully delivering or otherwise dealing with a cargo of coals, by removing them from the sloop *Dart* into the steam-ship *Oder*, without having delivered a pit note, denoting the quantity and quality of the coal to the inspector of coals of the Local Board of Health of Kingston. The appellant was convicted.

The appellant, who was a shipowner at Hull, purchased fifty-nine tons of coals, which were shipped on board the appellant's own keel, the *Dart*, and were brought by the *Dart* into the Humber Docks, at Hull, and from thence

to the Railway Dock, where the coals were put into the bunkers of the *Oder*, a steam-ship belonging to the appellant.

The original pit-note, denoting the quality and quantity of the coals, was not delivered to the inspector, as required by the 7th section of the said Act. The local board contended that the facts above disclosed showed that the coals in question came within the words "sold and delivered or otherwise dealt with."

Reference was made to 50 Geo. 3, c. xli., entitled an Act for watching the town of Kingston-on-Hull, and also for preventing frauds and impositions in the quality, measure, and delivery of coals sold in the said town. Section 98 of that Act exempted from its operation persons bringing, landing or delivering coals for their own use and consumption only; but persons claiming such exemption were compelled under that Act to verify the same, if required by the inspector, upon oath in the manner prescribed.

This statute was repealed by the Hull Improvement Act, 1854 (17 & 18 Vict. c. ci., s. 8), which was substituted for it; but section 178 of the Act of 1854 re-enacted an exemption similar to that contained in the previous Act. Section 178 of the latter Act was repealed by 26 & 27 Vict. c. 32, s. 4, so that the exemption in favour of coals brought, landed, or delivered by any person for his own use was repealed.

It was contended by the appellant that there was no "dealing" with the coals in the present case, because looking at the different sections the "dealing" contemplated by the 7th section must be taken to involve a trafficking, and that the Act did not intend to prevent persons from consuming their own coals, brought from the pit in their own keels to steamers passing from Hull to places abroad, as in this case.

For the respondents it was contended that the taking the coals on board in the dock at Hull was both a delivery of and dealing with them, and that it was utterly impossible for the local board to know to what purpose coals brought into Hull were intended to be converted, and the Act must be held to apply to all coal brought within the district. The appellant was found guilty of a breach of the provision of the 7th section and was fined under the 17th section.

There was a second case in which the appellant was charged with not paying the tax under section 8; but the question of law involved in the two cases was precisely similar.

Lewers for the appellant.—The question is whether a pit note must be shown for coals transferred from the appellant's own keel to his own ship, under section 7 of 26 & 27 Vict. c. 32. That Act was only intended to prevent fraud on purchasers. The preamble of the provisional order incorporated in 26 & 27 Vict. c. 32, recites that a petition had been presented praying for additional powers to prevent "fraud in the sale and delivery of coal." That can only apply when fraud is possible, which is not the case when a person ships coal for his own use. The inspectors mentioned in section 6 are only inspectors of coal which shall be "brought for sale to, or sent from, or shall pass through the district." But the words "for sale" must apply to each of these clauses; and in the 7th section it is admitted that the word "delivered" must mean "delivered for sale," and the meaning assigned to "dealt with" must be "*ejusdem generis*" with the words which precede it. [KEATING, J.—If the party deliver at a quay, how is it to be known whether they are intended for sale or not? how can the inspectors tell what the coals are intended for when they come into the Humber?] If the coals were there for a double object, no doubt the appellant would be liable.

Philbrick (*Mellish*, J.C., with him), for the respondents.—The Act was intended to prevent frauds between buyer and seller; possibly it was not intended primarily that a man bringing coal from the pit for his own use should be taxed, but one uniform rule was necessary. The penalties inflicted by the Act of 1854 are kept alive by that of 1863; and under the 17th section

of the latter Act, if the offence is not committed within twenty-four hours, it cannot be committed at all. If the party retains the coal within the district twenty-four hours, or deals with it earlier, in either case, without delivering the pit note, he is equally liable. [ERLE, C.J.—I do not find that coal passing through the district need show a ticket or pay a tax.] The case of coal passing through the district is referred to at the end of the 6th section. The Acts of Geo. 3 and 17 & 18 Vict. both exempted coal introduced into a district by a person for his own use; but it was found that fraud then prevailed, to prevent which the exemption was omitted in the last Act.

ERLE, C.J.—I think the conviction ought to be affirmed. The appellant bought the coal in question at the pit, and transported it to Hull in his own keel, and it was there transhipped to a steamer also belonging to the appellant for the purpose of being used by him. He was asked for a pit ticket under section 7, and for the tax under section 8, and he is liable if, by means of these transactions, the coal was dealt with within the meaning of the 26 & 27 Vict. c. 32. The 7th section of that Act provides that a tax shall be paid if the coal is sold, or delivered, or otherwise dealt with, and I think that I give effect to that statute by holding that this coal was dealt with in the present case. I think that the statute means dealt with as a proprietor would deal with his property, and not in the sense of mercantile traffic. I am confirmed in this opinion by the comparison of the previous statutes. Those statutes exempt the coal imported for the use of the person who imports it from the tax, but by this statute the exemption is repealed. The preamble of the Act 26 & 27 Vict. c. 32, recites that a petition had been presented by the mayor, aldermen, &c., of the borough of Kingston-upon-Hull, praying "for the alteration and extension of the provisions of the Improvement Act for preventing fraud in the sale and delivering of coal, so as to comprise coal exported beyond the seas as well as any other coal sold or delivered within or passing through a district comprising the borough; and I conclude from this that it is not intended that the provisions of the Act should be limited to cases where the coal is bought for mercantile traffic. If an individual were to import coal which he did not at first intend for sale, and after the expiration of twenty-four hours changed his mind and sold, he would not be liable to pay the tax if the interpretation contended for is correct.

BYLES, J.—I am of the same opinion. These Acts were passed for the benefit of the people at large, and not of particular individuals. I had at first some doubt, but I now think that "otherwise dealt with" must comprehend such transactions as these, otherwise the frauds which were intended to be prevented would be easily perpetrated. The former acts contain an exemption in the case of coal imported for the owner's own use, and the exemption is omitted in the last Act.

KEATING, J.—I think the conviction was right. Taking advantage of the light thrown on the case by the former Acts, I think there can be no doubt that the object of the statute was to prevent fraud in the sale of coal. The Legislature at first thought that it would be sufficient if the pit note was shown, but said that if the coal was for personal use that need not be done. This act says that the pit note is to be shown not only with reference to coal actually sold but also to that which is in any way "dealt with." Can it be doubted that the transactions which here took place amounted to a dealing with coal? If they were not, cases should be suggested, as that mentioned by the Lord Chief Justice, when a change of intention after the twenty-four hours had elapsed, would have exempted the owner from paying the tax. That could not have been intended. I am clearly of opinion that this amounted to a dealing with the coal, and that the conviction was right.

SMITH, J.—I am of the same opinion.

Judgment affirmed with costs.

[IN THE COURT OF COMMON PLEAS.]

April 24, 1866.

LEWIN AND ANOTHER v. BROWN.

14 W. R. 640.

Patent—Agreement for the assignment of—Mutual undertakings.

PATENT.—*The declaration stated that a petition had been presented by the plaintiffs, at the request of the defendant, for the granting to the defendant of a patent, that the plaintiffs had filed a provisional specification, at their own expense, upon condition that the defendants should complete the specification within six months, and that afterwards it was agreed that the defendant should sell to the plaintiffs his right in respect of the said patent for the sum of 5l., to be paid by the plaintiffs to the defendant on their having completed at their own expense the said patent; that it thereupon became necessary in order to enable the plaintiffs to complete the said patent in pursuance of the said agreement, that the defendant should sign and seal a complete specification; that the plaintiffs tendered to the defendant a complete specification for his signature.*

Breach, that the defendant would not sign it:—Held, that the defendant was bound, under this agreement, to sign the specification.

The first count of the declaration stated for that prior to the making of the agreement between the plaintiffs and the defendant hereinafter mentioned, to wit, on the 16th day of December, 1864, a petition had been presented by the plaintiffs to her Majesty's Commissioners of Patents for Invention, at the request of the defendants, and at their own expense, for the granting to the defendant of a patent for an improvement in the construction of cylinders used in the manufacture of articles of pottery, such as pipes, tiles, hollow bricks, and the like; and the plaintiffs then duly filed, at their own expense, the provisional specification for the said patent, and on the said 16th day of December, 1864, duly obtained from the said commissioners a patent for the same, and provisional protection for the said patent to the defendant for six months, under the provisions of the Patent Law Amendment Act, 15 & 16 Vict. c. 84, upon the condition that the defendant should particularly describe and specify the nature of his said invention within six months from the said 16th of December, 1864, the time limited by the said provisional protection. And the plaintiffs further say that afterwards, to wit, in the month of January, 1865, by an agreement in writing, made between the plaintiffs and the defendant, it was mutually agreed by and between the plaintiffs and the defendant that the defendant should sell and dispose of to the plaintiffs all his right, title, claim or property, value in and in respect of, the said patent right of the defendant in the said improvements so made by the said defendant in the said patent tile machine as aforesaid for the sum of 5l., such sum to be paid by the plaintiffs to the defendant on their having completed, at their own expense, the said patent for the said improvement, so as to be entitled to sell such pipe machine with the said improvements so made by the said defendant; and the defendant, by the said agreement, confirmed and transferred to the plaintiffs all his right, title, value, or claim to the said patent for the said sum of 5l. And the plaintiffs further say that it thereupon became and was necessary, in order to enable the plaintiffs to complete the said patent, in pursuance of the said agreement, that the defendant should sign and seal a complete specification of the nature of his said invention within the time so limited by the said patent and provisional protection as aforesaid, in order that the plaintiffs should be enabled to file the same pursuant to the provisions of the said Patent Law Amendment Act and the said patent and

the said provisional protection; and the plaintiffs further say that afterwards and within reasonable time before the same would be required, they duly tendered to defendant for his signature and seal, the necessary, proper, and complete specification of the nature of his said invention for the said patent so required to be signed and sealed by him in compliance with, and in pursuance of, the provisions of the said Patent Law Amendment Act, as aforesaid, and without which said signature and seal of the defendant to the same the plaintiffs would be unable to obtain the said patent from the said commissioners, and would be unable to perform that part of the said agreement on his part to be performed. And the plaintiffs aver that all things were done on their parts, &c., yet the defendant did not nor would sign or seal the complete specification within the said time so limited in the said provisional specification as aforesaid, although often requested so to do, but therein wholly made default, whereby the plaintiffs were wholly and unavoidably prevented from taking the necessary and proper steps to enable them to complete, at their own expense, the said patent within the said time so limited as aforesaid," &c., &c.

To this count the defendant demurred, on the ground

(1.) That the payment to the defendant of the 5*l.* was conditional upon the patent being completed, but the defendant gave no undertaking, and was under no liability to sign and seal a complete specification.

(2.) That the alleged agreement was void as not being under seal.

Prideaux in support of the demurrer.—There is no promise here either express or implied on the part of the defendant, to complete the patent. The purchase-money was only nominal, and all the parties meant was that if the patent should be completed the plaintiff would pay 5*l.* for it, but there was no obligation to complete. *Aspdin v. Austin* (5 Q.B. 671); *Dunn v. Sayles* (5 Q.B. 685). [BYLES, J., referred to *Elderton v. Emmens* (13 C. B. 495) as overruling these cases.] *Rashleigh v. South-Eastern Railway Company* (10 C. B. 612); *Smith v. The Mayor of Harwich* (2 C. B. N.S. 651). The declaration, after stating that a provisional specification had been filed, &c., states that "afterwards by an agreement, &c.," so that what subsequently took place was quite distinct, and the only consideration for the promise was the completing of the agreement. [BYLES, J.—Is it not like the case of a conveyance when the vendor prepares a conveyance which the purchaser refuses to sign?] 2. The agreement amounts to a sale of the defendant's interest in the patent, and is therefore void for not being under seal. *Hindmarsh on Patents*, 234; *Power v. Walker* (3 M. & S. 7); *Chanter v. Dewhurst* (12 M. & W. 823).

Cole, for the plaintiff, was not called upon.

ERLE, C.J.—We think the parties intended that the defendant should complete the specification, and we must give effect to their intention.

Judgment for the plaintiff.

[IN THE COURT OF EXCHEQUER.]

April 18, 1866.

HARDING v. HALL.

14 W. R. 646; 14 L. T. 410.

Distress—Bailiff—Right to sell for expenses.

DISTRESS.—A bailiff who seizes goods under a distress warrant, if his authority to sell on behalf of the landlord is then withdrawn, has no right to go on and sell for his expenses.

This was an action for the conversion of two horses and a waggon, and the question in dispute was whether they were the property of the plaintiff, or had passed to the defendant by a valid sale.

The case was tried before Pigott, B., at the last Staffordshire Assizes. The plaintiff was the father-in-law of one Barton, and took a bill of sale of Barton's effects, including the property in question. Barton's landlord also put in a distress for rent, and the bailiff who distrained seized the goods in question with other goods on the premises. The bailiff held the goods both on behalf of the landlord, and also of the plaintiff, as the bill of sale creditor. The attorney, who acted both for the plaintiff and for the landlord, then paid out the landlord, and directed the bailiff to withdraw on behalf both of the landlord and of the plaintiff. A dispute then arose as to the fees payable to the bailiff, and whether he was entitled to double possession-money or not. The bailiff thereupon removed the horses and waggon, and sold them to pay his fees and expenses. The defendant became the purchaser at the sale. The learned Judge directed the jury that the bailiff had no right to sell, and a verdict was found for the plaintiff, with leave to move to enter a verdict for the defendant if the bailiff had power to sell.

H. Matthews now moved accordingly.—There is no direct authority upon the question. But a sheriff may sell for his poundage, although ordered to withdraw by the execution creditor; *Alchin v. Wells* (5 T. R. 470); *Watson on Sheriffs*, 83. And the case of a bailiff is analogous. [POLLOCK, C.B.—The bailiff and the landlord are but one person; the sheriff and the creditor are two.] The sheriff can only levy his expenses by statute; and the right is given for the benefit of the creditor, not the sheriff, so that the cases are analogous.

POLLOCK, C.B.—We are all of opinion that there ought to be no rule in this case. The question arises thus: The landlord gave his bailiff an authority to distrain. The bailiff does so, and takes the horses and waggon. Before more is done he receives notice from the landlord that the rent is paid. After that it is clear that he had no authority to sell, and therefore the defendant has no title.

MARTIN, B.—I am of the same opinion.

BRAMWELL, B.—I am of the same opinion. The bailiff had no right to sell, for his authority was withdrawn. As to the case of *Alchin v. Wells*, Mr. Matthew's argument is, first, that the sheriff has a right to sell under these circumstances; and, secondly, that the case of a bailiff is analogous. But *Alchin v. Wells* fails to establish the first of these positions. It only decides that the Court would not actively interfere against the sheriff by ruling him to return the writ; not that he was not a trespasser, or had any right to sell. And I think it clear that he had none. But, at any rate, a bailiff is a mere agent for a principal, and must look to his principal for his remuneration. It would be absurd, when the landlord may distrain in person, if his employing a bailiff should make any difference. The defendant, therefore, has no title.

PIGOTT, B.—I was clearly of opinion at the trial that the bailiff had no right to sell; and I think so still.

Rule refused.

[IN THE COURT OF QUEEN'S BENCH.]

April 30, 1866.

LECOCQ AND WIFE v. THE SOUTH-EASTERN RAILWAY COMPANY.

14 W. R. 649; 7 B. & S. 415; 14 L. T. 401.

Foreign commission—Costs of employing counsel—Practice.

EVIDENCE. K.—*In order to entitle the successful party in an action to the cost of employing counsel on a foreign commission it must be shown that special circumstances necessitated such employment.*

The action was under Lord Campbell's Act for injury sustained by the death of the plaintiff's son, who was killed at the Staplehurst accident, on the defendant's line. A commission was sent to France to examine witnesses, and counsel were employed on that commission by both plaintiffs and defendants. The plaintiffs recovered 400*l.* On the taxation of costs the Master disallowed the plaintiff's costs of the counsel who attended the commission.

Murphy moved for a rule calling on the defendants to show cause why the master should not be at liberty to review his taxation, by allowing these costs against the defendants. There was no case either way, but the plaintiffs, finding that the defendants would employ counsel, and in view of questions of law which might arise, had employed counsel, and having obtained the verdict were entitled to these costs.

BLACKBURN, J.—I am of opinion that there should be no rule in this case. I am far from saying that in no case of a commission to a foreign part will costs be allowed, but the course is so unusual that it must only be where some special circumstances of the case show that it was necessary. This is not shown here, and it is not sufficient to contend that as the defendants employed counsel the plaintiffs were obliged to do so without showing something special in the case.

MELLOR and SHEE, JJ., concurred.

Rule refused.

[IN THE COMMON PLEAS.]

April 28, 1866.

BRANSBY v. THE EAST LONDON BANKING COMPANY (LIMITED).

14 W. R. 652; 14 L. T. 403.

Cheque—Action for non-payment of—Banker—Entry in pass book.

BANKER.—*The plaintiff was entitled to draw on the defendant's bank when his balance there exceeded 100*l.* One Saturday it fell just below that amount, but he paid in on that morning an open cheque for 150*l.* on another bank. Afterwards, the same day, he drew on the defendant's bank a cheque, which was paid, and then, after banking hours, one for 17*l.* 10*s.* The latter cheque was presented on the Monday morning and payment refused, the clerk indorsing on it "effects not cleared." About the same time the plaintiff called at the bank and saw his pass-book, in which the 150*l.* cheque was entered as cash paid in by him on the Saturday. Subsequently the manager*

told him that "the walk clerk," whose duty it was to go and get the 150l. cheque cashed, went out at ten o'clock, and so had gone when the cheque was paid in on Saturday, and had not yet returned. In an action against the bank for not paying the 17l. 10s. cheque, the plaintiff was non-suited at the close of his case:—Held, that although the non-payment must be taken with the statement of the manager, there was some evidence that the bank was in funds to pay the cheque on the Saturday, and that, therefore, the non-suit was wrong.

Declaration.—That the plaintiff was a merchant, and the defendants were bankers, in London, and the plaintiff was a customer, and employed the defendants as bankers upon the terms that they would from time to time, out of any moneys of the plaintiff in their hands as such his bankers applicable to the purpose, pay for him, on presentment at their bank, any cheques which might be drawn by him upon them as such bankers at the bank, and which should be duly presented at the bank for payment by any person lawfully entitled to receive the amount of such cheques, not exceeding the amount of the balance of moneys of the plaintiff in their hands as such his bankers applicable to the payment of such cheques at the time of the presentment thereof, and such balance of moneys of the plaintiff having been in their hands as such bankers a sufficient and reasonable time to enable them and their clerks and servants to know that such balance of moneys of the plaintiff in their hands as such his bankers applicable to the payment of such cheques, was so in their hands as such the plaintiff's bankers, and sufficient for the payment of such cheques; and the plaintiff says that whilst he was such customer of and employed the defendants as such bankers on the terms aforesaid, he drew a certain cheque upon and directed to them as such his bankers, and thereby required them as such bankers to pay to one Lake or bearer 17l. 10s., in payment of a debt then due from him to Lake, which cheque he then delivered to Lake, and Lake, then being the lawful holder of the cheque, and entitled to receive the amount thereof, duly presented it at the bank for payment; and the plaintiff says that all conditions were performed, &c., to entitle him to have the cheque paid by the defendants as such his bankers, when so presented; yet the defendants, as such his bankers, did not nor would, pay the cheque when so presented as aforesaid, but neglected and refused so to do, although they, as such his bankers, then had in their hands a balance of money of the plaintiff applicable to the payment of the cheque, more than sufficient in amount for the payment thereof, and although the said balance then had been in their hands, as such his bankers, a sufficient and reasonable time to enable them and their clerks and servants, to know that such balance of moneys applicable to the payment of the cheque was in their hands, as such the plaintiff's bankers, and was more than sufficient for the payment of the cheque; by means of which several premises the plaintiff has been and is greatly injured in his credit, &c.

Pleas:—

1. That at the time of presentment the defendants had not in their hands a balance of the plaintiff applicable to and sufficient for the payment of the cheque.

2. That at the time of presentment the balance had not been in the defendant's hands a sufficient or reasonable time to enable them, their clerks, and servants, to know that a balance applicable to, and sufficient for, the payment of the cheque, was in their hands.

Issue on these pleas.

At the trial before Erle, C.J., at the Guildhall, the following facts were proved:—

The plaintiff was an upholsterer in the Old Kent-road, and, in September, 1864, he opened an account with the defendants, who are bankers in Cornhill.

In March, 1865, the plaintiff received this letter from the defendants' general manager:—

" Sir,—By a rule of the bank I am precluded from granting accommodation to customers whose balance falls below 100*l.*, and, although this regulation has not been enforced hitherto in your case, I must, before passing to credit the bills forwarded by you this day, have a distinct understanding with respect to the balance to be left with us. On your returning to me duly signed the inclosed form of undertaking your bills shall be discounted.—Yours, &c."

The form inclosed was as follows:—

" Sir,—In consideration of your discounting for me from time to time approved bills of exchange, or making me any advance thereon by way of loan, I hereby agree to leave in your hands a minimum balance of 100*l.* as a collateral and continuing security against said bills, and I hereby authorise you to retain this amount on my account for such purpose."

This form was signed by the plaintiff and returned to the manager of the bank.

On the morning of Saturday, the 13th of May, the plaintiff had a balance in the bank of 99*l.* 10*s.* 7*d.*, reduced during the day to 82*l.* 18*s.* 7*d.* Two cheques drawn by the plaintiff were presented on this Saturday, one of which was paid, and the other for 3*l.*, which was dishonoured.

About half-past ten the same day the plaintiff paid into his account an open cheque drawn by a third person on Sir Claude Scott and Company's Bank in Cavendish Square for 150*l.*, and it was proved that it was the custom of the bank not to enter cheques to the credit of their customers' accounts until they were cashed. The same afternoon, after banking hours, the plaintiff drew a cheque on the defendant's bank in favour of a Mr. Lake for 17*l.* 10*s.*; and on Monday, the 15th of May, about eleven o'clock, Lake, who had not been in the interval in communication with the plaintiff, presented this cheque at the defendant's bank, when it was returned to him with the indorsement "effects not cleared"; he thereupon served a writ on the plaintiff. About the same time as the presentation of the 17*l.* 10*s.* cheque by Lake, the plaintiff called at the bank and looked at his pass-book, in which the 150*l.* cheque was entered as "cash—150*l.*," under the date of the 13th of May, and on the opposite side of the account was an entry in pencil of 232*l.* 18*s.* 7*d.* to his credit. It was not positively shown whether the plaintiff saw these entries in his pass-book before or after the presentation of the 17*l.* 10*s.* cheque, but he himself swore that he saw them in time enough to stop that cheque.

The plaintiff himself was the only witness in support of his case, and he said that about twelve o'clock on the Monday he called at the bank to see the manager about the matter, and the latter then told him that the "walk clerk had gone out before the 150*l.* cheque was paid in on the Saturday, and that, therefore, it could not be cashed till the Monday; and that he did not know if he was back then."

At the close of the plaintiff's case his lordship directed a non-suit.

A rule was obtained to set aside the non-suit, and for a new trial on the grounds (1) that the evidence entitled the plaintiff to a verdict. (2) That the defendants having treated the cheque for 150*l.* as cash, the plaintiff had a balance available for cashing the cheque for 17*l.* 10*s.* (3) That there was evidence for a jury that the plaintiff had such a balance. (4) That the defendants had no right to treat the 150*l.* cheque otherwise than as cash, without positive evidence that they had not received the cash for it; (5) that it was a question for the jury whether, under the terms of the agreement of the 25th of March, they had such a right, or whether those terms had been waived; (6) that they had no such right without evidence either that there were special terms agreed on between the plaintiff and the defendants as to the time which was to elapse before the plaintiff was to be entitled to draw against cheques paid in to his account, or else that a reasonable time

had not elapsed, and that the question of reasonable time was a question for the jury.

Karslake, Q.C., and *Sir G. Honyman* showed cause, and contended that it lay on the plaintiff to show that the bank had in their hands a balance on which he could draw on the Saturday. The entry in the pass book was no evidence against the bank unless the plaintiff could show that he altered his position on the faith of that entry. The cheque paid on the Saturday was cashed as a matter of favour and not of right.

M. Chambers, Q.C., *Campbell Foster*, and *Channell* in support of the rule.—The defendants have so dealt with the accounts as to make the 150*l.* cheque money for the plaintiff's purposes as against them, and by payment of the cheque presented on the Saturday they treated the 150*l.* cheque as cash. *Cumming v. Shand* (8 W. R. 182; 5 H. & N. 95); *Skyring v. Greenwood* (4 B. & C. 281); *Byles on Bills*, 17. There is evidence that the plaintiff acted on the faith of the entry in the pass book, for if he had not seen the entry of cash to his credit he might have waited in the bank to ask Lake to defer presenting his cheque. The defendants ought to have adduced evidence to show that they did not get cash for the 150*l.* cheque on the Saturday.

KEATING, J.—This was an action for non-payment of a cheque. By an agreement between the plaintiff and the banking company, the plaintiff was only entitled to draw on them when they had a balance of 100*l.* in their hands to his credit. That being so, it appears that on the 13th of May his balance was just below that sum, and on the morning of that day he paid in a cheque on another bank for 150*l.* The cheque, the non-payment of which is the subject of the present action, was given by the plaintiff to Lake after hours on the Saturday for 17*l.* 10*s.*, and it was presented about half-past ten on the Monday. About the same time, or not very long after, the plaintiff called at the bank, and there saw his pass-book, and that the 150*l.* cheque was entered in it to his credit as cash. Then, after hearing that the 3*l.* cheque had been dishonoured, he learns that the clerk had gone out before the cheque was paid in on the Saturday, and it was for that reason the dishonoured cheque had not been paid; the manager accounted in this way for its dishonour. At the trial it seems to have been considered that this might be taken to be the true reason of the non-payment; and my Lord held that you must take the fact of non-payment together with the explanation of the manager, and, we think, rightly. If that were all there would be no difficulty in saying that this rule should be discharged; but there is some difficulty in saying whether that understanding did prevail, and if not, there was sufficient evidence given to call on the bank for an answer. The statement of the manager was not evidence, and, under the circumstances, it would be better that the case should be inquired into again, and the bank can call their clerk to explain the non-payment.

MONTAGU SMITH, J.—I agree that there was some evidence that the 150*l.* cheque was cashed. It was paid in on the Saturday, and undoubtedly it was treated in the book as cash, and the payment of the cheque on that day indicated that the money had been received. If, however, the bank had not received the money, the plaintiff can only recover on the ground of estoppel; but on that ground he may not be entitled to succeed if he was told at the time that the money had not been received. But there is no evidence of the manager's statement being true in fact. There was, therefore, some *prima facie* evidence for the plaintiff, and the defendants must meet that. It may have been assumed that the statement of the manager would not be denied; but as the case is now disputed it must go down to ascertain its correctness.

ERLE, C.J., concurred.

Rule absolute.

[IN THE COMMON PLEAS.]

May 8, 1866.

CRUX v. ALDRED.

14 W. R. 656.

Contract—Liquidated damages.

PENALTY.—*The plaintiff, a builder, contracted with the defendant to do certain repairs and alterations to a house, to be completed within a specified time, "subject to a penalty of 20l. per week that any of the works remained unfinished" after the stipulated periods:—Held, that the sum of 20l. per week was in the nature of liquidated damages, and could be deducted by the defendant without proving the loss he had actually sustained by reason of the delay.*

This was an action on a builder's account. A verdict was found for the defendant.

Lord obtained a rule *nisi* to enter a verdict for the plaintiff, pursuant to leave reserved. The work was performed by the plaintiff under a contract, and consisted of considerable repairs and alterations to a shop in Oxford Street. A portion of the sum claimed by the plaintiff had been paid into court, and the defendant claimed to be entitled to set-off the residue under the following clause of the contract, on account of the completion of the work having been delayed:—

"Penalty clause.—The work shall be begun on Monday, 6th February, and be completed to the carcase of the new building. The shop-front and the shop walls, all the cases and fittings, within two months; and the whole works completed within three months therefrom subject to a penalty of 20l. per week that any of the works remain unfinished after either of the stipulated periods have expired, except in case of frost impeding the works, or of such part of the papering as the walls may not be in a fit state to receive, for which a corresponding allowance shall be made, and in case of extra work an extension of time will be made after the rate of one week for every 100l. value thereof so executed on the premises."

Keane, Q.C., and *Tapping*, shewed cause against the rule and contended that the deduction of 20l. per week stipulated for in the above clause was not to be considered as liquidated damages, but only a penalty, and that the defendant could only set-off such sum as he proved he had lost in consequence of the delay. The money was payable if the works were not completed; the non-completion might be caused by the omission of any one of a number of things of various degrees of importance, and the rule was that where a sum of money is payable on the performance, or omission to perform any one of several things, such sum of money is considered a penalty, and the damage actually sustained must be proved: *Sainter v. Ferguson* (7 C. B. 716); *Holme v. Guppy* (3 M. & W. 387); *Astley v. Weldon* (2 B. & P. 346); *Sparrow v. Paris* (7 H. & N. 594); *Fletcher v. Dyche* (2 T. R. 32); *Hitchcock v. Coker* (6 A. & E. 438).

Hannen and *Lord*, in support of the rule, contended that the money in question must be considered as liquidated damages, and was payable on the omission to perform one thing only, viz., the last thing which had to be done in order to complete the work, whatever that might be. If the distinction now contended for had been well founded it would have arisen in many of the previous cases.

ERLE, C.J.—We think the sum of 20l., which is to be deducted on the non-completion of the work within a certain period, must be considered to be liquidated damages, and should not be construed in a nugatory manner as amounting to a penalty.

BYLES, KEATING, and SMITH, JJ., concurred.

Judgment for the defendant.

[Other points arose on the construction of the contract which are not of general interest.]

[IN THE COURT OF EXCHEQUER.]

April 23, 1866.

ROBINSON v. EMERSON.

14 W. R. 658; 4 H. & C. 352; 14 L. T. 291; 12 Jur. N.S. 378.

Not applied, *Sims v. Pay*, 1889, 60 L. T. 602 (Q.B.D. Div.).*Poor law*—55 Geo. 3, c. 137—4 & 5 Will. 4, c. 76—*Penalty—Statute—Repeal*.

POOR LAW. A. STATUTE.—*The statute 55 Geo. 3, c. 137, s. 6, enacts that "no overseer of the poor shall supply for his own profit any goods for the use of any workhouse, or otherwise for the support or maintenance of the poor in any place for which he shall be appointed as such, under pain of forfeiting the sum of 100l." The statute 4 & 5 Will. 4, c. 76, s. 77, enacts that "it shall not be lawful for any person filling an office concerned in the administration of the laws for the relief of the poor in any parish or union to furnish for his own profit any goods ordered to be given in parochial relief, or any goods for or in respect of the money ordered to be given in parochial relief to any person in such parish or union," and imposes a penalty of 5l.:—Held, that the latter statute was not an implied repeal of the former.*

Henderson v. Sherborne (2 M. & W. 236), observed upon.

This was an action for a penalty under the statute, 55 Geo. 3, c. 137, s. 6. The declaration stated that the defendant, whilst an overseer of the poor for the Weardale Union, in his own name supplied goods for the maintenance of the poor of the union.

To this declaration there was a demurrer.

George Atkinson, Serjt.—The declaration is founded on the statute 55 Geo. 3, c. 137, s. 6; but that section is repealed by 4 & 5 Will. 4, c. 76, s. 77. The earlier statute prohibited the supply of goods to the workhouse or for the maintenance of the poor. *Proctor v. Manwaring* (3 B. & A. 145), decided that this did not prohibit the supply of goods to an individual pauper. This decision, no doubt, was the occasion of the later enactment. But the later Act prohibits the supply to any person; and person includes a body corporate: section 109. It therefore imposes a different penalty for the same offences which the former Act dealt with, though it extends to other offences as well, and accordingly it impliedly repeals the earlier Act: *Henderson v. Sherborne* (2 M. & W. 236), where a doubt is expressed on this very point (see marginal note); *Lockwood v. The Attorney-General* (9 M. & W. 378, 10 id. 464).

Manisty, Q.C., and *A. Wills*, on the other side, were not called upon.

MARTIN, B.—I am of opinion that the declaration is good. It shews a case expressly within the term of the statute 55 Geo. 3, c. 137, s. 6. But it is said that that section is repealed by the Poor Law Act. The object, however, of this latter Act was merely to remedy the defect found in *Proctor v. Manwaring*. I think Lord Abinger's reasoning in the case cited sound; but the defect in the present argument is, that no intention to repeal the former Act appears. The true explanation of the matter is that the Legislature thought what was done in *Proctor v. Manwaring* ought to be prohibited, and they thought a penalty of 5l. sufficient, but no general repeal was intended.

BRAMWELL, B.—I am of the same opinion. The first Act imposed a penalty of 100l. on supplying the workhouse. The Poor Law Act clearly contemplated the continuance of its provisions, for it says (section 51) that the penalties imposed by it shall apply to officers appointed under the New Act. Then it goes



on to provide (section 77) for the case previously omitted, namely, the supply of goods to an individual; and in this case it imposes a penalty of 5*l.* The only doubt upon the matter arises from the mistake of the reporters of *Henderson v. Sherborne*, in the *quære* which they have inserted in their marginal note. The *quære* ought to have been whether the first Act was not repealed so far as it concerned individuals, not whether it was repealed *in toto*.

Judgment for plaintiff.

KINDERSLEY, V.C., April 30, 1866.

COX v. SLATER.

14 W. R. 665; 14 L. T. 510.

Practice—County Court Act (Equity Jurisdiction)—Appeal—Specific performance—Lease.

COUNTY COURT. F.—Where a county court judge considers that he has not jurisdiction, and a case is stated for the opinion of the appellate court, the appeal can only be heard in the presence of both plaintiff and defendant.

Hull applied in this suit, which was an equity plaint from the Bloomsbury County Court, for the opinion of this Court under these circumstances. The plaintiff by his plaint sought specific performance of an agreement to grant a lease for twenty-one years, at 65*l.* per annum rent, in consideration of 40*l.*

Mr. George Lake Russell, the county court judge, considered that he had no jurisdiction, the same opinion being held by other county court judges, the words of the Act (28 & 29 Vict. c. 99, s. 1 cl. 4) limiting the jurisdiction to suits for specific performance, &c., "when the purchase-money does not exceed the sum of 500*l.*" There was nothing in the Act which expressly restricted its application to absolute sales, but Mr. Russell (and other county court judges) considered that a reservation of rent excluded the jurisdiction. The plaint asked an injunction to restrain an action of ejectment which was in the paper in the Court of Exchequer to-day, and Mr. Russell had this morning refused the injunction. The parties were anxious to save the expense of a bill. If his Honour would express an opinion, the judge would act upon it.

The appeal was in the regular form of a statement, signed by the judge of the county court.

KINDERSLEY, V.C.—It would be going a good way to call this a purchase; giving a premium for a lease is not a purchase; although a purchase of a term might be so. I must not advise you, but if I were to do so I should say, file a bill or take counsel's opinion.

I cannot decide such a question on an *ex parte* application; it is clearly a question which I am bound to decide, but it must be in the presence of both parties.

KINDERSLEY, V.C., April 30, 1866.

Re MERRY'S SETTLED ESTATES.

14 W. R. 665; 14 L. T. 510.

Practice—Settled Estates Act—Leave to oppose.

SETTLED LAND.—Where the seven days has expired within which a party

may appear to oppose an application, under the 20th section of the Leases and Sales of Settled Estates Act, and under C. O. xli. r. 17, some sufficient reason must be assigned for not coming in time, otherwise an application for special leave will not be granted.

F. O. Haynes applied in this matter, under C. O. xli. r. 17, and 19 & 20 Vict. c. 120, s. 20, for leave to give notice of motion to oppose an application under the Act, the seven days therein mentioned having expired. The petition, which had not been heard, was for a lease under the Act, and was now opposed on behalf of two persons, one of whom, *Harriett Gibbs*, a widow, was resident in Jamaica, out of the jurisdiction, as appeared on the face of the petition, and the other of whom was entitled to a share of the property of which the lease was to be granted. The petitioner had a life estate in the property under a will, with remainder to her children (there being no possibility of any), and, in default, the property was to be sold and divided among the other brothers and sisters who were living at the death of herself and her husband. Five of these were already dead, and in case of a general failure a *Mr. Merry* would be entitled. Neither he nor *Mrs. Gibbs* had been served; but the present application was on behalf of both.

There was nothing in the Act as to alleging reasons why the application had not been made within the seven days.

KINDERSLEY, V.C.—As to *Mrs. Gibbs*, it is a sufficient excuse that she is out of the jurisdiction. With respect to *Mr. Merry* the case is different; some reason or excuse must be alleged why the application was not made within the seven days, and in his case none being brought forward, his application cannot be granted. The very fact of special leave being requisite shows that some reason must be assigned.

Wood, V.C., March 22, 1866.

THE SOUTH-EASTERN RAILWAY COMPANY v. THE LONDON,
BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

14 W. R. 666.

Railway company—Motion to pay the purchase-money into Court—Unimpeached award.

COMPULSORY PURCHASE.—A railway company, having entered into possession of land required for their undertaking under an agreement to pay the amount which should be fixed by arbitration for the purchase-money on the final settlement of the purchase with interest thereon in the meantime, will, during the progress of a suit for specific performance of the contract, after the award, which remains unimpeached, has been made, and the title accepted, be ordered to pay the purchase-money with interest thereon into Court, although they set up a case that the amount fixed by the arbitrator was fixed by him higher than it would otherwise have been in consequence of statements made by the other side that the taking of their land would cause them the necessity of executing expensive works, which remain unexecuted at the date of the motion to bring in the purchase-money.

This was a motion that the defendants might pay into Court the sum which had been fixed by arbitration as the compensation for a piece of the plaintiffs' land, which they had taken under their compulsory powers, together

with interest on such sum from the day on which they had entered into possession of the land.

The defendants had taken possession more than eighteen months ago, and before the amount of the compensation had been fixed, entering into an agreement, when they did so, to pay, "upon the final settlement of the purchase," the amount to be fixed as the compensation, together with interest thereon from the time of their being let into possession.

The bill was filed for specific performance. The title, however, had been accepted, and the conveyance settled by both parties. The only question between them was whether the plaintiffs were or were not under an obligation to build a boundary wall between their own premises and those of the defendants. It appeared that the plaintiffs had stated before the arbitrator that they should be obliged to build such a wall in consequence of the defendants taking the land in question, and that the building of it would cost them 3,000*l.* This statement of the plaintiffs had, according to the defendants, materially influenced the mind of the arbitrator when fixing the compensation; and it was insisted that the defendants were bound to build the wall. The amount fixed by the arbitrator was 18,500*l.*, which was less by 3,500*l.* than the sum to which the plaintiffs had reduced their first claim.

Giffard, Q.C., and *Phear*, for the plaintiffs, stated the case.

Taylor, for the defendants, contended that they could not be ordered to pay the purchase-money into court until the final settlement of the purchase, which would not be until the case was heard and the decree made. The defendants had taken possession under a special agreement and not under the Act.

Giffard, Q.C., in reply, said that in cases of this kind, possession was always taken under some agreement; the purchaser never entering against and in spite of the vendor. The point in these cases always was whether there was a *bond fide* question of title between the parties. Here there was no such question. He cited *Morgan v. Shaw* (2 Mer. 138); *Fowler v. Ward* (6 Jur. 547); and the principles laid down by Lord St. Leonards' *Vend. and Purch.* p. 231.

Wood, V.C., said that he should grant the application. The amount of compensation had been awarded *simpliciter*. The award itself was unimpeached; and all that was said now was that the plaintiff had done or said something which the arbitrator might possibly have acted upon. It might, however, be observed on the other side that it was possible that the arbitrator had struck out this very item from the estimated value, for he had awarded a sum less than that claimed by more than the alleged cost of building the wall. However that might be, no steps had been taken to set aside the award, and as the defendants had entered into possession of the land, and carried on their operations upon it, they had no claim to retain the purchase money. The amount, with the interest thereon, at the rate stipulated in the agreement, must be paid into court within a month from the service of the order.

ROMILLY, M.R., April 24, 1886.

In re TOTTENHAM AND HAMPSTEAD JUNCTION RAILWAY COMPANY.

14 W. R. 669.

Lands Clauses Consolidation Act, s. 85—Costs of party appearing to consent—Practice.

COMPULSORY PURCHASE.—*The Court will, under special circumstances,*

allow a party appearing to consent to a petition under the 85th section of the Lands Clauses Consolidation Act, his costs of appearance, though it is not the usual practice so to do where a party appears merely to consent.

This was a petition by the company for payment out of Court of two sums deposited by the company in Court, under the 85th section of the Lands Clauses Consolidation Act (8 Vict. c. 18), upon an allegation in the petition that the conditions of the two bonds had been duly performed by payment of the respective purchase-moneys to the parties respectively entitled, the lands having been sold to the company by private contract. There were two respondents, who were both served with the petition, and the two properties were perfectly distinct from each other.

The first respondent admitted that he had been paid and did not appear. The second respondent, a Mr. Eiloart, had been appointed by the Court in a suit to represent seven-tenths, and also by the owners of one-tenth to represent them, in the negotiation of the sale of these shares to the company, and the owner of the remaining two-tenths had also appointed the same respondent for the same purpose. Mr. Eiloart in the completion of the purchases had employed one solicitor in respect of the seven-tenths and one-tenth shares, and the owners of the other two-tenths had employed another solicitor. Mr. Eiloart appeared at the hearing of the petition and admitted by his counsel that he knew of the payment of the purchase-money of the seven-tenths and one-tenth, but stated that he had no personal knowledge of the payment of the purchase-money for the remaining two-tenths, and that the company had not furnished any evidence of the fact of payment until the day before the hearing of the petition, when they filed an affidavit deposing to such payment.

Under these circumstances counsel insisted that Mr. Eiloart was entitled to his costs of appearance notwithstanding the company had, on serving him with the petition, stated that they should oppose any payment of such costs, and also served the solicitor of Mr. Eiloart with a document, which they requested Mr. Eiloart to sign, purporting to authorise the company to instruct counsel to consent to the prayer of the petition, and stating that the company would pay the costs thereof. The company had not requested Mr. Eiloart to join in the petition.

Townsend for the company.

Joyce for Mr. Eiloart.

LORD ROMILLY, M.R.—Mr. Eiloart is, under the circumstances, entitled to his costs of appearance, as although ordinarily a vendor in such cases is not allowed his costs, it was where the vendor had clearly been paid; but if it were not clear that he had been paid, then he was entitled to appear and be satisfied on that point. With respect to *E. P. Stephens*, 2 Phil. 772, Seton, 3rd ed. 1099, cited by the respondent's counsel, in which Lord Cottenham had held that a respondent was entitled to his costs of appearance on a petition by a company for the payment out of the deposit, the Court, following the opinion of Lord St. Leonards, now takes a different view, and always* disallows such costs unless there are special circumstances in the case.

* This rule is always followed by his Lordship, never by any of the Vice Chancellors.—*Ed. W. R.*

[CROWN CASE RESERVED.]

May 5, 1866.

REG. v. DAVID DAVIES.

14 W. R. 679; 14 L. T. 491; 10 Cox C.C. 239.

Larceny—24 & 25 Vict. c. 96, s. 3.

CRIMINAL LAW. C.—*The prisoner, a carrier, was employed by the prosecutor to deliver in his (the prisoner's) cart a boat's cargo of coals to persons named in a list, to whom only he was authorized to deliver them. Having fraudulently sold some of the coals, and appropriated the proceeds:—Held, that he was properly convicted of larceny as a bailee within 24 & 25 Vict. c. 96, s. 3.*

Case stated by West, Recorder of Manchester:—

The prisoner was tried by me at the Quarter Sessions for the City of Manchester on the 4th of April, 1866. The indictment charged him with stealing two loads of coal, the property of Andrew Dobbie and another. The prisoner was a carter and was engaged by Dobbie to deliver in his (the prisoner's) cart a boat's cargo of coals to certain persons named in a list which was handed to the prisoner, and he was not authorized to deliver coals to any person whose name was not contained in that list. Two of the loads of coal he fraudulently sold to persons not in the list; for one of them he obtained twelve shillings; it did not appear how much he received for the other. Upon these facts it was contended by the counsel for the prisoner that he could not be convicted under 24 and 25 Vict., c. 96, s. 3, as it was clear that the property was never to be restored to the owner, who had entrusted it to the prisoner, and who was therefore not a bailee within the meaning of that Act; and they cited *R. v. Hassall* (9 W. R. 708; 1 Leigh & Cave's Reports, 58). I however directed the jury that if the coals were entrusted to the prisoner for the specific purpose that they should be delivered by him to the persons named in the list, and that he, instead of delivering them, fraudulently converted them to his own use, that the prisoner ought to be found guilty. The jury found the prisoner guilty and I let him out on bail until the opinion of the Court for Crown Cases Reserved was taken upon the propriety of the conviction.

Torr, for the prisoner, cited *R. v. Bunkall* (12 W. R. 414; 1 L. & C. 371); *R. v. Hassall* (9 W. R. 708; 1 L. & C. 58), and Mr. Greaves's Criminal Consolidation Acts.

Hopwood, contra, was not called on.

POLLOCK, C.B.—We are all of opinion that this conviction must be affirmed. It seems to me that the question is only like what I said on Saturday last viz.—whether stealing is stealing.

MARTIN, B.—Common sense is beginning to prevail.

Conviction affirmed.

CRANWORTH, L.C., May 5, 1866.

*Re PERKINS.**Ex parte PERKINS.*

14 W. R. 680.

*Bankruptcy—Provisional assignee—Officer of the Court—Costs.*BANKRUPTCY.—*A provisional assignee incurred costs for legal proceedings*

in respect of a debtor's estate in his hands under 1 & 2 Vict. c. 110, undertaken without the sanction of the Court.

He also retained the debtor's property after he ceased to be an officer of the Court:—Held, affirming the Judgment of Mr. Commissioner Holroyd, that the charges in question must be disallowed, and that he must pay the costs occasioned by such retention.

This was an application for the payment to a debtor of a balance now in the hands of the provisional assignee, under the provision of 1 & 2 Vict. c. 110, and the Bankruptcy Act, 1861, and for a revesting order in respect of the debtor's real estate. The insolvency took place in 1851. The whole of the debts had been paid, and a balance remained in the hands of the provisional assignee, who also continued in possession of the real estate. He made a claim upon the balance and the estate on account of the costs of some legal proceedings. On July 28th, 1865, the Lord Chancellor made an order upon an application on behalf of the debtor (reported 13 W. R. 1001), by which it was referred to Mr. Commissioner Holroyd to ascertain and state what was the amount of the debtor's estate in the hands of the provisional assignee. The Commissioner reported that there was a balance of 183*l.* 1*s.* 1*d.*, and some further small sums due to the debtor, and that a portion of the costs of the proceedings instituted by the provisional assignee had been incurred without authority and ought not to be charged against the estate.

Cole, Q.C. and Reed, for the debtor, contended that the provisional assignee was wrongfully retaining the estate, the whole debts having been long since satisfied, and that the estate ought to be revested in the debtor. The provisional assignee was retaining the property for his personal benefit.

Sargood, for the provisional assignee, contended that the insolvency originated in a series of frauds, and that the debtor had no claim upon the indulgence of the Court. It must not be presumed that the provisional assignee had incurred costs without authority, which might have been verbally given by the Commissioner. As to costs, he contended that the provisional assignee had no personal interest in the matter, and therefore ought not to be required to pay them out of his own pocket.

LORD CRANWORTH, C., said that he approved of the report of the Commissioners, and the provisional assignee must pay over the balance disallowed by him. He had spent the insolvent's money in costs which he had no authority to incur, and which had been disallowed. As to costs, he would hear what Mr. Cole had to say in reply. He thought it hard that an officer of the Court should have to pay costs out of pocket, but he ought to have shown authority for the proceedings he had undertaken.

Cole, Q.C., in reply said he only applied for costs since 1864. The provisional assignee had insisted on retaining the estate when he had ceased to be an officer of the Court for his personal advantage.

The LORD CHANCELLOR said he allowed the costs of the appeal to himself. because since the time of the appeal the provisional assignee had been just in the position of any one else holding property and refusing to pay it over to those to whom it belonged.

The order was that the balance of 183*l.* 1*s.* 1*d.* and the other small sums should be paid over to the insolvent, and he should apply to the Commissioner for a revesting order.

ROMILLY, M.R., May 1, 1866.

In re HELLMAN'S WILL.

14 W. R. 682; L. R. 2 Eq. 363.

Considered, *In re Chatard's Settlement Trusts*, [1899] E. R. A.; 68 L. J. Ch. 350; [1899] 1 Ch. 712; 80 L. T. 645; 47 W. R. 515 (Ch. D.).

Foreign domicil—Legatees—Payment of legacy.

INTERNATIONAL LAW.—*A legatee domiciled abroad may, if of age, according to the law of his place of domicil, receive payment of his legacy, although a minor according to the laws of this country and a legatee domiciled abroad may be paid his legacy on attaining his majority according to the laws of this country, even if he is a minor according to the law of his place of domicil.*

A testator domiciled in this country, by his will bequeathed legacies to two persons domiciled in Hamburg. One, a young lady, being of the age of eighteen, the other a youth, being of the age of seventeen, at the time of the testator's death.

By the law of Hamburg a woman is of age when she attains eighteen years, and the father of a minor, which the male legatee was by the law of his domicil, can receive any legacy bequeathed to such minor and give a receipt for it.

Vaughan Hawkins, after stating the above circumstances, asked whether the executors might pay the legacies, the one given to the female legatee, to the young lady herself, and the other to the father of the minor.

LORD ROMILLY, M.R.—On the production of proper evidence that the young lady is of age according to the law of her place of domicil, the executors must pay the legacy to the young lady. The legacy to the male legatee may be paid to him on his coming of age, according to the law of this country, or that of his place of domicil, whichever event shall first happen, but not to the father.

STUART, V.C., May 1, 2, 1866.

BARRETT v. HARTLEY.

14 W. R. 684; L. R. 2 Eq. 789; 14 L. T. 474; 12 Jur. N.S. 426.

Approved, *James v. Kerr*, [1889] E. R. A.; 58 L. J. Ch. 355; 40 Ch. D. 449; 60 L. T. 212; 37 W. R. 279 (Ch. D.). See, *Mainland v. Upjohn*, [1889] E. R. A.; 58 L. J. Ch. 361; 41 Ch. D. 126; 60 L. T. 614; 37 W. R. 411 (Ch. D.); *Rae v. Joyce*, 1892, 29 L. R. Ir. 500 (C. A.).

Account—Trustee and cestui que trust.

ACCOUNTS AND INQUIRIES. PARTNERSHIP. TRUST AND TRUSTEE.—*Where A. and B., partners, assigned all their stock-in-trade, &c., to C., in trust to secure a sum of money advanced by C. and upon further trusts that C. might manage the business until he and other creditors were repaid sums due to them:—Held, on a bill for an account filed by the surviving partner, that C. was not entitled to credit himself with any sums as "bonuses," notwithstanding that his management of the concern had been such as to pay all creditors and largely to diminish his own debt, and that the partners had repeatedly acquiesced in such charges.*

The bill in this case prayed that an account might be taken of what was due from the plaintiff to the defendant on the security of a certain indenture of the

1st of July, 1848; and that, in taking such account, certain sums claimed and charged by way of "bonuses" on the principal sum, secured by the said indenture, might be disallowed; and that, on payment by the plaintiff to the defendant of what might be found due on such account, the defendant might be ordered to re-assign to the plaintiff the property comprised in the said indenture.

The facts of the case were as follows:—The plaintiff and his father (the late Thomas Barrett the elder) had carried on the business of cotton spinners at Prestolee for many years. Shortly previous to the year 1848, the business had fallen off; and the firm had borrowed various sums of one John Hartley, a near relative of the parties, amounting in the whole to the sum of 6,000*l.* 9*s.* The business still continuing to fall off and the firm becoming, in the year 1848, involved with other creditors, an arrangement was come to between the two Barretts and Hartley, by which the latter agreed to advance a further sum of 3,000*l.* The terms of this agreement were embodied in a deed made between the parties and executed on the 1st July, 1848.

By the terms of this deed, Thomas Barrett the elder and the present plaintiff, in consideration of the advances made to them, assigned to Hartley all their stock-in-trade, business premises, machinery, &c., in trust, that the said Hartley, his executors, administrators, and assigns should take possession of the same and should have power to accept any composition for any of the debts or moneys owing by the said firm; and upon further trust "that the said John Hartley, his executors, administrators, or assigns, should, for so long as he or they should in his or their discretion think fit, but not longer or otherwise, and without incurring any obligation so to do, carry on the said business of cotton spinners then or theretofore carried on by the said Thomas Barrett the elder and Thomas Barrett the younger, or any part or branch of the said business." The deed contained further provisions for the defrayal of all expenses incurred in carrying on the said business, a power of sale, a general assignment of the premises on a further trust to secure the principal sum of 9,000*l.* 6*s.*, with interest at 5 per cent., and a trust of the surplus after payment in favour of the assignors.

From the date of this indenture to the year 1859 Hartley continued to superintend the business, giving to it daily time and attention, the cash book being entirely kept by Hartley, and the ledger being kept partly by Hartley and partly by the plaintiff. By the year 1854, the affairs of the firm had been worked round to a comparatively prosperous condition, and in that year an agreement was alleged to have been made between the Barretts and Hartley, by which the latter was to receive, in addition to his interest on the principal sum lent, a bonus of 1,000*l.* for his services rendered up to that time, and an additional sum of 100*l.* per annum. The only evidence of the character of this agreement consisted of entries made in the books from time to time. From these it appeared that, in 1854, John Hartley had been credited with the sum of 1,000*l.*, as "bonus 6 years," and in the years 1855, 1856, 1857, 1858 and 1859, a further sum of 100*l.* had in each year been entered to the credit of his account. In 1859, John Hartley discontinued his superintendence of the business and a formal settlement of account took place. This account recognised the various "bonuses" as placed to Hartley's credit, and found that a balance of 3,700*l.* was still due to him. This balance it was arranged should be paid off by half-yearly instalments of 250*l.* Thomas Barrett the elder was not a party to this settlement, he being then aged and infirm. He died in May of the ensuing year, and Hartley died shortly after, leaving his widow, the present defendant, his executrix and legal representative. The instalments not having been paid for a considerable time, the defendant had enforced her securities. The plaintiff now sought to reopen the account, stating that he was under the influence of undue pressure at the time of sanctioning the "bonuses" to Hartley and praying that they might be disallowed. There was no evidence either of direct pressure on the part of Hartley or of remonstrance by the defendant.

Bacon, Q.C., and *E. K. Karlake*, for the plaintiff.—The relationship between the parties was that of mortgagor and mortgagee. The Court will not permit a mortgagee to take advantage of his position to make an agreement with the mortgagor by which he shall receive more than his principal, interest and costs. He cannot receive payment for services rendered in receiving rents: *French v. Baron* (2 Atk. 120), *Godfrey v. Watson* (3 Atk. 518), *Langstaffe v. Fenwick* (10 Ves. 404). If the position of the parties was not strictly that of mortgagor and mortgagee, it was that of trustee and *cestui que trust*. Neither is a trustee who manages an estate himself entitled to remuneration for his own care and pains: *Bonithon v. Hockmore* (1 Ver. 315), *Lord Trimleston v. Hamill* (1 B. & B. 377) was also cited.

Malins, Q.C., and *Kay*, for the defendant.—This is not a question of mortgagor or mortgagee, or of trustee and *cestui que trust*. It is a case *per se*; but, if otherwise, the rule excluding any collateral arrangement with a mortgagee, and limiting the rights of a mortgagee to his principal, interest, and costs, was a rule consequent only on the usury laws. Those laws being repealed the rule must fall with them. There was no pressure on the plaintiff, the whole arrangement was for his and his father's benefit. He cannot now turn round, and having received benefit of the capital and services of Hartley, repudiate an agreement for remuneration so deliberately made, acquiesced it, and confirmed. There was no obligation on the part of Hartley to carry on the business. The deed merely gave him a power to do so if he thought fit.

STUART, V.C.—In this case the question raised is one of great importance. There are certain settled principles in this court with reference to the relationship of mortgagor and mortgagee and that of trustee and *cestui que trust*. There is also a principle acted upon in this court as to the law of contracts, viz., that, in order that a contract of any kind shall be binding, there must be the consent of both parties to the agreement, and under such circumstances as to show that there was no pressure or influence to make that consent an imperfect consent. Where the consent to an agreement is by parties who are not on an equal footing in respect to it, in the eye of this Court it may be no agreement. Cases have been referred to—cases of mortgagor and mortgagee—when the usury laws existed, and when there was a clear and decided contract for a loan and interest. Then the law would not permit the mortgagee to obtain payment for a collateral service by means of a “bonus,” or by any other means to exact from the mortgagee anything beyond the terms of the contract, or even under the contract. In fact the mortgagee was limited to his principal, interest, and costs. It is probably true that the cases in which the principle was declared were decided when the usury laws were in existence, and when it was said that such “bonuses,” being mortgage bonds for disguising the illegal interest taken, would, if allowed, be a cloak for usury. But it is an observation of importance, now that the usury laws are repealed, that there was in these cases another branch of jurisdiction of this Court which prevented any oppressive bargain enacted from a man under grievous necessity or want of money from being enforced against him. The moment the usury laws were repealed and the lender became entitled to exact any thing he pleased—from that moment the jurisdiction of the Court, which existed independently of the usury laws, was again called into operation.

The case in hand, however, depends on other circumstances. The deed of July, 1848—not, perhaps, improperly, called a mortgage deed—was a deed for securing a large sum of money advanced by the late Mr. Hartley, and vested the whole stock-in-trade of the partnership in him. This property was vested in him for various purposes, as to all of which, in my judgment, the character of trustee is carefully preserved. These purposes may shortly be described as, first, to pay the then existing creditors of Barrett & Son; then to repay himself the sum of 9,000*l.* 6*s.* which he had advanced; and on both these sums to pay an interest of 5 per cent. When these purposes were served Hartley was to pay

the surplus to the two Barretts. Now there can be no doubt about the terms of that deed and the rights of the Barretts to the surplus after this general purpose was fulfilled. This made Hartley as clearly a trustee of the surplus as any trustee could be. Besides that general purpose, there were various discretionary powers given to Hartley. He was not bound to give his services in the supervision of the business longer than he thought fit. He had a power to sell at any moment; and his powers were so complete that I think the lady now before the Court has truly described the position of the plaintiff to have been such that these advances saved him from ruin. Under the supervision of Hartley the concern prospered, the trade debts were paid, and Hartley's debt was reduced by a very considerable amount. Now, in addition to what has been said upon the relationship of mortgagor and mortgagee, and trustee and *cestui que trust*, there is another very well settled rule of this Court—that a trustee is not to exact anything for his services, nor is he allowed to partake of the bounty of the party for whom he acts, during the existence of the relationship. A trustee who has greatly benefited his *cestui que trust* is in no better position. The present plaintiff's case is that the mortgagee or trustee (without any covenant in the deed for the purpose), told him that he intended to charge a "bonus," and that he was made to enter the sum of 1,000*l.* in the books as such, or as that which has been called "payment for valuable services." The plaintiff admits, however, that although many conversations took place on the subject, he did not venture to remonstrate. It seems to me that the plaintiff, with all his property in the hands of another person, was clearly under circumstances of great pressure, and that although the original advance was an act of kindness, the law will not permit a man doing an act of kindness to say he must have 1,000*l.* for it. [His Honour here referred to the case of *Langstaffe v. Fenwick* cited in the argument.]

In this case there are circumstances of pressure and difficulty on the part of the plaintiff which did not occur in the case I have just referred to, and the evidence shows that the plaintiff and his father were not in a position to help themselves. It may be said that this is an agreement, the benefit of which the plaintiff and his father have had—but there still remains the question, Was this done under pressure? My opinion is that this agreement cannot stand, and these "bonuses" cannot be allowed. An account must be taken of what is due on the security of the indenture of July, 1848, without allowing the sums charged as "bonus." There will be no costs of either side up to the decree, and on payment of the sum found due, the plaintiff will have a re-conveyance of the property.

Wood, V.C., April 28, 1866.

CLINCH v. FINANCIAL CORPORATION (LIMITED).

14 W. R. 685; L. R. 2 Eq. 271; 12 Jur. N.S. 484.

Practice—Production of documents—Company—Directors.

DISCOVERY. A.—Upon the common order for an affidavit of documents the directors of a company must make discovery of all documents in the possession of the company.

Taylor v. Rundell (Cr. & Ph. 104) followed.

This suit was instituted by the plaintiff on behalf of himself and all other the shareholders in the Financial Corporation, except the defendants, against the Financial Corporation, the Oriental Commercial Bank, the directors of the Corporation and the bank respectively, and the liquidators appointed to wind up the Corporation.

By an order made in the cause on the 30th day of November, 1865, upon the plaintiff's application, it was ordered that the defendants, the Corporation and the bank, by their secretaries or other proper officers, and also the other defendants, should, within fourteen days after service of the order, make and file a full and sufficient affidavit or affidavits stating whether they, or any, or either of them had or had not in their or any of their possession or power, and, if any, what documents relating to the matters in question in the cause; and it was ordered that the Corporation and bank should produce, at their respective offices, and the directors and the liquidators at the offices of their respective solicitors, the documents which, by such affidavits or affidavit, should appear to be in their or either of their possession or power, except such of the same, if any, as they or either of them might, by such affidavit or affidavits, object to produce.

By their affidavit, filed on the 15th day of January, 1866, the directors of the bank swore that, according to the best of their knowledge, remembrance, information and belief, they had not, and never had had, in their own, or any other person's possession, custody, or power, any document relating to any of the matters in question in the suit, "other than such as might be in the possession of the bank, and which would be accounted for in the affidavit to be made by the secretary of the bank."

This affidavit having been declared by the Court to be insufficient, the directors filed a second affidavit on the 28th of March, 1866, whereby they swore that to the best of their knowledge, information, and belief, they had not then, and they never had had, in their or any other person's possession, custody, or power, any document relating to any of the matters in question in the suit. Thereupon the plaintiff took out a summons to consider the sufficiency of the last-mentioned affidavit; and such summons was adjourned into court and now came on for hearing.

A. E. Miller, for the plaintiff, submitted that the directors had, by their first affidavit, admitted that they had documents in the possession of their agent, the secretary of the bank. The plaintiff wished to test the evidence of the secretary who was not a party to the suit by the oaths of the directors who were parties. A further affidavit must therefore be made by the directors. There were at least two documents in the possession of the directors, which they had mentioned in their answer; and the fact of their being directors made them liable to give a schedule of documents in the possession of the bank, or to explain why they did not. If, indeed, the directors would swear that they had seen the schedule to the affidavit of the secretary, and that there was no document in the possession of the bank other than those mentioned in that schedule, that would be sufficient; but the plaintiff was entitled in this matter to have the oath of each of the directors as well as that of the secretary of the bank. He cited *Stuart v. Lord Bute* (11 Sim. 442); *Attorney-General v. Retford* (2 M. & K. 35); *Acomb v. The Landed Estates Company* (14 W. R. 387).

Little, for the directors, argued that the secretary had accounted for all the documents of the bank, and that, moreover, the plaintiff had access to those documents. It would be wrong, he urged, for the directors to admit possession of the documents of the bank, for in that case they would be obliged, under the order for the production, to produce those documents at the hearing of the cause, though they were merely officers of the bank, whose office might expire before the hearing. The true possession of these documents was in the bank, and the bank was a party to the suit, and the only object of this application was to make the directors repeat the affidavit of the secretary. As the bank was on the record, the proper order would be for the bank to produce; and it was through the secretary of the bank that the plaintiff must have production. From the directors he could only have an account of the documents in their separate private possession, of which there were none. The subject was

unfettered by authority, and *Stuart v. Lord Bute* (*loc. cit.*) was a case of private partnership.

WOOD, V.C., said he thought that the directors had misconceived the form of the order, for they thought that it alluded to a possession of documents by the bank separate from the possession of the directors; but the possession of the bank was the possession of the directors. It was true that an abstraction called the bank was a party on the record; and that the legal title to the documents in question was vested in that corporation. No order of the Court however could be made on the secretary of the bank without the defendants being represented in Court in their capacity of directors.

The possession of the documents of a company must rest with those who managed its concerns, and who alone could deal with those documents; and the question now before the court had frequently been tried upon exceptions to answer as well as upon summons to consider the sufficiency of an affidavit. His Honour then referred to the case of *Taylor v. Rundell* (Cr. & Ph. 104), as showing that the directors of a company must give information as to documents not only in their own private possession or power, but also in the possession or power of the company. His Honour said that, with regard to the directors in the present case, they had control over the documents and they must answer for those which were in their possession or power *quâ* directors; and although the secretary had made an affidavit, yet the directors must affirm that which he had done, and say that they had no other documents but those which were mentioned in his affidavit. There was no difficulty as to the production of the documents; because upon a motion for production of documents the directors could make any defence which might be open to them. The plaintiff had a right to have a list of the documents made by the directors, they not having stated that they had in their possession no other documents than those which had been mentioned by the secretary.

As the directors had misconceived the meaning of the order it would be better to say nothing about costs.

[IN THE EXCHEQUER CHAMBER.]

May 11, 1866.

WINTER v. DUMERGUE.*

14 W. R. 699; 12 Jur. N.S. 726: affirming 14 W. R. 281; 12 Jur. N.S. 56 (C.P.).

Landlord and tenant—Assignment of lease—Failure to obtain consent of lessor—Recovery of deposit-money.

LANDLORD AND TENANT.—*The defendant being in possession under a lease, under covenant not to assign without the lessor's assent, agreed to sell the residue of her term to the plaintiff, he paying 750l., part of the purchase-money, before the completion of the purchase. If the lessor's assent to the assignment could not be obtained, the defendant was to be at liberty to rescind the contract, and was thereupon to return the 750l. The plaintiff paid the 750l., and afterwards endeavoured to obtain a new lease; in this endeavour he was assisted by the defendant. The lessors offered a new lease for the same term and at the same rent, but containing different covenants, and refused to give their assent to the assignment of the term. The plaintiff declined to accept this lease, and brought an action to recover the 750l.*

Held, affirming the judgment of the Common Pleas, that the application

* *Coram*, Pollock, C.B., Blackburn, Shee, and Lush, JJ., Bramwell, Channell, and Pigott, BB.

for a new lease did not operate as a rescission of the original contract, and that, therefore, the plaintiff was entitled to have the lessors' assent to the assignment, or, failing that, to recover the deposit.

Error from the Court of Common Pleas on a judgment for the plaintiff on a special case.

Reported 14 W. R. 281. The facts are shortly as follows:—

In 1852 the Mercer's Company, owners in fee of St. Martin's Hall, leased it to John Hullah for sixty-four years, he covenanting not to assign or underlet the premises without the written consent of the lessors, and not to use them for any other purpose than as a music hall, or for certain public meetings, or for the exhibition or sale of works of art.

In 1860 Hullah became bankrupt, and the defendant purchased the residue of the term, which was sold by order of the Court of Bankruptcy.

In 1863 the plaintiff, by articles of agreement, agreed to purchase the residue of the term of the defendant, subject to the covenants and conditions contained in the lease to Hullah; 500*l.*, part of the purchase-money, to be paid to the vendor on execution of the agreement, and 250*l.*, further part thereof, on the 1st of December following; on payment of the said sum of 250*l.* before the 1st of December the vendor to deliver an abstract of title before the 15th of December. Then followed this clause:—

“If the vendor shall be unable to procure the lessor's assent to the assignment to the purchaser, the vendor may, by notice in writing to be given to the purchaser or his solicitor, at any time, and notwithstanding any negotiation or litigation in respect of any such objection or requisition as aforesaid, rescind this contract, and shall thereupon return to the purchaser the sum of 500*l.*, paid by him on the execution of these presents, and the said sum of 250*l.*, if paid by him as hereinbefore stipulated.”

The two sums of 500*l.* and 250*l.* were duly paid.

The object of the plaintiff was to establish a central cooking depot, and promenade concerts for the working classes, and the defendant joined with him in endeavouring to obtain for him a lease from the Mercer's Company, which would enable him to carry out this object. After protracted negotiations the Mercer's Company, on the 11th of March, 1865, offered him a lease at the then existing rent, and for the same term, but which would not enable him to carry out his object fully. They refused their licence to assign the original lease. This lease the plaintiff refused to accept, and gave the defendant notice that if the license was not obtained by the 18th of March he should consider the contract at an end. On the 28th of April not having obtained the license, he gave formal notice that he had rescinded the contract, and claimed the repayment of the deposit of 750*l.*

The question for the Court was whether he was entitled to recover this sum.

Manisty, Q.C. (*H. T. Cole* with him), for the defendant.—The real question is whether the lessors' assent to the assignment of the original lease is part of the title which the plaintiff was entitled to have. The object of the plaintiff was in reality to obtain a new lease with new covenants, and, as a step to this, he at first attempts to get the old lease assigned to him; subsequently, however, he asks in the alternative either for a new lease or for an assignment of the old one, and gets the defendant to concur in the application and to further it. It is submitted that by so doing he has waived his right to the assignment, and that, if he has the offer of a new lease, he cannot turn round and refuse to accept it, and demand the assignment of the old one. [*BLACKBURN, J.*—Does it come to more than this? The plaintiff prefers a new lease, and the defendant says, I will assist you as far as I can in obtaining it. Does this amount to a rescission of the old contract and the substitution of a new one?] It would not be equitable that he should be able to demand the license after being a party to the application for a new

lease; he has departed from the original contract. [BRAMWELL, B.—You must at any rate make out that the lease which was offered was such a lease as the parties contemplated; did the Mercer's Company do more than offer one with entirely different covenants?] The application for the lease has disclosed what the defendants' object in asking for it was, and has been the means of preventing his obtaining the license; and it is submitted that, even if the terms of the lease were not those for which he asked, he cannot recover the deposit.

F. Russell and C. Bowen, for the plaintiff, were not heard.

POLLOCK, C.B.—We are all of opinion that this judgment must be affirmed, and on the grounds stated in the judgment of the Court below. We think that, although attempts were made to enter into a new arrangement, the original contract was not waived.

Judgment affirmed.

[LORDS JUSTICES.]

May 22, 1866.

CORSER v. JONES.

14 W. R. 704.

Practice—Transfer of cause from one branch of the court to another.

EXECUTOR AND ADMINISTRATOR.—*When two suits relating to the administration of the same estate are instituted in different branches of the Court, and in one of these suits a decree has been obtained, the circumstances may be such as to render it proper that that suit should be transferred to the branch of the Court where a decree has not been made.*

This was an application to have this cause, which was set down before the Master of the Rolls, transferred to the court of Vice-Chancellor Stuart, on the ground that the late Judge had already made a decree in a suit of *Brooks v. Jones*. Both suits related to the administration of the same estate, but that of *Brooks v. Jones* was instituted by an equitable mortgagee to realize his security, while the suit of *Corser v. Jones* was instituted by a specialty creditor on behalf of himself and all other the creditors of the testator. Devisees of specifically devised real estates were made defendants to the latter suit, but not to the former. It was alleged now that it would be necessary, in order to satisfy the creditors, to have recourse to the specifically devised estates.

Southgate, Q.C., Everitt, W. Morris, and B. B. Rogers, appeared upon the motion.

Their Lordships thought that the two causes must come to the same court, and that the reasons in favour of transferring *Brooks v. Jones* to the Rolls preponderated. As, however, some of the parties to the latter suit had not been served with notice of this motion, unless they consented to the transfer of that suit to the Rolls, the present motion must be dismissed.

ROMILLY, M.R., May 5, 7, 1866.

Re THE UNIVERSAL BANK (LIMITED).

14 W. R. 705: on appeal, [1866] E. R. A.; 14 W. R. 906 (L. JJ.).

Winding-up—Petitioning creditor—Order—Costs.

COMPANY. M.—*A. received from B., a promoter of a company, certain promissory notes which had been given to B. by the company, but which, at the time of the transfer to A., were overdue.*

B. was under an agreement not to negotiate the notes unless the company started.

The company never started, but after failing in establishing itself, passed a resolution for a voluntary winding-up. A. presented a petition asking for a winding-up by the Court.

Held, that A. could not stand in a better position with respect to the promissory notes than B.; that B. would have been restrained in equity from suing on the notes; that A. showed no case to interfere with the voluntary winding-up, and his petition must therefore be dismissed with costs.

This was a petition to have the above company wound-up by the Court.

Darby, in support of the petition.—A resolution for a voluntary winding-up has been already passed by the company, but the 145th section of the Companies Act of 1862 saves the rights of creditors to a winding-up by the Court. The company's debt to the petitioner arises from certain promissory notes which have come into the petitioner's hands for value, but after they were overdue. The respondents dispute the payment of these notes, on the ground that they were given to a promoter of the company, on condition that they should not be negotiated unless the bank started. The petitioner knew nothing of this arrangement though the bank in fact never was established. The voluntary liquidator is one of the guarantors for the payment of the preliminary expenses, and his liability therefore subsisting, he is interested in disputing the petitioner's claim; so as to lessen the number of creditors. At the time of being appointed liquidator he made an assignment for the benefit of his creditors, and he is not a proper person therefore to be intrusted with the winding-up.

Caldecott, for the voluntary liquidator, objected that the petitioner had produced no evidence showing any necessity for superseding the voluntary winding-up, that in fact he was not a creditor of the company at all, for according to his own showing the petitioner's claim was a disputed one, which he ought to establish at law.

LORD ROMILLY, M.R.—This is an application to wind up a company which never had any business. It was agreed that the directors and promoters should receive 1,000*l.* if the company started, and certain notes were therefore given to two of the promoters subject however to an agreement that they should not be negotiated unless the company started. These notes never were negotiated, and the promoters swear that they returned them, but in the course of certain transactions some of the notes were transferred to the petitioner. The promoter who received such notes would have been restrained in equity from suing on them, and the petitioner received them after they were overdue, and says that he made inquiries but could get no information about them.

The petitioner taking the notes overdue as he did, can stand in no better position than the promoter who received them, and has not in my opinion shewn any cause for interference with the voluntary winding up. The petition is dismissed with costs.

ROMILLY, M.R., April 28, May 4, 7, 1886.

In re GREAT NORTHERN COPPER MINING COMPANY (LIMITED).

14 W. R. 705.

Petition—Winding-up order—Opinion of shareholders—Costs.

COMPANY. M.—*If, on a petition for winding-up a company, the Court is of opinion that the circumstances are such that the opinion of the shareholders ought to be obtained, and such opinion, when obtained, is to the effect that there should be no winding-up, the Court, if satisfied that such is the bona fide opinion of the shareholders, will consider itself bound thereby.*

Therefore, such a petition having been ordered to stand over for the wish of the shareholders to be ascertained, and the shareholders expressing a bona fide desire to continue their concern, the Court dismissed the petition; but, being of opinion that the petitioner had a bona fide case at the time of presenting the petition, dismissed it without costs.

This was a petition to wind up the above company.

The company had been formed for the purpose of carrying on a mining business. It was a perfectly *bona fide* concern in its institution, but for some time past it had not obtained any ore from the mines which the company was formed to work. The matter had been before the Court before, and had stood over on a suggestion made by the Court, that the opinion of the shareholders should be taken as to whether the company should be wound up, or should continue, the officers of the company, undertaking meanwhile not to take their salaries so as to diminish the assets of the company. (10 S. J. 309). The works had been stopped for the time by a resolution of the company. The shareholders had in accordance with the suggestion of the Court held a meeting, and had at such meeting come to a resolution that the business should be continued.

Selwyn, Q.C., and *Brooksbank*, for the petition.

LORD ROMILLY, M.R.—As the matter stood over in order that the opinion of the shareholders should be taken, if I find that a *bona fide* expression of the shareholders as to the continuance of the undertaking has been obtained, I shall consider myself bound by that opinion.

Brooksbank.—If the circumstances are such as in the opinion of the Court to justify a winding up order, the opinion of the majority of the shareholders is utterly unimportant. [The MASTER OF THE ROLLS.—My impression is that the petitioner's case was a *bona fide* one. The question on which I must however determine this petition is, whether or not the expressed desire of the shareholders to carry on the business is *bona fide*.]

Jessel, Q.C., and *Roxburgh*, for the company, opposed the petition, and contended that the petition was a mere speculation got up by the petitioners for the purpose of getting the costs of the petition.

His Lordship, in the course of the argument, decided that he would make no order on the petition, but would simply deal with the question of costs.

Southgate, Q.C., in reply on the question of costs.—This is not a sham petition. The petitioner has endeavoured to obtain the opinion of the shareholders, and holds proxies to a large amount. He has endeavoured to obtain from the shareholders an expression of their opinion, and from many he has received an expression of their desire to have it wound up. There is nothing to justify the attack made upon him.

Bush, and *Jenner*, for other shareholders, against the petition.

LORD ROMILLY, M.R.—This petition stood over for the purpose of ascer-

taining the wishes of the shareholders. It is a case in which the shareholders ought to have an opportunity of determining what should be done to realise the company's property, and whether or not the concern should be carried on. The shareholders have met, and determined to carry on the concern. On the evidence it appears that the meeting has been fairly held, and considering the fact that there are no debts of the concern unpaid, it cannot be said that the conclusion the shareholders have come to is a wrong one. The petition is dismissed; it appears, however, on the evidence that at the time the petition was presented there was a proper case for a petition, and it will therefore be dismissed without costs.

ROMILLY, M.R., May 22, 1866.

BARONESS HERBERT v. SALISBURY AND YEOVIL RAILWAY COMPANY.

14 W. R. 706; L. R. 2 Eq. 221; 14 L. T. 507.

Purchaser—Specific performance—Rate of interest—Penalty.

PENALTY.—*A purchaser contracted after a fixed day to pay 4l. per cent. on unpaid purchase-money, and after another fixed day to pay 8l. per cent.:—Held, that such contract was not in the nature of a penalty, and would be enforced in equity.*

This was a suit for specific performance of agreements entered into by the defendant company for the purchase of certain lands belonging to the late Lord Pembroke. There was no dispute as to the facts as set out by the bill, which were shortly as follows:—

The late Lord Pembroke was seised of part of the land the subject of the suit, as tenant for life under a settlement, and part as tenant in tail made, with reversion to the Crown.

The Act authorising the Salisbury and Yeovil Railway was passed in 1854, and, subsequently thereto, agreements were entered into between Lord Pembroke and the railway company for the purchase by the company of the said land, by which it was stipulated that all the lands to be taken by the company should be considered as comprised in the settlement, except such (if any) as the earl's solicitor should state to be lands the reversion to which was in the Crown. That the title should be absolutely accepted as to the whole of the lands to be taken, and that the purchase-money for the lands granted by the Crown should be paid into Court, and that for the lands in settlement should be paid to the trustees of the settlement before July 1st, 1858, and that from that day interest at 4l. per cent. should be paid on so much of the purchase-money as remained unpaid; but that if payment should be delayed beyond January 1st, 1859, interest at the rate of 8l. per cent. on the purchase-money should be paid from that day until the day of payment.

Delay was afterwards occasioned by disagreement as to quantity of acreage, and by difficulty of distinguishing the Crown lands and the settled lands which were required to be conveyed by separate instruments.

No steps were taken by the defendants to relieve themselves from this liability to the higher rate of interest by paying the purchase-money into court.

A compromise as to the disputed points was entered into in September, 1864, but the defendants refused to pay interest at the rate of 8l. per cent. as stipulated by the agreement.

The bill prayed specific performance, and that interest might be paid on

the purchase-money at the rate of 8l. per cent. from the 1st January, 1859, and that such interest might be declared to be a charge or lien upon the purchased premises.

Baggallay, Q.C., and *C. Hall*, for the plaintiffs, cited *Esdaile v. Stevenson* (1 Sim. & Stu. 122); *Lord Palmerston v. Turner* (33 Beav. 524); *Williams v. Glenton* (1 L. R. Eq. 200); *De Visme v. De Visme* (1 M. & G. 836).

Townsend (Selwyn, Q.C., with him).—The delay was all on the part of the vendors, who neglected to distinguish the lands granted by the Crown from those in settlement, and they ought not to make profit of their own default. [LORD ROMILLY, M.R.—You might at any time have applied to me, and paid the money into court.] The question is not, as in *De Visme v. De Visme* and other cases cited, whether we are to pay interest at all, but whether we are to pay the higher rate of interest, which the Court will view as a penalty, and will relieve against as in the case of a mortgage. He cited: *Lady Holles v. Wise* (2 Vern. 289); *Strode v. Parker* (2 Vern. 316); *Nicholls v. Maynard* (3 Atk. 519); *Walmesley v. Booth* (3 Ch. Rep. 481).

LORD ROMILLY, M.R.—I agree that the case of *De Visme v. De Visme*, and other similar cases, have no application here, for the question is not whether interest shall be paid at all, but whether 8l. per cent. is a penal rate of interest such as this Court will relieve against. If a man enters into a contract with his eyes open to pay a high rate of interest definitely and unconditionally, he cannot afterwards complain of the hardness of the contract, nor does it matter whether there is, as in this case, an ascending scale of interest. This is quite different from a covenant to pay a higher rate of interest if the lower rate is not paid punctually. The stipulation to pay 8l. per cent. was an essential term of the contract, and not in the nature of a penalty, and no fraud having been proved there must be a decree for specific performance according to the terms of the contract.

Wood, V.C., May 2, 1866.

GASKIN v. ROGERS.

14 W. R. 707; L. R. 2 Eq. 284.

Will—Construction—“Penalty legatees.”

WILL.—Where a testator has impressed a particular sense of his own on the expression “pecuniary legatees,” annuitants under the will do not fall within the meaning of that expression.

Further consideration.

The principal question was whether, under a residuary gift to persons taking “pecuniary legacies” under the will of the testator in the cause, annuitants could take. The testator after directing that his trustees should pay his “debts, funeral and testamentary expenses, and the life annuities hereby given as the same shall become due, and in the next place pay the several pecuniary legacies hereinbefore given,” and directing a certain accumulation; directed that after the expiration of the term of accumulation and the termination of certain annuities, the accumulated fund should be divided amongst and paid to “the several persons including the executors of my will herein named and charitable institutions, taking pecuniary legacies under which denomination legacies of government stock or funds are intended to be included of the amount or value of 50l. each or upwards, under this my will, or any codicil I may hereafter make to the same, including servants entitled to legacies of accumulative nature depending on length of service in cases wherein the

accumulated amount or value at the time of my death shall be or exceed 50l.; but excluding persons taking legacies as to which express provision has been or shall be made by me to the contrary, rateably and in proportion to the amount or value of their respective original legacies, the legacies of 3l. per Cent. Annuities being for this purpose estimated and valued at par, without regard to the actual market price or value thereof."

The testator made a codicil to his will, written in the margin of it, and by the side of an erasure of a clause in the will, which had directed that annuitants were not to share in the residue. The codicil directed that the words erased should be treated as cancelled. It was attested by a legatee and annuitant under the will.

Gifford, Q.C., Rolt, Q.C., Amphlett, Q.C., Daniell, Q.C., Cotterell, Speed, Dickinson, and E. K. Karlake, for various parties interested in the exclusion of the annuitants, contended that the testator intended to exclude annuitants.

Bristowe for the charities; *Osborne, Q.C.*, and *C. O. Boys* for the personal representatives of the legatee and annuitant who had attested the codicil, cited *Gurney v. Gurney* (3 Drew. 208).

Rodwell and *F. Vaughan Hawkins* for other parties.

WOOD, V.C., said there was no doubt on the construction of the will and codicil that the annuitants took nothing under the residuary gift. The term "pecuniary legatees" would have no effect, *primâ facie*, in excluding annuitants; but this rule must give way to the cardinal rule of giving effect to the testator's intention as expressed in his will. Taking the whole will irrespective of the passage erased, the ambiguity would be removed. (His Honour read the gift of the residue, commenting on the distinction between "pecuniary legacies" and "life annuities" in the will.) The testator had impressed a particular sense of his own on the word "pecuniary legacies." Having no more than this, we could have no doubt but that the annuitants were intended to be included. Let us now introduce the clause struck out (His Honour read the clause). This was not making an exception out of a class which he had before included, but it stated the intention to include them. It was a monstrous construction to suppose that by striking out the words the testator meant to give the annuitants a share.

With regard to the attesting witness, His Honour held that the case before Vice-Chancellor Kindersley (*Gurney v. Gurney* loc. cit.) had no application. There the residue was well vested in the witness by the will, subject to charges, and on condition of surviving the period of distribution.

His Honour made a decree in accordance with these views, excluding the annuitants and the attesting witness from sharing in this residue.

ROMILLY, M.R., May 7, 1866.

In re CHESTERFIELD AND MIDLAND COLLIERY COMPANY.

14 W. R. 721; 14 L. T. 509.

Allotment of shares—Contributory—Shareholders—Winding-up.

COMPANY. C.M.—Where a man had paid a deposit on application for shares in a company, but the shares were never allotted:—Held, that he could not be placed on the list of contributories.

For allotment it is not sufficient to place a man's name on the list of shareholders if he is not placed upon the registered list within a reasonable time after application for shares.

This was an application to have the name of W. P. Hawkins struck off the list of contributories to the winding up of the Chesterfield and Midland Colliery Company.

The Company was established in 1861, and the prospectus stated that a deposit of 10s. per share was to be made on application. If 2,000 shares were not subscribed for the deposit would be returned. The shares were 5l. each. The applicant applied for 50 shares on the 3rd of September, 1861. On the 20th of December, 1861, the directors passed a resolution that a sufficient number of applications had been made, and proceeded to allot shares. Hawkins' name did not appear in its proper place in the list of directors made out, and he never had any notice of allotment. The directors made out the list for the registry of shareholders for 1862 without including his name. It appeared, however, in the list for 1863. He had refused to pay the call on allotment.

T. A. Roberts, for the official liquidator, said that it was for Hawkins to show why his name should be struck out.

Roxburgh, for Hawkins, contended that it did not appear that the necessary 4,000 shares had been subscribed for at the time of the allotment, and that Hawkins was not registered as a shareholder within the proper time. He referred to the case of the *Ramsgate Victoria Hotel Company v. Montefiore* (14 W. R. 335; 1 L. R. Ex. 109). No calls were ever paid by Hawkins.

T. A. Roberts, in reply, read some letters which passed between the secretary to the company and Hawkins, tending to show an intention to allot, and referred to the ledgers of the company to show that his name appeared all through.

LORD ROMILLY, M.R.—If there had been an allotment made I should have made him a contributory. But no allotment ever was made to him. No letter ever was written to show that he was a shareholder. They call upon him to pay his allotment call, and then acquiesce in his non-payment of it. The books of the company are evidence, but they do not show that his name was put down in the list in due time. I will not give costs in this case.

ROMILLY, M.R., May 8, 9, 1866.

Re BARNED'S BANKING COMPANY.

14 W. R. 722; 14 L. T. 451.

Petition for winding-up—Question whether compulsory or voluntary—Order.

COMPANY. M.—In the month of June, in the year 1865, a company purchased a banking business for about 150,000l. In the month of April, 1866, the company failed, with liabilities estimated at about three and a-half millions. Some creditors of the company presented a petition for a compulsory winding-up. The company itself presented a petition for a voluntary winding-up under the supervision of the Court. The petition for the compulsory winding-up came on to be heard before the petition for the voluntary winding-up under supervision.

The Court ordered a compulsory winding-up without waiting till the other petition would be heard. Where a company has failed under such circumstances, the shareholders ought to have every opportunity of ascertaining the cause of failure. This is better done by means of official liquidators.

This was a petition for the compulsory winding-up of the above company. The company commenced business in the month of June, 1865, having

purchased the business of a banking firm in Liverpool for about 150,000*l.* In the month of February, 1866, the directors presented a report to the shareholders representing the prospects of the company as most favourable, and recommending the declaration of a dividend. In April, 1866, the company suspended payment, with liabilities estimated at about 3,000,000*l.* The company had itself at a meeting held on the 1st of May passed a resolution for a voluntary winding-up. The liabilities of the company appeared at such meeting to be greater by half-a-million of money than they appeared to be by the balance-sheet attached to the report.

The petition, which was presented by the Bank of England, was presented on the 20th of April.

Selwyn, Q.C., and *Cotton*, in support of the petition, stated the facts, and said it was urged on the other side that there had been a resolution for a voluntary winding-up, and therefore there ought not to be a compulsory order. What the petitioners desired was that the business should not be conducted by persons who might be improperly biassed, and that nothing should be done without the sanction of the Court. By section 84 of the Companies' Act, 1862, the winding-up commences from the presentation of the petition. If, therefore, a creditor makes a proper case by petition for winding-up the company, nothing that has been done in the interim between the presentation and hearing of the petition, can affect the creditors' right to a winding-up order. A bankrupt might as well say, "I would rather manage my own affairs," and therefore be allowed to do so.

Baggallay, Q.C., *Jessel, Q.C.*, and *Kekewich*, for other parties, also supported the petition.

Southgate, Q.C., and *Robinson*, for the company, opposed.—With regard to many of the liabilities arising from bills, the company are not the persons primarily liable, but are only liable as indorsers. There is another petition, by the company, for a voluntary winding-up under the supervision of the Court, which cannot come on before next term. This petition should not have been forced on before that presented by the company. [LORD ROMILLY, M.R.—The ground on which this petition was permitted to come on at this time was the unexpected withdrawal of other petitioners, whose petition would have come on earlier in the regular course.] The petitioners have not stated the amount of their security, and although they are large creditors, still they may be amply secured. A large number of creditors who attended the meeting of the company are in favour of the voluntary winding-up under supervision. There is no question here but that the assets are very considerable, and the sole question is in what manner the company shall be wound up. That question ought to be decided on the hearing of the petition presented by the company.

The General Rolling Stock Company (Limited) (34 Beav. 314); *Isle of Wight Ferry Company* (2 H. & M. 597), were cited.

LORD ROMILLY, M.R.—A compulsory winding-up order ought to be made in this case. Nothing could be gained by the petition standing over, even if, in the view of the meeting of the 1st of May, a voluntary winding-up was thought desirable. It is most desirable that immediate steps should be taken to realise the assets of the company. This can be better done by official than provisional liquidators. Moreover, better security can be obtained from the former than the latter, and the Court is bound in these cases, where the amount coming into the hands of the liquidators is so large, to see that ample security is provided. In one case that came before me the amount actually in the hands of the liquidator before he came to pass his periodical accounts was double, or more than double the amount of security given by him. In the event, therefore, of any grave defalcation, which fortunately has not yet happened, the members of the companies who guarantee liquidators, often to large amounts, would be seriously involved. This is not the case of an old establishment having failed,

when it might be advantageous to allow the winding-up to be, to a certain extent, conducted by those who had been for years connected with it.

There can be a more searching inquiry into, and more complete disclosure of, the affairs of a company when wound up compulsorily. The career of this undertaking is startling. In June, 1865, the sale of the bank business to the company took place. In April of the following year it fails, with liabilities to the extent of 3,800,000*l*. The creditors ought to be put in the best position possible to obtain the fullest information as to everything connected with this company, and the causes which led to such a disastrous issue. The order must be for a compulsory winding-up.

KINDERSLEY, V.C., March 17, May 8, 1866.

WEBB v. HUNT.

14 W. R. 725.

Injunction—Light and air—Degree of injury—Sky area.

EASEMENTS AND PRESCRIPTION.—*W., residing near Fenchurch Street, London, had ancient windows looking into an archway and passage passing under part of his house towards the rear, and also a skylight near a cottage belonging to Messrs. H., who pulled down the cottage and commenced a building intended to be very lofty, immediately facing the end of the archway passage. On a written notice from W. they desisted, but seven months after, when the Courts were not sitting, suddenly recommenced, and carried up the wall to a great height before a bill could be filed or an interim order for an injunction obtained, which was done as soon as possible, to restrain raising any buildings so as to obstruct the plaintiff's light and air, and the enjoyment of his ancient lights, and for damages:—Held, on the evidence at the hearing, and measurement of sky area, that the plaintiff was entitled to damages.*

This case came on for the Hearing.

The bill was filed by Richard Francis Webb against Robert Holdsworth Carew Hunt, Thomas Turnbull, and Holdsworth Hunt, to restrain them, their agents, servants, and workmen, from raising, or permitting, or continuing to remain raised, the height of certain new buildings then erecting above the height of the old buildings standing on the defendant's land; or above the height of a certain ware-room, or nearer than a certain cottage stood prior to the alterations so commenced by the defendants; and from erecting, or allowing to continue erected any building or buildings of the defendants which might obstruct, darken, or prejudicially affect the ancient lights, or the access of air, to the enjoyment of which the plaintiff was entitled; and from constructing or allowing to remain constructed in these said new buildings any window which might overlook the plaintiff's premises; and that they might pay such costs and damages as the Court might award, and the costs of suit.

The plaintiff was the lessee of a house No. 9, Coopers Row, Allhallows, Fenchurch Street, for seventeen years' lease unexpired, dated in March, 1861, from St. John's College, Oxford, the defendants being the owners and occupiers of large buildings eighty feet high to the north and east, that is at the back of his premises. The defendant's premises were approached by an archway ten feet six inches wide under part of the plaintiff's house, and for more than twenty years the road leading backwards, and being a continuation of the archway, had not been built upon nor obstructed for 60 ft. and upwards. Beyond this stood a cottage belonging to the defendant of the variable height of 21 to 26 ft., and by the side of it, and opposite to the back of the rest of the plaintiff's house, a

ware-room 24 ft. high. The plaintiff's house was generally 20 ft. or more distant from the cottage and ware-room, although a one-storied room belonging to him approached within 6 ft. of the ware-room, and was lighted by a skylight. The plaintiff was a wine merchant and picture dealer, and the bill alleged that the light obtained through the skylight of the one-storied room was of large amount and essential to his business, and that he and his predecessors for twenty years had enjoyed free access of light and air, except as obstructed by the cottage and ware-room. In October, 1864, the defendants pulled down the cottage, and began to erect large buildings, which completely blocked up the road beyond and being a continuation of the archway, and touched the east wall of the ware-room. The plaintiff ascertained that the intention was to raise the new buildings to a height far exceeding the old ones, and Messrs. Young & Son, his solicitors (by his direction), on the 22nd October, gave the defendants and their architect notice in writing requiring them not to raise the new buildings so as to obstruct his light, and threatening proceedings in chancery. On the receipt of this notice the building operations were suspended, but on the 15th May, 1865, the building was recommenced and carried on with such dispatch that before the bill could be filed an *interim* order for the injunction obtained (which was done immediately), the wall was raised to 45 ft., and the defendants threatened to raise it to the height of 70 ft.

The bill then charged injury, and that the one-storied show-room would be rendered almost useless, and prayed for an injunction and damages. Evidence was produced in support of the plaintiff's case, both by himself and his undertenants, a sack manufacturer and a wine merchant; and it was also alleged that an old gentleman in bad health, who also was a tenant, had been obliged to leave in consequence of the building; but this was denied, as also the obstruction and injury. It was stated that the defendant had purchased the plaintiff's premises, and that a railway company had given notice to take the whole property.

Baily, Q.C., and *Andrew Thomson*, for the plaintiff.

Glasse, Q.C., and *Cecil Russell*, for the defendants.

Cases cited:—*Durell v. Pritchard* (14 W. R. 212); *Isenberg v. East India House Estate Company* (12 W. R. 450); *Jackson v. The Duke of Newcastle* (12 W. R. 1066); *Johnson v. Wyatt* (2 D. J.S. 18; 12 W. R. 234); *Clarke v. Clark* (14 W. R. 115); *Stokes v. City Offices Company* (2 H. & M. 650; 13 W. R. 537); *Lyon v. Dillimore* (14 W. R. 511); *Curriers' Company v. Corbett* (13 W. R. 538); *Robson v. Whittingham* (14 W. R. 291).

May 8.—*KINDERSLEY, V.C.* (after stating the facts).—The position of the plaintiff's house is peculiar, and his ancient windows look out into the archway, down which the only light from the sky comes, that is a strip from the zenith to the horizon; and I do not propose to refer to any other windows; but there is a skylight in the roof sloping south. This strip of sky therefore came to the windows at an angle of about twenty-seven degrees with the horizon, and that was the principal light. From the defendants' proceedings in May, 1865, it is impossible to doubt that they intended to get the building completed as soon as possible, and it is remarkable that they chose a time when the Courts were not sitting, and the plaintiff was obliged to send down into the country to me to get an *interim* order, and they thus outstripped the plaintiff's solicitor and draftsman. This is a case in which, it appears to me, supposing there is sufficient injury, the Court will give damages. The defendants' new building immediately faces the passage from which the plaintiff's windows get light, and cuts off about thirty or thirty-three degrees, and the proportion which that bears to the total area of sky which the plaintiff previously had it is difficult to ascertain, but having regard to the measurement, it is clear that it does materially interfere with the light of the windows and the skylight. As to the evidence, there is, as usual, a conflict, and whether the plaintiff's pictures would be better or worse for a good light I do not know; but he swears that

the light is materially interfered with. As to their invalid lodger, I do not think it is established that he left in consequence of the diminution of light; nor can I place any reliance upon the scientific evidence, which is mere discussion of probabilities *à priori*. But, having regard to the evidence and measurements, I think the plaintiff is entitled to a declaration that he ought to be compensated by damages, with the usual reference; the defendants to pay the costs, including the costs of the motion.

Wood, V.C., March 23, 24, 1866.

THE ATTORNEY-GENERAL *v.* THE GREAT WESTERN RAILWAY
COMPANY.

14 W. R. 726.

Railway Company—Deviation—Nuisance to the public.

RAILWAY.—*Where a railway company, keeping within their powers of deviation, deviate from their deposited plans in such a way as to arouse an apprehension, which was not aroused by the deposited plans, that great inconvenience and risk will be caused to the public, yet they will not be restrained by injunction if the information or bill against them does not charge them with capriciously using their powers of deviation, and if no evidence is given to show that, granting the deviation, the line could be constructed in such a way as to allay the aroused apprehension.*

Motion for decree.

This was an information and bill against the Great Western Railway Company. The information was filed at the relation of the Clerk to the Local Board of Health for the hamlet of Smethwick, in the parish of Harborne, in the county of Stafford; and the bill by the same clerk as plaintiff. The informant and plaintiff prayed that the defendants, their servants, &c., might be restrained from constructing, or causing or permitting to be constructed, a certain bridge carrying a public roadway in Smethwick, called Roebuck Lane, over their railway so and in such manner that the level of the said Roebuck Lane should or might be raised more than four feet higher than its former level.

Roebuck Lane was one of the principal thoroughfares of Smethwick, and was also the main thoroughfare between Smethwick and West Bromwich. A very large amount of traffic, consisting to a great extent of waggons carrying loads of ironwork of enormous weight, was in the constant habit of passing along it.

It was alleged by the information and bill that the result of the construction of the railway in the manner now intended by the defendants, would be serious inconvenience and risk to the persons engaged in the traffic along Roebuck Lane, in consequence of the fact that near the proposed bridge or viaduct which was to carry Roebuck Lane over the railway, Roebuck Lane makes a considerable curve, and then passes over a canal by a narrow and inconvenient bridge. Had the defendants kept to their deposited plans and sections, the incline of Roebuck Lane from the viaduct would have terminated before reaching the canal bridge. Now, however, the canal bridge would about bisect the incline, and serious consequences might be apprehended from the enormous loads of iron, &c., having to go down and make a sharp turn close by the canal bridge.

The information and bill contained some allegations, which his Honour thought were not proved, as to an express agreement between the local board

and the defendants, that the latter were not to raise the roadway of Roebuck Lane more than four feet above its former level.

Amphlett, Q.C., and *Eddis*, for the informant and plaintiff, argued that, admitting that the defendants had power to do the acts complained of, yet they ought to be compelled to construct their line with as little inconvenience to the public as possible. They cited *Manser v. Northern and Eastern Counties Railway Company* (2 R. Cas. 380).

Rolt, Q.C., and *T. Stevens*, for the defendants, cited *The Queen v. East and West India Docks and Birmingham Junction Railway Company* (1 W. R. 409; 2 El. & Bl. 466), and *Coats v. The Clarence Railway Company* (1 R. & M. 181).

WOOD, V.C., said that there was nothing in the information and bill about the company's having capriciously used or exceeded their powers. The Company clearly had power to make the deviation, which they said caused them to raise the level of the road. There was no evidence to show that if the deviation was made, the line could be constructed in any better way than that proposed by the company. The information and bill must be dismissed with costs.

WOOD, V.C., April 21, 1861.

In re KIRKBRIDE'S TRUSTS.

14 W. R. 728; L. R. 2 Eq. 400; 15 L. T. 51.

See *Long v. Lane*, 1885, 17 L. R. Ir. 11 (M.R.): 1886, 17 L. R. Ir. 24 (C. A.).

Will—Construction—Changing words.

WILL.—*A testator bequeathed personalty in trust for his wife for life, and after her death to be divided between his brothers and sisters; and he declared that in any case any or either of his brothers or sisters should die in his lifetime, and before they should have received any benefit from the bequest, then the share of him or her so dying should go over.*

The Court refused to change the word "and" into "or," but held the second clause of the declaration to be explanatory of the first.

This was a petition under the Trustee Act.

James Kirkbride, by his will, dated January 14th, 1846, bequeathed his residuary personalty to his executors, upon trust to invest and pay the produce to his wife Jane Kirkbride for life, and after her death upon trust to pay and divide the principal unto and between his brothers, Jonathan Kirkbride, John Kirkbride, and his sisters, Margaret Cameron, and Mary Liddle, in equal shares. The testator then proceeded as follows:—"My will is, that in case any or either of them the said Jonathan Kirkbride, John Kirkbride, Margaret Cameron, and Martha Liddle shall die in my lifetime, and before they shall have received any benefit from the aforesaid bequest, then the share of him or her so dying shall go to and be divided equally between and amongst his or her respective children, if more than one, share and share alike, and if but one then to such one."

The testator died on the 19th of August, 1852, leaving his wife, and all his said brothers and sisters him surviving.

The testator's brother John Kirkbride was the only one of the legatees who died before the testator's wife. He died in 1854. The testator's wife died in 1863.

After the death of the testator's wife, the executors, having realized the

estate, paid the shares of Jonathan and Martha to them respectively, and accounted for the share of Margaret, who had died in the meantime, with her personal representatives. A dispute having arisen about John's share, they paid it into Court. The present petition was presented for the payment of such share.

The testator's brother John left seven children, four sons and three daughters, viz.:—James the younger (since deceased), Isaac, John the younger, William, Jane wife of Richard Highmoor, Margaret wife of John Story, and Elizabeth Byers (since deceased).

The testator's brother John, by his will, left his residuary personalty to his four sons in equal shares. Isaac and John the younger had been partners in business, but were now bankrupts.

The petition was presented by the two surviving daughters of John and their husbands, the personal representatives of the deceased daughter, and Isaac; and it prayed that the fund in Court, after payment thereof of costs, &c., might be divided into seven equal parts, and severally paid to the surviving children of John, the representatives of such as were dead, and the assignee of the two bankrupts.

Willcock, Q.C., and *Brodrick*, for the petitioners, contended that the testator had contemplated more contingencies than one, viz.—(1) the death of any of his brothers and sisters in his own lifetime; and (2) the death of any of them in the lifetime of the tenant for life, and, therefore, before receiving any benefit from the bequest. The word "and," then, must be read "or" in the expression "die in my lifetime and before receiving, &c." If the literal sense be kept to, the second portion of the sentence would be silenced. They cited 1 Jarm. on Wills, 483; *Maberly v. Strode* (3 Ves. 450); *Bell v. Phyn* (7 Ves. 458); *Mackenzie v. King* (12 Jur. 787).

Babington for the representatives of James the younger and William. The second clause explains the first, and is equivalent to, "and consequently before receiving any benefit, &c." The brothers and sisters took a vested interest, and, therefore, by surviving the testator only they would receive some benefit, for they could alien their reversions.

Bagshawe for the creditors' assignee of Isaac and John the younger.—The Court will not read "or" for "and" if the consequence will be a divesting of a vested interest: See 1 Jarm. on Wills, 484; *Day v. King* (Kay, 708). If "and" be read "or," then the first clause of the sentence is reduced to silence.

Willcock, Q.C., in reply.

Wood, V.C., said that it would be best to adhere to the language of the will. This was, however, a case very near the line where alterations were made to suit the supposed intention of the testator. It had been urged that "and" should be read "or," because, if it were not, then the second clause of the sentence would be identical with the former. But if "and" were read "or," then besides the difficulty arising from the fact that the operation of changing words would be gone through for the purpose of divesting a vested legacy, further difficulties would arise. For if the disjunctive were taken, then the second clause might mean either (1) dying in the lifetime of the tenant for life, or if it be taken more strictly, (2) dying before the actual receipt of the legacy. That the latter construction should be the right one was against Lord Thurlow's condemnation of "an immeasurable intent." If the former were the right one the testator could easily have described it *simpliciter*. The reasonable construction was that the second clause explained the first. If the Court did change "and" into "or" for the purpose of avoiding the surplusage arising from the second clause of the sentence being silent, there would then be a new surplusage, for the first clause would be silent. And if the Court did make the change it would then place itself in the difficult position of being

obliged to conjecture the meaning of the words "before they shall have received," &c.

There must, therefore, be a declaration that the legacy to John vested in him absolutely on the death of the testator.

WOOD, V.C., April 21, 1866.

In re MANIFOLD'S SETTLEMENT TRUSTS.

14 W. R. 729.

Settlement—Construction—Interest upon interest—Absence of express power to accumulate.

TRUST AND TRUSTEE.—*A settlor assigned certain mortgages and "all interest thereon then due and payable, and thereafter to accrue and become due and payable" unto trustees for the equal benefit of his two infant granddaughters. The trusts as to one moiety were that, when one of the granddaughters attained twenty-one, the trustees were to pay the rents, interest, and annual produce of such moiety of the said principal moneys, interest, and securities to her for life; the moiety after her death to be in trust for her children, if any. There was no express provision for either accumulation or maintenance during the granddaughter's minority; but there was a power of maintenance during the minority of her possible children. In default of children, after her decease the moiety of "the said principal sums, securities, and premises" was to go over to the petitioner.*

The trustees accumulated and invested the produce of her moiety during her minority; and after she had attained her majority they paid her the interest of the invested accumulations, together with that of her moiety of the principal sums until her death. She died without having been married.

It was held that the accumulated sum formed part of the principal of her moiety, and went over to the petitioner under the trust in his favour declared in the settlement.

This was a petition for the payment of a sum of money out of Court.

The facts were as follows:—

James Manifold, by an indenture of settlement, dated March 2nd, 1837, after reciting that in consideration of the natural love and affection which he had for his two granddaughters, Ann Orford and Elizabeth Orford, he had determined to assign the several principal sums of money then due and owing to him upon the mortgages and securities thereafter referred to, and the interest thereof, unto trustees for the benefit of his said granddaughters, assigned the same and "all interest then due and payable, and thereafter to accrue and become due and payable" for and in respect of the said sums respectively, and the securities, &c., unto trustees, upon certain trusts, for the benefit of his said granddaughters.

At the date of the settlement both the granddaughters were infants, Elizabeth being only fifteen years of age. The sum in court arose out of Elizabeth's share of the trust funds. Her share being settled by reference to Ann's share, in the following extract from the trust in her favour, Ann's name has been changed to Elizabeth's. The words of the material part of the trust were as follows:—"Upon trust that when and so soon as the said Elizabeth Orford shall attain the age of twenty-one years, the said (trustees) shall, during the life of the said Elizabeth Orford, pay one moiety of the rents, interest, and annual produce of the said principal moneys, interest, securities, and premises

into the hands of the said Elizabeth Orford, for her separate use." After her death, one moiety of the principal was to be in trust for her children (if any). Powers of maintenance were given to the trustees, after her death, for the benefit of her children during their minority; and powers of advancement out of expectant shares were given to them during her life, and with her consent. In default of children, the moiety, described in this provision as "a moiety of the said principal sums, securities, and premises," was to go to the present petitioner. The latter, who was one of the original, but not one of the present, trustees of the settlement, afterwards became the settlor's sole executor and residuary legatee.

Nothing was said in the settlement about the application of the produce of the moiety of the trust funds during Elizabeth's minority. Accordingly the trustees, who entered into possession of the settled monies immediately after the execution of the settlement, accumulated such produce until, on Elizabeth's attaining her majority, it amounted to 600*l*. They then invested that sum, and paid the interest thereof along with the interest of a moiety of the principal, unto Elizabeth during the rest of her life. She died, without having been married, in 1864, at the age of forty-two, having made a will and appointed William Orford and the petitioner her executors. The petitioner renounced probate, and the will was proved by William Orford alone.

William Orford, as Elizabeth's executor, claimed the 600*l*. as having become her absolute property on her attaining twenty-one. The petitioner claimed to be entitled to it either in his own right under the settlement or as being the sole personal representative of the settlor. In consequence of these rival claims the present trustees of the settlement paid the money into court, and the present petition was presented.

Freeling for the petitioner.—The sum in court either reverted to the settlor, or else forms part of the principal settled, or else passed to Elizabeth. The true view is that it forms part of the capital.

Little for William Orford.—The sum passed to Elizabeth. There was no provision made by the settlement for accumulating, and the trustees were not justified by it in accumulating and investing at all.

Bardswell for the trustees.

Wood, V.C., said that he thought the right construction was that the accumulation in question formed a portion of the capital. Mr. Little's remark that there was no power in the settlement for accumulating applied with greater force to the absence therefrom of a power of maintenance during Elizabeth's minority, especially when it was considered that there was such a power for the benefit of her children should she have any. Where the expression "interest upon interest" was found, there must, at all events, be some investment which was not provided for. The only question was, what interest was the settlor speaking of as producing other interest? Was it only the interest accrued due at the date of the deed? Some light was thrown upon that question by the words "all interest now due and payable and thereafter to become due and payable." Nothing was directed to be done with the trust moneys until Elizabeth attained twenty-one, when the interest of the principal and interest was to be paid to her. Looking back to see what interest the settlor was speaking of, the only interest found was interest then due and thereafter to become due. He must hold, therefore, that the interest which accrued due before the time when the trustees were directed to pay the produce to Elizabeth became part of the principal. The gift over to the petitioner being of "the principal moneys, securities, and premises," which latter word was wide enough to embrace everything, he should hold that, in the events which had occurred, the petitioner was entitled to the sum in court under the trust in his favour declared in the settlement.

[PROBATE.]

April 27, 1866.

ELLISON v. MCCORMICK.

14 W. R. 742.

Administration—Next of kin—Needless opposition—Costs.

WILL.—The Court will adhere to its usual practice in granting administration, unless a strong case is shewn against its doing so.

And accordingly, although charges of intemperance and misconduct were alleged against the eldest male next of kin, who represented the majority of interests, and who was the prior applicant, the Court granted administration to him in preference to a female representative of the deceased.

Margaret Perry, of Chorlton-upon-Medlock, died on February 1, 1866, intestate, a widow without child or parent, leaving two brothers, Nehemiah and William Ellison, the elder of whom, Nehemiah, was the plaintiff in this suit, and one sister Mary Ann, now the wife of the defendant William McCormick, her next of kin, and the only persons entitled to her personal estate.

Affidavits were put in on behalf of the plaintiff, stating that the younger brother William was desirous that his elder brother Nehemiah, rather than his sister Mary Ann McCormick, should have the grant of letters of administration. That the deceased had in her lifetime always expressed a wish that Nehemiah Ellison should have the management of her affairs after her death. That the estate consisted principally of a beerhouse in the management of which the plaintiff's daughter, Mary Anne Ellison, had assisted the deceased for four years previous to her death. That she was well acquainted with the customers and the requirements of the house, and that she was conducting the business. That subsequent to the death of the intestate, the defendant and his wife had endeavoured to effect the removal of the plaintiff's daughter from the beerhouse. That the defendant had in the first instance proposed a joint administration with the plaintiff, but that, on that being objected to, he had offered to consent to the grant being made to the plaintiff alone, on the terms that the plaintiff should give him a promissory note for 7*l.*, payable on demand.

The defendant's affidavits stated that the plaintiff was a person of intemperate habits, and that he would be likely to mismanage the property. These charges the plaintiff distinctly denied, and stated that he was a gate-keeper on a railway, a situation which he could not have retained had he been any other than a sober and trustworthy person.

Spinks, Dr., contended that the grant of administration should be made to Nehemiah Ellison the plaintiff, the elder surviving brother of the deceased. The Court never forces a joint administration, and where there are several next of kin the Court inclines to make the grant to the person with whom the majority of parties interested are desirous of entrusting the estate. If the interests are equal the elder brother will be preferred. The person to whom the deceased herself gave a preference, and in whom she had greater confidence, has a greater claim: *Warwick v. Greville* (1 Phill. 123), *Coppin v. Dillon* (4 Hagg. 361), *Budd v. Silver* (2 Phill. 115), *Napper v. Napper* (10 Jur. 342). A son has been preferred to a married daughter, though there were affidavits that he had improperly interfered in the estate: *Chittenden v. Knight* (2 Lee, 559).

Littler, contra, for the defendant, opposed the grant, on the ground that the plaintiff was an habitual drunkard, and unfit to have the control of the estate which he alleged had already suffered from the plaintiff's mismanagement.

Sir J. P. WILDE.—The grant of administration must be made to that person to whom, according to the general practice of this Court, it naturally would go. The plaintiff has a right, as the elder brother of the deceased; but that alone would not be conclusive. He also represents the majority of interests; and lastly, he is the male, whereas the party opposing is the female, representative of the deceased. On all grounds he is shewn to be the person to whom the Court would make the grant.

It is much to be deprecated that where there is a person who, according to the usual practice of this Court, is entitled to administration, there should be any opposition unless a strong case is made out against him. Here it is alleged that the plaintiff is a drunkard, and I should consider that if a charge of habitual drunkenness were established against him, it would be a sufficient reason to justify his exclusion from the grant. Here, however, it is oath against oath, as the plaintiff most positively denies the charge, and states, in support of that denial, that he is now, and has been for some time past, a gatekeeper on a railway, a position of trust and responsibility, which he reasonably urges would not be confided to him were he a person of intemperate habits, as the defendant describes him.

All the rest of the case is immaterial. It would be monstrous if, when a man is entitled to the possession of goods for the purposes of administration, the other parties entitled should, by their own acts, throw difficulties in his way and derange the conduct of the business, and then should find fault with the way in which it was carried on, and comment on the mismanagement which they themselves had caused.

The grant must go to the *prior petens*, the plaintiff in this suit.

Now, with regard to the costs, I consider that the opposition was needless and frivolous, and I therefore give costs against the opposition. It would be a most dangerous precedent were I not to do so. The opposition in this case was not with the object of getting administration, but was prompted by the expectation that the plaintiff would thereby be forced into accepting the terms which the opposer propounded to him.

Administration will be granted to the plaintiff, who must give justifying security to the amount of the defendant's share.

LORDS JUSTICES, Feb. 28, March 5, April 20, May 25, 1866.

WAITE v. MORLAND.

14 W. R. 746; 14 L. T. 649; 12 Jur. N.S. 763.

Will—Construction—“All my property, brewery, &c.”—Right to purchase at an undervalue—Property subject to a mortgage.

WILL.—S., who carried on the business of a brewer, by a codicil to her will, directed “that M. do, on my decease, immediately purchase all my property, brewery, &c., at one-fourth less than its value, with the proviso only that from that time and for ever, C. receives no profit from the business, and has nothing more to do with the property in any way or form whatsoever.” C. had formerly been in partnership with S. in the brewery business. Part of the property of the testatrix connected with the brewery was, at her death, subject to a mortgage:—Held, upon the construction of the codicil, coupled with the facts of the case, that M. was entitled to purchase at three-fourths of its value, not only the actual brewery and the property lying within its precincts, but also the public-houses belonging to the testatrix, and which were held by her for the purposes of her trade, the tenants thereof being bound to

take their beer from her brewery. Held also, that M. was entitled to purchase the equity of redemption of the property in mortgage at three-fourths of its value, and then to take the property subject to the mortgage.

This was an appeal by the defendant, G. B. Morland, from the order made by Vice-Chancellor Wood, upon the further consideration of this cause. The case is reported on the hearing before the Vice-Chancellor in 13 W. R. 963.* In addition to the statement of facts contained in that report, it may be mentioned that the testatrix, in the year 1842, purchased from the trustees of her father's will the Abbey Brewery, at Abingdon, the plant of the brewery, some cottages within its precincts, and a large number of public-houses, partly freehold, partly copyhold, and partly leasehold, which were attached to the brewery. 15,000*l.*, part of the purchase-money for this property, was secured by the testatrix to the trustees of her father's will, by a mortgage of the freehold and copyhold premises comprised in the purchase, and was made payable by instalments. 6,666*l.* 13*s.* 4*d.*, part of this purchase-money, was remaining unpaid at the time of the death of the testatrix. The testatrix, from the time of her making this purchase, until the time of her death, carried on the business of the brewery, either alone, or in partnership with John Moses Carter (the gentleman referred to as "Mr. Carter" in the former report). In the years 1843 and 1844 the testatrix purchased two other public-houses, and in the year 1848 she took John Moses Carter into partnership with her in the brewery; and an agreement dated 19th of October, 1848, was entered into between her and John Moses Carter. In the schedule to this agreement the public-houses from the father's trustees, and the two public-houses purchased by the testatrix as above mentioned, were described as belonging to the brewery. The term of this partnership was afterwards extended by a memorandum dated the 13th of October, 1849. After the formation of this partnership, the testatrix purchased another public-house, and from that time the firm, during its continuance, paid her interest at 5 per cent. upon the purchase-money of this house, in addition to a sum of 1,400*l.* per annum, provided for by the agreement. The partnership expired on the 11th of October, 1856, and after that date the testatrix purchased several other public-houses. All the public-houses purchased by the testatrix after she had become the purchaser of the brewery, as well those purchased before as those purchased after the formation of the partnership, were purchased by her as additions to the brewery premises, and with the object of thereby increasing the trade or business of the brewery. All these public-houses, as well as those which the testatrix had purchased from the trustees of her father's will, were always employed in carrying on the business of the brewery, the tenants being bound by their agreements to take their beer from that establishment. Many of the leasehold public-houses above mentioned were held by the testatrix under the Corporation of Abingdon for terms of twenty-one years, renewable every fourteen years; and about the year 1860 the testatrix agreed with the corporation to purchase the reversion of these houses, and since the death of the testatrix, this agreement was carried into effect under an order in this cause, under which the purchase-money was paid out of the personal estate of the testatrix, without prejudice to any question. About the year 1856, the testatrix agreed with Sir G. Bowyer to take a lease of a piece of land and to build a public-house thereon. This public-house was afterwards built by her, but no written agreement was entered into, nor had any lease been actually granted.

Rolt, Q.C., J. W. Chitty, and C. H. Blake, for the appellant.

Giffard, Q.C., Willcock, Q.C., Eddis, Berkeley, and Swanston, for the different respondents.

J. W. Chitty, in reply.

* By an accidental misprint, the date of the codicil is in that report given as 20th January, 1863; it ought to be 1853.—W. L. C.

April 20.—TURNER, L.J., after stating the facts of the case, proceeded as follows:—The first and most material point to be determined upon this appeal is whether the appellant is entitled to purchase all or any of the public-houses above mentioned at three-fourths of their value; and it will be convenient first to consider this question without reference to the purchase by the testatrix from the Corporation of Abingdon, or to her agreement with Sir G. Bowyer. This question must depend upon the words and the context of the codicil. It was argued, on the part of some of the respondents, that no certain meaning can be collected from any part of this instrument, and that the whole of it ought to be held void for uncertainty. But some part of the instrument at least is clear; it is clear that the brewery, in the sense of the place in which the business was carried on, is well disposed of by the instrument; and the difficulty of determining to what further extent, if any, the instrument was intended to operate, cannot make the instrument void; and this argument, therefore, may be laid out of the case. It was also argued for the appellant that the instrument gave him the right to purchase the whole of the property of the testatrix upon the stipulated terms, and that this right on his part could not be affected by his having limited his claim to the public-houses in question; but I think that this argument, also, cannot be maintained, and that the right of purchase, given by this instrument, was intended to be, and was, limited, and not universal. To hold that the instrument gave the right to purchase the whole property upon the stipulated terms would, as it seems to me, be inconsistent with the insertion in the instrument of the words "brewery, &c.," and with the whole context of the instrument. The question, then, is, what was the limit intended by this instrument; in other words, what is the meaning of the words "all my property, brewery, &c.," construed in connection with the context. These words, no doubt, are difficult of construction, but it is to be observed that the testatrix was evidently dealing with property in which John Moses Carter individually had had some interest, and he had individually had no interest in any part of her property except that part of it which was employed in the brewery. It is to be observed, too, that the purposes of this instrument were twofold: one, to exclude John Moses Carter; the other, to give to the appellant. These circumstances satisfy my mind that, awkwardly as the words "all my property, brewery, &c.," stand in point of collocation, the true meaning of them is, "all my brewery property." It must be admitted, however, that this conclusion does not wholly solve the difficulty of the case. There is still to be considered the question whether these public-houses ought to be considered as falling within the description of brewery property, and I think that they ought to be so considered. I think so for several reasons—First, it is obvious from the facts above stated, that they were throughout so treated and considered by the testatrix. Secondly, I am satisfied that, having regard to the context of this instrument, it is too narrow a construction of the word "brewery" to treat it as applying only to the place in which the business of the brewery was carried on. The context seems to me to shew that the word "brewery" in this instrument was not used as descriptive of locality, but was used as extending and referring to the trade or business. By the terms of the instrument, J. M. Carter was to receive no profit from the business, and the public-houses in question were the source and fountain of the business. Thirdly, having regard to the two purposes of this instrument, it is, I think, reasonable to conclude that what was taken away from J. M. Carter was intended to be given to the appellant. Apart, therefore, from any question as to the purchase from the Corporation of Abingdon, and as to the agreement with Sir G. Bowyer, my opinion is that the appellant is entitled to purchase all these public-houses at three-fourths of their value, and I respectfully dissent from the opinion of the Vice-Chancellor upon this point. Then how does the case stand as to the two last-mentioned properties? There was, as I understand, a binding contract by the testatrix, in her lifetime, with the Corporation of Abingdon for the purchase of the fee of the public-houses held under leases

from them, and there was also, as I think, by reason of the expenditure made by the testatrix, a contract for a lease binding upon Sir G. Bowyer, upon his admitting, as he has in fact done, the terms on which the lease was to be granted; and I think that, according to the true construction of this codicil, the appellant was entitled to purchase upon the stipulated terms, whatever property the testatrix had in connection with the brewery. It seems to me, therefore, that he is entitled to purchase these public-houses also upon those terms.

In the course of the argument before us, some question was raised on the part of the appellant with respect to the mortgage to the trustees of the father's will; but, as the appellant succeeds wholly upon the first point, I do not see what question there can be about that mortgage. I observe that the petition of appeal also raises some other points, but nothing was said upon those points in the course of the argument before us, and, if necessary, the case must be further spoken to upon those points. Assuming that my learned brother agrees with me in the conclusions at which I have arrived, this order will be so materially altered, that minutes should, I think, be prepared, and the case spoken to upon the minutes.

KNIGHT-BRUCE, L.J., concurred.

May 25.—This case now came on upon the minutes of the decree, and was argued upon the question how the mortgage debt, affecting part of the property, which the Court held that Mr. G. B. Morland was entitled to purchase at three-fourths of its value, was to be dealt with.

Rolt, Q.C., Chitty, and C. H. Blake, for G. B. Morland.—The will was made before Locke King's Act, and therefore the mortgage debt ought to be paid off out of the personal estate of the testatrix. The only two possible constructions would be either (1) that the equity of redemption should be valued, then that Mr. Morland should pay three-fourths of that value, and take the estate subject to the mortgage; (2) that the mortgage should be first paid off out of the testatrix's personal estates, and then that Mr. Morland should pay three-fourths of the gross value of the property. Suppose the estate were worth 20,000*l.*, and the mortgage debt upon it were 10,000*l.* The equity of redemption would then be worth 10,000*l.* If the first be the true construction, Morland would pay 7,500*l.*, and then take the estate subject to a debt of 10,000*l.*—that is, he would pay 17,500*l.* for an estate worth 20,000*l.* But if the second be the true construction, then the mortgage being paid off, Mr. Morland would have to pay 15,000*l.* for the estate worth 20,000*l.* It is clear that the second must be the right construction. Mr. Morland is in the position of a devisee of the property upon condition; viz., the condition of paying three-fourths of its value: *Earl of Radnor v. Shafts* (11 Ves. 448; Sugd. Vend. & Purch. (ed. 1839), 194).

Willcock, Q.C., Giffard, Q.C., Berkeley, and Eddis, contra.—The debt was not a personal debt of the testatrix. There is no covenant to pay it in the conveyance to her. The devisee is not entitled to have the mortgage paid off out of the personal estate. This is more properly, not a devise of the estate, but a simple right to purchase. In the will a right to purchase is given to the trustees; in the codicil a right is given to a particular trustee to purchase in a particular manner. He stands in the position of an ordinary purchaser, and must take the estate subject to all liabilities affecting it. They cited *Scott v. Beecher* (5 Mad. 96).

Rolt, Q.C., in reply.

TURNER, L.J., said that it was impossible to say clearly what the testatrix meant. The impression, however, on his mind was that Mr. G. B. Morland was intended to take the equity of redemption—that is, the estate as it stood. He was entitled to buy the equity of redemption at three-fourths of its value.

KNIGHT-BRUCE, L.J.—The good sense of the case is so.

As to the property purchased by the Corporation of Abingdon,

Their LORDSHIPS held that Mr. G. B. Morland was entitled to purchase that at three-fourths of the value of the leasehold interest, in addition to three-fourths of the sum paid by the testatrix for the purchase of the reversion.

LORDS JUSTICES, April 27, June 1, 1866.

Ex parte RICHARDSON.

Re MOSELEY GREEN COAL AND COKE COMPANY (LIMITED).

14 W. R. 749; 14 L. T. 610; 12 Jur. N.S. 517.

Joint-Stock Companies Act, 1856, section 91—Clerk to official liquidator—Costs—Taxation.

COMPANY. M.—*The certificate of the taxing-master as to the costs of a clerk employed by an official liquidator under section 91 of the Joint-Stock Companies Act, 1856, is subject to review by the commissioner in bankruptcy, and it is open to him to refer the reasonableness of such costs to the liquidator to report thereon, notwithstanding the fact that the taxation of those costs took place in the presence of the liquidator's solicitors.*

Semble, a report of the liquidator in such a case would not be binding upon the commissioner.

The above company was formed under the Joint-Stock Companies Act of 1856, and was being wound up. The official liquidator of the company employed a clerk of the name of Hutton, in the business of the winding-up. Hutton afterwards sent in a bill of costs for the work done by him. This bill was referred to the taxing-master in bankruptcy for taxation, and he, on the 30th June, 1864, taxed it at 219*l.* 2*s.* Hutton afterwards got into difficulties, and made an assignment of his property for the benefit of his creditors, to Richardson, the present applicant. Richardson applied to the official liquidator for payment of the above sum, who objected that the charges were exorbitant, and refused to pay the amount, but offered to pay 50*l.* as a sufficient sum. Richardson then applied to Commissioner Goulburn, and he made the order now complained of, referring the matter back to the liquidator, for him to report whether the amount charged was reasonable. From this order Richardson now appealed.

De Gez, Q.C., and Reed, for the appellant, referred to section 91 of the Joint-Stock Companies Act, 1856, 19 & 20 Vict. c. 47. The Court always acts by its officer the taxing-master. At any rate it was wrong to refer the matter back to the person liable to pay the sum in question. The bill was taxed in the presence of the liquidator's solicitors, and no complaint was made then. They cited Alsop v. Lord Oxford (1 M. & K. 564).

Bagley, for the respondent, the liquidator.—The reference was only to the commissioner's own officer, for him to report in writing. Under section 91, the commissioner himself only has power to make a final order.

TURNER, L.J., said that he thought the right course would be for this appeal to stand over. It had been assumed in the argument for the appellant that the commissioner must be guided entirely by what the liquidator might report. He, however, did not so understand the order. When the liquidator had made his report it would be open to the commissioner to act upon it,

or not to act upon it, as he should think fit. He could not say that the commissioner was not authorised to consult his own officer to guide him in the view which he should take in the matter. The taxing-master's certificate must be subject to the review of the Court itself. When the commissioner had come to a final decision, the matter could, if necessary, be mentioned here again.

KNIGHT-BRUCE, L.J., said that he should have been in favour of discharging the commissioner's order; but, as his learned brother did not agree with him, this could not be done. He did not, therefore, see any advantage in dissenting from the course proposed by his learned brother.

TURNER, L.J., said that he, too, should have been in favour of discharging the order, if he had thought that the commissioner was bound to act upon the report of his own officer.

Appeal to stand over, with liberty to apply.

ROMILLY, M.R., April 25, 1866.

LAWRANCE v. BELL.

14 W. R. 753.

Covenant to pay annuity—Assignee of covenantee—Set off—Right of covenantee to proceed in equity.

ANNUITY.—A person entitled to an annuity under a deed assigned the annuity. The assignee filed a bill to recover some arrears of the annuity, the defendant, the covenantor, filed an affidavit stating that he had claims against the original covenantee more than the amount claimed by the bill:—Held, that the defendant had, by his affidavit, precluded himself from raising the point that the plaintiff's demand was merely legal, and that the plaintiff was entitled to proceed in equity, but that the defendant might set off any sums bonâ fide advanced or paid on account of the annuity previous to the notice of assignment.

This was a suit by the assignee of a certain indenture made between the defendant and one Mr. Lawrance, securing to the said Mr. Lawrance an annuity of 200l., for arrears due in respect of the annuity. The defendant, in consideration of the said Mr. Lawrance appointing him his deputy in certain offices held by him, and allowing him to receive the emolument derivable from such offices, and as in consideration of the plaintiff advancing to him a sum of money and giving up to him the occupation of the offices occupied by Mr. Lawrance as a solicitor, and assigning to him the lease thereof, covenanted to pay the said Mr. Lawrance an annuity of 200l. a-year.

Baggallay, Q.C., and E. Cook, for the plaintiff.

Freeman, for the defendant.—This is a purely legal demand and cannot be the subject of a suit in equity. There is no allegation or evidence that the covenantee in the indenture securing the annuity refuses to allow the plaintiff to sue in his name in an action at law; he has, in fact, made an affidavit on behalf of the plaintiff: *Hammond v. Messenger* (9 Sim. 327), *Keys v. Williams* (3 Y. & C. 462), *Cator v. Burke* (1 Br. C. C. 434).

LORD ROMILLY, M.R.—The defendant has precluded himself from raising any such defence; by his affidavit he shows that the plaintiff cannot proceed at law. He alleges that he has made certain payments on behalf of Lawrance

which he has a right to set off against any money due in respect of the annuity, and disputes the fact of anything being due. The plaintiff has a right to have the benefit of the covenant. The defendant may set off payments made by him by way of advance of the annuity at Lawrance's request between the date of the indenture and his having notice of the assignment.

ROMILLY, M.R., May 25, 26, 28, 1866.

LORD KENSINGTON v. METROPOLITAN RAILWAY COMPANY.

WILLIAMS v. THE METROPOLITAN RAILWAY COMPANY.

14 W. R. 754.

Railway company — Contractor — Possession — Purchase-money — Offer to compromise—Costs.

COMPULSORY PURCHASE.—*Two companies employed the same solicitor and contractor:—Held, that it is no defence to a suit against one of the companies for acts done by the contractor upon the land purchased by that company, that the acts complained of were done by him in his capacity of contractor for the other company.*

An injunction was sought to restrain a railway company from entering on land before payment of the purchase-money. They remained in possession three months, and then paid the purchase-money:—Held, that they must pay the costs of the suit.

COSTS.—*In a suit in which the plaintiffs ultimately succeeded, an offer had been made by the defendants to submit to a decree, on the basis of each party paying their own costs, which was simply refused:—Held, that each party must pay the costs subsequent to the offer, for it was open to the plaintiffs to propose to vary the terms offered by adding a provision for the payment of costs by the defendants.*

The bills in these suits were filed to obtain an injunction to restrain the defendants from entering upon some land belonging to Lord Kensington, of which the plaintiff in the second suit was the occupying tenant.

The District Railway Company had purchased from Lord Kensington, for the sum of 75,000*l.*, a piece of land adjoining that in question in the present suits. The Metropolitan Company had agreed to purchase from Lord Kensington the property in question for the sum of 27,000*l.*, and as far as he was concerned, they only needed to deposit the purchase-money in order to entitle them to possession.

Messrs. Burchell were the solicitors, and Messrs. Peto & Co. the contractors for both railway companies. The District Company deposited their purchase-money, and Messrs. Burchell wrote to the contractors directing them to enter upon the land for the purpose of constructing the railway. Upon this, on the 13th of October, 1865, the contractors took possession, not only of the land sold to the District Company, but also of that sold to the Metropolitan Company. This entry, as far as the Metropolitan Company was concerned, was stated by Messrs. Burchell to have been a mistake; but as the contractors still remained in possession, without depositing the purchase-money due to Lord Kensington, or purchasing the interest of the plaintiff Williams therein, the plaintiffs, on the 9th of November, 1865, filed their bills for injunction, as above stated.

On the 16th November, 1865, motions for injunction were made, and were turned into motions for decree on an undertaking by the defendants not to

enter. They continued, however, in possession till the month of January, 1866, when they deposited Lord Kensington's purchase-money, and made an arrangement with the plaintiff Williams.

On the 28th of February, 1866, they proposed to settle the suits on the basis of each party paying his own costs, to which the plaintiffs declined to accede.

The causes now came on for hearing.

Selwyn, Q.C., and *Eddis*, for the plaintiffs.—The defendants were not entitled to possession till payment of the purchase-money. They had, however, entered and carried on the works of the railway three months before payment, by this means gaining three months' use of the land.

Jessel, Q.C., and *Bovill*, for the defendant.—The entry was entirely an accident, and was wholly the fault of the contractors. The contractors ought to have been made parties. The acts of the contractors do not bind the company, except by express authority. The letter authorising the entry is headed "*Re District Company.*" The acts of the solicitors and contractors were done solely in their capacity of solicitors and contractors for the District Company. They cited *Reedie v. The London and North-Western Railway Company* (4 Exch. 244), and *Allen v. Hayward* (7 Q.B. 960).

LORD ROMILLY, M.R.—The distinction between the contractors as contractors for the different companies is untenable. The only question will be whether the plaintiffs are entitled to costs.

Selwyn, Q.C., in reply.—Everything done upon the land must have been done for the benefit of the Metropolitan Company. The District Company could not possibly have had any business there.

May 28.—LORD ROMILLY, M.R.—The plaintiff in the first suit agreed to sell six acres of land for 27,000*l.* Possession was not to be taken till the money was paid. Messrs. Peto, however, entered into possession on the 24th of October, 1865, and began to dig for the purpose of carrying on their works. On the 31st of October the plaintiffs' solicitor wrote to Messrs. Burchell, informing them of the entry. Messrs. Burchell, in reply, stated that the entry was not by their authority, but did not inform the plaintiffs' solicitor that they had directed Messrs. Peto to retire from the land, and when they did so direct them Messrs. Peto disregarded the notice, and continued in occupation. Accordingly, on the 3rd of November, the plaintiffs filed their bills. I am of opinion that the conduct of the defendants was such as to mystify and mislead the plaintiffs. The defendants rely on the fact that the contractors entered without the authority of the Metropolitan Company. Messrs. Peto, however, remained in possession of the property for three months before the purchase-money was paid, and when Messrs. Burchell sent notice to the contractors to withdraw, they did not specify the land from which they were to withdraw, and the contractors remained in possession, and now seek to shelter themselves by saying that it was a mistake. They attempted also to raise a question, which they afterwards abandoned, as to the identity of the land. If this question had not been raised, and the solicitors had really endeavoured to make Messrs. Peto withdraw, they might have raised their defence more properly.

I am of opinion that the defendants have been in the wrong, and must pay all the costs up to the 28th of February, 1866. If they had then made an offer to settle and pay all the costs, I should have given them costs now, but their offer only extended to the payment of their own costs. I think, however, that the plaintiff might have suggested the condition of payment of all the costs by the defendant. I am of opinion that I can give no costs after that day.

In *Williams' case* there will be no costs at all.

ROMILLY, M.R., May 28, 1866.

COOPER v. MACDONALD.

14 W. R. 755.

Power to appoint new trustees—Trustees appointed by the Court.

TRUST AND TRUSTEE.—A power to appoint new trustees was to the survivors and survivor. Trustees had, on a former occasion, been appointed by the Court:—Held, that the power was gone, and new trustees must be appointed by the Court.

This was an application for the appointment of new trustees of a will.

The will contained a power for the survivors and survivor of the trustees therein named, their or his assigns, to appoint new trustees (subject to certain consents not material to the question raised), the original number being three. New trustees had been appointed by the Court on a former occasion. There were now two of these last trustees, and the question was whether a new trustee should be appointed by them or by the Court, or whether no new trustee at all should be appointed.

Southgate, Q.C., Selwyn, Q.C., Baggallay, Q.C., Beavan, Everett, and Speed, appeared for the various parties.

LORD ROMILLY, M.R.—The power was to the survivors and survivor of the trustees under the will. The present trustees are not appointed under this power, and therefore they are not donees thereof, and the power is gone.

The petition will be adjourned to chambers, with a direction to appoint new trustees.

KINDERSLEY, V.C., May 25, 28, 29, 1866.

Re THE ST. DAVID'S GOLD MINING COMPANY (LIMITED).

14 W. R. 755; 14 L. T. 529.

See Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), ss. 193, 199, 200.

Voluntary winding-up—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 138, 147, 148.

COMPANY. M.—The Court will not, at the instance of shareholders, interfere where a company is being wound up voluntarily, and order a winding-up under supervision, except where the resolution determining on the voluntary winding-up has been obtained by fraud or undue overbearing.

The mere fact of some dissentient shareholders making charges against the liquidators under a voluntary winding-up is not sufficient ground for interference.

Semble, the affidavit prescribed by the 4th Gen. Ord. under the Act is in all cases necessary, but not, therefore, in all cases sufficient.

This was a petition praying that this company, then in course of a voluntary winding-up, might be ordered to be wound up under the supervision of the Court; and that some proper persons might be appointed liquidators, either in substitution for, or to act jointly with, the existing liquidators.

The material facts were briefly as follows:—

In 1862 one Searby obtained a mining lease of a large tract of land in the

vicinity of the well-known Vigra and Clogau gold mine, near Dolgelly, and in September, 1862, the present company was formed, with a nominal capital of 100,000*l.*, in 40,000 shares of 2*l.* 10*s.* each, for the purpose of purchasing and working the grant. Messrs. C. H. Maude and E. J. Bridell, the petitioners, were two of the first board of directors. The purchase was made of Searby at the price of 25,000*l.*, half in shares. In 1863 the directors made a further purchase from one Wright, of the right to wash for gold the alluvial deposit of the river Mawddach, at the price of 2,500*l.* They issued a further prospectus stating this arrangement, and that a considerable gain was anticipated as the result; and an allotment took place of such shares as had not hitherto been taken up. No gold was ever discovered to any amount worth mentioning either by mining or washing, and after awhile the shareholders became dissatisfied with the prospects of the concern. (It was stated that gold dust had been introduced by some of the employes on the mine into such specimens of the river mud as were selected for testing, thus raising expectancies of gold where none in reality existed). And at a general meeting of the company a resolution passed in favour of filing a bill in equity against Searby and Wright, which was subsequently done. In August, 1864, took place the second general meeting of the company, at which much dissatisfaction was expressed at the conduct of the directors (the petition stated that an attack was made on the directors by the respondents), and several alterations were made in the directory. The petitioners also impugned the legality of this meeting, alleging that necessary formalities were not complied with. In November, 1864, an extraordinary general meeting was held, at which Messrs. E. Pearson, F. H. Deane, and A. Bathurst, the respondents, were appointed sole directors (Messrs. Maude and Bridell, the petitioners, had previously retired). Shortly after this a Mr. Petherick, who had been commissioned by the former directors to report on the prospects of the mine, sent in an unfavourable report, and soon afterwards a Mr. Deane, employed on the Vigra and Clogau mine, who had been engaged by the former directors to test specimens of the river mud, and who had reported favourably thereon, also sent in an unfavourable report. A requisition was now got up by Maude and forwarded to the directors, requiring them to convene an extraordinary general meeting, to consider the position and management of the company, and take the necessary steps. The directors (respondents) then convened an extraordinary general meeting to consider the past and present management of the company, and appoint a committee of investigation. This meeting took place on May 30th, 1865, and a committee of investigation was appointed, but the fitness of the members composing it was impugned by the petitioners. On the 3rd of August, 1865, this committee made their report, unfavourable in some respects to the respondents, but exonerating them in the main from any imputation of mismanagement. Another extraordinary general meeting took place on December 19th, 1865, at which it was resolved that the company should be wound up voluntarily, and the respondents should be appointed liquidators. This resolution was subsequently confirmed by another meeting held in January, 1866.

The principal charges made by the petitioners against the respondents were—

1. That the appointment of the respondents as directors had been obtained by improper means.
2. That the respondents had made improper appropriations of the company's money for their own remuneration.
3. That they had not prosecuted the working of the undertaking.
4. That they had plunged the company into ruinous and unwarrantable litigation.
5. That their appointment as liquidators was improper, and improperly obtained.

Part of the allegations of the petitioners were not verified otherwise than by

the ordinary affidavit in support of the petition; some discussion took place on this point, and his Honour intimated an opinion that the meaning of the 4th Consolidated Order under the Act was that such an affidavit was always necessary, but not that it was in all cases necessarily sufficient.

Glasse, Q.C., and *C. F. Randolph*, for the petitioners, and *J. Pearson* for several other shareholders, in support, urged that the individuals whose conduct as directors would have to be investigated, ought not, as liquidators, to have the carriage of the winding-up. They were willing to waive the removal of the present liquidators, or even any addition to their number, if they could only obtain the supervision of the Court, and contended that, at any rate, they were entitled, on the strength of the *London Mercantile Discount Company* (1 L. R. Eq. 277; 1 W. R. 219), to have the petition stand over until a meeting of the shareholders could be held.

Baily, Q.C., and *Bagshawe*, for the respondents.

Re Bank of Gibraltar and Malta (1 L. R. Ap. 69; 14 W. R. 69), and *Re Northumberland and Durham Banking Company* (2 De G. & J. 508; 6 W. R. 527), were also cited.

KINDERSLEY, V.C., said that but for the fact that the respondents, the present liquidators, were, at the date of the resolution appointing them such, the sole directors, he could not have entertained the application at all; he then proceeded to weigh the effect of this consideration in the present case.

After recapitulating the facts, his Honour remarked that the conduct of the respondents had been fully investigated by a regularly appointed committee of investigation, and there was no reason for doubting the honesty of this report, which tallied with the evidence before the Court; and an additional probability of its truth arose from the fact that, as stated by the petition, it was in some respects unfavourable to the respondents. After this a perfectly regular meeting had resolved on a voluntary winding-up, and after their conduct had undergone a minute investigation by the committee appointed for that purpose, the respondents had been appointed liquidators at an extraordinary general meeting, and, as required by law, the resolution so appointing them had been confirmed by a subsequent meeting. There had thus been a deliberate determination by the company, in favour of winding up voluntarily with the respondents as liquidators. The principle governing the Court in these cases was to be gathered from the cases cited, and appeared to be that where a company has deliberately determined on a voluntary winding-up, the Court will not interfere unless the resolution has been obtained by fraud or improper overbearing influence, and is, therefore, not truly the sense of the company on the subject. He thought this was quite in accordance with the language of the Act. In the *London Mercantile Discount Company's case* (*ubi sup.*) Vice-Chancellor Wood had ordered the petition to stand over until a meeting of the shareholders could be held, and he himself was pressed to do the same here; but in that case there was an important reason for such a course, which was wanting here. There an important report was not produced to the shareholders until after the resolution, whereas here the shareholders knew, at the date of the resolution, all they could possibly be told. There was therefore no ground for ordering the petition to stand over. In fact, if a meeting was desirable, it might have been, and might still be, held; it was said, however, that the sanction of the Court was required before a meeting could be held which could bind the company; but the object of such a meeting was not to bind but to obtain the sense of the company, and it had not been shewn that that had already been otherwise than fairly done. The deliberate determination of the company could not be upset by a few dissentient shareholders. The Lord Justice Turner and Vice-Chancellor Wood had both been of opinion that, where a voluntary winding up was possible, it was certainly advisable; it would always be competent for the Court to interfere under section 138.

The application must, therefore, be dismissed with costs.

Glasse, Q.C., asked his Honour to add to the order, leave to the petitioners to file a bill in the name of the company, (they undertaking to indemnify the company,) in the terms of the order granted by the Lords Justices in *Re Bank of Gibraltar and Malta (ubi sup)*.

His Honour refused to add to the order.

Wood, V.C., April 23, 24, 25, 26, 27, May 1, 1866.

PENN v. JACK.

PENN v. BIBBY.

PENN v. FERNIE.

14 W. R. 760; L. R. 2 Eq. 314.

Practice—Evidence—Patent—Trial of issues—Particulars of objections—Form of issue.

PATENT.—*In a patent case, where issues have been tendered for trial, and particulars of objections delivered by the defendant, though the plaintiff opens by calling witnesses to prove the novelty of his invention, yet the onus of proving affirmatively the instances alleged in the particulars of objections rests on the defendant; and when he has completed his evidence in support of them, the plaintiff can call witnesses to rebut it.*

When the plaintiff's rebutting witnesses have been examined, the defendant will not be allowed to call witnesses in reply—at all events after his counsel has summed up his evidence, and where the judge is of opinion that the witnesses whom the defendant now wishes to call should have been called in chief, and not in rejoinder.

The Court expressed great dissatisfaction with the issue—whether the alleged invention was or was not proper subject-matter for a patent.

The bills in these three suits were filed to restrain the infringement of a patent, taken out by the plaintiff in October, 1854, for the use of wood in the construction of the bearings and bushes of the shafts of screw and submerged propellers instead of metal, which, he said, previously to that time had been universally employed in the construction of such bushes and bearings.

The defendant in the first suit was the ship-smith who had constructed and fitted certain ships with the bushes or bearings for the shaft—*i.e.*, the supporting holders of the shaft—which were alleged to have infringed the plaintiff's patent; and the defendants in the other two suits were the owners of the ships so fitted.

The three suits came on together on motion for decree, and trial without a jury of the issues which had been delivered.

Rolt, Q.C., Grove, Q.C., Cotton, and T. Aston, for the plaintiff.

Sir H. Cairns, Q.C., Webster, Q.C., and E. E. Kay, for the defendants.

The first issue was as to the novelty of the alleged invention. Particulars of objections had been tendered by the defendant in compliance with the Patent Law Amendment Act, 15 & 16 Vict. c. 83. The chief particular of objection was, that the defendant Jack had, previously to the date of the plaintiff's patent, *viz.*, in May, 1851, fitted up a screw steamer, called the *Livorno*, with wooden bearings, which were in all material respects identical

with those described in the plaintiff's specification, and that the *Livorno*, so fitted, had successfully made a voyage round the Mediterranean.

The trial of the issues was opened by the plaintiff calling a number of scientific and practical engineers, who deposed as their belief that the alleged invention was novel, and that, antecedently to the date of the patent, wood had never, to their knowledge, been used in the construction of the bearings of the shafts of screw propellers.

The defendant then called witnesses in support of his particulars of objection, and in particular he called one Greenshields, who was the chief engineer of the *Livorno* in 1851. Greenshields deposed to having ordered the defendant Jack to make wooden bushes for the shaft of the screw, and to having himself superintended the substitution of the wooden bushes so made for the old metal bushes which had been in the ship before. He stated further, that the wooden bushes were not removed during his continuance in the ship, and that they were in when he left her about a year afterwards. It appeared that some two or three years after Greenshields left her she foundered in the Black Sea.

Rolt, Q.C., said that he should now call witnesses on the part of the plaintiff to rebut Greenshield's evidence, and upon an objection being raised by the defendant's counsel,

Cotton and T. Aston contended that the plaintiff had a right to call such witnesses.

Kay opposed, on the ground that the *onus* of proving the novelty of the alleged invention rested on the plaintiff. The defendants had brought witnesses to disprove the novelty; they had not opened a new case. The plaintiff had had notice of the instance of the *Livorno*; and if he could have displaced that instance he should have done it at the opening.

Aston contended that the plaintiff had not taken upon himself to prove his own version of every instance of prior user which had been alleged by the defendants. Both sides should have an opportunity to state to the Court their version of every disputed question of fact. Here there was a fact in dispute. In what way could the plaintiff have stated this fact? How could he have known the defendants' case? Not from the objections. The Court would not force a plaintiff to go through all the objections in the dark.

Wood, V.C., said that it was quite impossible that the Court could be satisfied as to the true state of the facts without hearing the plaintiff's witnesses. The plaintiff did not know the nature of the proof to be given by the defendant of the instance alleged by him without hearing it. Though at common law the plaintiff in a patent case was bound to aver the novelty of his invention, yet even there all he had to do was to call witnesses, who, from their pursuits or position, were likely to know whether the patented invention was new or not, to speak as to their never having heard of it before the date of the patent; "and that" (he was quoting from the summing-up of *Tindal, C.J.*, in *Galloway v. Bleadon*, (1 Web. 526)) "was enough to call on the other side to show affirmatively that it was not new; that it was an old matter." The affirmative, therefore, of this instance lay upon the defendant. In the particular of objection the defendant was not bound to give the name of the witnesses or the nature of the facts to which they would depose. The plaintiff could not be expected to meet a case like the present on such scanty information as the mere name of the vessel. His Honour would be sorry to give occasion to such an expensive proceeding as a motion for a new trial. The witnesses were all present; and the most direct and sensible course was to have the whole case brought before the Court at once. Independently of this last consideration, however, he was clearly of opinion that, as a matter of principle, the plaintiff should be allowed to call his rebutting witnesses. His Honour then, in support of his decision, read from

Taylor on Evidence, 376: "If several issues," &c., and from the judgment of Pollock, C.B., in *Shaw v. Beck* (8 Ex. 392).

The plaintiff then called the engineer who succeeded Greenshields in the *Livorno*. He swore that soon after he went aboard of her, and before anything was done to her bushes, he saw the bushes while she was in the graving-dock, and they were not wood but iron.

Kay then summed up the evidence for the defence, and afterwards—

Sir Hugh Cairns, Q.C., said that the rebutting evidence was as unknown to the defendants as the evidence of the latter was said to be to the plaintiff. He asked leave, therefore, to call a witness who could swear that at the time when the last witness said he examined the bushes in the graving-dock, the *Livorno* was not in the graving-dock at all.

Grove, Q.C., opposed, and—

Wood, V.C., refused the application, chiefly on the ground that the evidence which the defendants now wished to tender in rejoinder ought to have been tendered in chief. They knew the importance which attached to this instance of the *Livorno* and they should have followed the vessel up until she was lost.

The issues tried in these suits were four in number, viz.—1. The novelty of the invention. 2. The sufficiency of the specification. 3. The fitness of the alleged invention to be the subject of a patent. 4. The infringement.

Wood, V.C., during the trial, more than once expressed his dissatisfaction at the form of the third issue, and hoped never to see such an issue before him again.

Wood, V.C., May 7, 1866.

Re BOOTH'S CHARITIES.

14 W. R. 761.

CHARITY.—*Where property is held by trustees to be employed in the repairs of a chapel, and any surplus is to be distributed among the poor of the parish, the trustees will not be ordered to rebuild the chapel instead of merely repairing it, although it is in a very dilapidated condition, and unequal to the wants of the inhabitants, and the trust estate has increased very largely since its first institution.*

By an indenture of grant and feoffment of the 18th February, 1630, Humphrey Booth the elder conveyed certain real estate in Manchester to the use of himself for life, with remainder to trustees upon certain trusts for the benefit of the poor of the borough or town of Salford. His grandson Humphrey Booth, by his will dated the 3rd March, 1672, devised certain real estates in Salford to be employed towards all repairs of the chapel of Salford, and in case there should be any overplus, then his will and mind was that it should be distributed amongst the poor of Salford at Christmas as the moneys left by his grandfather (meaning thereby the rents, issues, and profits of the trust estate and premises comprised in or subject to the trusts of the said indenture of the 18th February, 1630) were.

By "the Booth's Charities' Act, 1846," the two charities, and the charity estates of Humphrey Booth the elder, and Humphrey Booth the younger, his grandson, were amalgamated. This Act contained provisions for the repairs and maintenance of Trinity Chapel, Salford (the chapel of Salford

alluded to in Humphrey Booth's, the grandson's, will), and of the "fittings, furniture, and ornaments suitable for divine service," and for the formation of a reserve fund "to be applied in the re-building, renovating, or restoring of the said chapel, or its fittings, furniture, or ornaments; or for any of them as occasion shall require; or in defraying any extraordinary expenses to be incurred in the repairs and maintenance of the same particulars." The church or chapel of the Holy Trinity, Salford, the subject of the above charitable trusts, being in a very dilapidated condition, and exceedingly deficient in its accommodation, the rector and churchwardens, with the sanction of the Charity Commissioners, took out a summons to procure the expenditure of part of the charity funds, which had very greatly increased in value, in having the church re-built instead of merely repaired. It was also sought to enlarge the chapel.

This summons having been adjourned into court—

Rolt, Q.C., and *W. Barber* in support of it, contended that the church must be rebuilt, and that there was nothing in the will of Humphrey Booth the grandson, or the "Booth's Charities' Act" inconsistent with the application of the charity funds for this purpose. They argued, that, under the grandson's will, the capital was what was given for the repairs, and that the right of the poor of Salford was merely contingent, the expression of the will being "and in case there shall be any surplus." The church was the primary object of the testator's bounty, the poor were merely a subordinate object. Had the church been burned down when uninsured, the trustees would have been bound to rebuild it.

Wickens, for the Attorney General.

Sir H. Cairns and *Little* for the trustees, argued that they ought not to rebuild, but only to repair.

Rolt, Q.C., in reply.

Wood, V.C., said that this was a question between those interested in the repair of the chapel and those interested in the surplus. It was not for him to inquire into the nature of the charities. The intention of the testator was to repair the chapel effectually, and to provide for it in future, but not for enlarging it. We are not entitled to say that because the funds are increased, therefore we may increase the objects of the charity. He could not direct a reference to chambers to approve of the new scheme proposed. His Honour made a declaration that the trustees were not at liberty, under the Act of Parliament, to apply any part of the rents and profits of the estates to Humphrey Booth, the younger, in enlarging the chapel in the Act referred to by rebuilding the same on any larger site.

[ADMIRALTY.]

May 1, 1866.

THE "PHANTOM." *

14 W. R. 774; L. R. 1 A. & E. 58; 12 Jur. N.S. 529.

SHIPPING. E.—*Salvage, its ingredients—Validity of agreement made beforehand with salvors.*

This was an appeal from an award of justices of a petty sessional division in a case of salvage for services rendered on the 11th of January last, in Lowestoft Harbour.

* Before Dr Lushington.

The smack *Phantom* was one of a considerable number of small craft which hurriedly entered the harbour of Lowestoft about the same time, on the day in question, owing to a gale from N.N.E. Naturally the vessels fell towards the south pier in a confused mass, damaging each other considerably by the falling and entangling of masts, spars, &c., and the services forming the subject of the present claim were rendered by the appellants in aiding the *Phantom* to cross to the north side of the harbour so as to be out of the way of vessels coming in. During the performance of this service, a brig, which had run into the harbour, actually came into collision with the *Phantom*.

It was alleged, on the part of the respondents, but denied by the appellants, that there was an agreement to perform the service for eight shillings and sixpence. The magistrates disallowed the claim for salvage, and dismissed the case with costs, on the ground that there was no ingredient of salvage in it; that the smack was in no danger; that the collision with the brig had nothing to do with danger; and that there was not much risk incurred. The value of the property saved was 700*l*.

The appeal was now argued by—

V. Lushington, for the appellants.

E. C. Clarkson for the respondents.

LUSHINGTON, Dr.—I am of opinion that, to constitute a salvage service, it is not necessary that there should be absolute danger; it is sufficient if there be a state of difficulty, and a reasonable apprehension that there might be danger of further difficulty occurring. I think that is proved in this case. I do not find it denied that masts and spars were falling in all directions, there was, therefore, risk to the asserted salvors. As to the alleged agreement for eight shillings and sixpence, assuming it to have been made as asserted by the master, is it valid? With respect to all agreements made when salvors are about to perform a duty, the Court is in the habit of overruling them if they are unjust and inequitable. Seeing that the vessel came in in consequence of a storm, and was aided in consequence of apprehended danger, which proved to be real, I think an agreement for the sum of eight shillings and sixpence utterly futile, and shall overrule the award. I think it is a service that requires a small sum of money, and I shall give 10*l*. and costs.

[IN THE QUEEN'S BENCH.]

May 8, 1866.

SKENE v. DAVIES.

14 W. R. 776; 7 B. & S. 463; 14 L. T. 622.

Common Law Procedure Act, 1854, s. 93—Security for costs—Plaintiff not within jurisdiction—Ejectment—Discontinuance—Second action for same premises.

PRACTICE. M.—S., in 1857, brought an action of ejectment against D. for certain lands. In 1858 it was agreed that the ejectment should be discontinued, and a chancery suit substituted. The ejectment was not, in fact, discontinued, but the chancery suit in substitution was instituted; and was dismissed:—Held, that this was such an unsuccessful prosecution of the previous suit as to entitle the defendant to have the plaintiff give security for costs in the subsequent action of ejectment for the same lands.

The facts in the present case were as follows:—In the year 1857 the plaintiff brought an action of ejectment, and the defendant, a tenant as representing his landlord, appeared to defend. Later in the year 1857 there was a consultation of equity counsel representing both parties in the ejectment, and by their recommendation it was agreed that the action of ejectment should be discontinued, and that a chancery suit should be substituted for it. A suit in chancery was accordingly commenced, but there was no formal entry of the discontinuance of the action of ejectment. The suit in chancery thus substituted for the ejectment was dismissed.

Subsequently, at the beginning of the year 1865, the plaintiff brought another action of ejectment against the defendant for the same premises. This action was stayed by order of Crompton, J., until security for costs should be given, on the ground that the plaintiff resided out of the jurisdiction.

Keane, Q.C. (*Cooke* with him), in Easter Term obtained a rule *nisi* calling on the defendant to show cause why the order of Crompton, J., should not be rescinded, on the ground that the plaintiff had returned within the jurisdiction and intended permanently to reside therein.

Lord now showed cause.—He contended that the order ought not to be rescinded—first, because the plaintiff's affidavits did not sufficiently show an intention permanently to return within the jurisdiction; and, secondly, because the defendant was entitled, under section 93 of the Common Law Procedure Act, 1854, to have the plaintiff give security for the costs, on the ground that there had been a prior action of ejectment by the plaintiff against the defendant for the same premises, and that the Court would not rescind an order to stay proceedings until security for costs was given, on whatever ground the order might have been obtained, if on other grounds, the defendant was entitled to have the plaintiff give security for costs.

Keane, Q.C. (*Cooke* with him), in support of the rule.

BLACKBURN, J.—In this case the rule must be discharged. The order to stay proceedings was, at the time it was made, right. The cases seem clearly to establish that where security has been given under an order, the security is not vacated by the return to the jurisdiction; but where the security has not been actually given, the return to the jurisdiction is a good ground to set aside the order for security for costs. Now, as to the first point, viz., whether or no the affidavits are sufficiently explicit as to the return within the jurisdiction, it is immaterial, as we are going to discharge the rule on the second ground. As to the second ground the facts appear to be these. [His Lordship then stated the facts from the plaintiff's attorney's affidavit.] So that from plaintiff's own attorney's affidavit it appears that it was agreed that the action of ejectment should be discontinued upon a suit in chancery being instituted for the same object, and in place of the action of ejectment, and this chancery suit was dismissed. Now, section 93 of the Common Law Procedure Act, 1854, says—"If any person shall bring an action of ejectment after a prior action of ejectment for the same premises has been, or shall have been, unsuccessfully brought by such person, or by any person through or under whom he claims, against the same defendants or against any person through or under whom he defends, the Court or judge may, if they or he think fit, on the application of the defendant, at any time after such defendant has appeared to the writ, order that the plaintiff shall give security for the defendant's costs, and that all further proceedings shall be stayed until such security shall be given, whether the prior action has been or shall have been disposed of by discontinuance or by nonsuit, or by judgment for the defendant." Before the Common Law Procedure Act, 1854, when a man was harrassed by perpetual actions of ejectment in respect of the same premises, the Courts ordered a stay of proceedings until the costs of the previous ejectment were paid, but if the costs of the previous action were paid the Court had no power to prevent these continuous harrassing ejectments. To

remedy this wrong, section 98 of the Common Law Procedure Act, 1854, was passed. It provided, not as formerly, that the costs of the former ejectments should be paid, and a stay of proceedings until they were paid, but that whether the costs of the previous action were paid or no the Court should have the power to stay the proceedings until security for costs was given in all cases of ejectment where there had been a previous action of ejectment which had not been successfully prosecuted, whether the ejectment had been discontinued or a nonsuit entered, or in whatever way it had not been successfully prosecuted. Here the action was not in fact actually discontinued or a nonsuit entered, but it was agreed that the action should be discontinued and a chancery suit substituted for it. This chancery suit was actually instituted and dismissed. Now it seems to me that the Legislature, by these words at the end of the section, "discontinued or a nonsuit entered," did not mean to cut down the wide words at the beginning of the section "after an action was unsuccessfully brought," but rather says that in whatever way it happens, that the ejectment is not successfully prosecuted, whether the termination of the action is final or interlocutory, enumerating the usual ways of finishing an action, the Court shall have power to stay proceedings until security is given.

In the present case the plaintiff is evidently unwilling to give security for costs. This itself is a very good reason why the order should issue. Then Mr. Keane says that we have no jurisdiction to make such an order, there being no application to us by the defendant to do so; the question before us being whether an order made on a different ground shall be rescinded or not, and that we must set aside this order, and undo to-day what we should have to do to-morrow. It cannot be that we should undo one day what we should do the next day.

MELLOR, J.—I am of the same opinion, I will only add, that I think it would have been more satisfactory if the plaintiff's affidavits of return had been more explicit. As to the other point, I had at first some doubt whether the words at the end of section 98 did not limit ways in which action must have been unsuccessfully prosecuted to entitled the defendant to have the plaintiff give security for costs, but I now think that these words are merely words enumerating the ordinary ways in which an action is unsuccessfully prosecuted. The grounds on which the Legislature have thought fit to give the defendant a right to have the plaintiff give security for costs, will exist equally, however the previous action may have been finished, or unsuccessfully prosecuted; as to the other matters urged by Mr. Keane, it would be absurd to set aside to-day an order which we should have to make to-morrow. Surely we should rather sustain the present order.

LUSH, J., concurred.

[IN THE COMMON PLEAS.]

May 24, 1866.

GRAY v. RAPER AND OTHERS.

14 W. R. 780; L. R. 1 C.P. 694.

Followed, *Courtald v. Saunders*, [1867] E. R. A.; 15 W. R. 906; 16 L. T. 562 (C.P.).

Co-operative society — Liability on promissory note — Jurisdiction — Practice.

INDUSTRIAL SOCIETY.—*The defendants, who were members of a co-opera-*

tive society, executed a promissory note "on behalf of" the society. After the making of the note, the society was registered under 25 & 26 Vict. c. 87. This action was brought upon the note, and at the time it was commenced the society was being wound up under 25 & 26 Vict. c. 89. Held, that section 202 of 25 & 26 Vict. c. 89, read in connection with section 17 of 25 & 26 Vict. c. 87, took away from the Court the power of adding a plea to the jurisdiction.

This was an action on a promissory note. The defendants were members of the London and South-Western Co-operative Society (Limited), which was, in the year 1855, registered under the 15 & 16 Vict. c. 31, and was, on the 29th September, 1862, after the making of the note, also registered under the 25 & 26 Vict. c. 87.

The only plea was that the said note was not the defendants' note, as alleged.

The note on which the action was brought was in the following form:—

"£100.

"May 8th, 1861.

"12 months after date we, the undersigned, being members of the executive committee on behalf of the London and South-Western Railway Co-operative Society, do jointly promise to pay W. Gray, or order, the sum of £100 value received.

"WILLIAM RAPER."

[Signed also by the other defendants.]

"John Wilson, Secretary."

The case was tried before Keating, J., at Guildhall, and a verdict was found for the plaintiff for 107l. 10s., with leave to move for a rule to enter a verdict for the defendants, and with liberty to add a plea on such terms as the Court of Common Pleas might think fit.

On a former day *McCalmont* had obtained a rule calling on the plaintiff to show cause why the verdict found for him should not be set aside and a verdict be entered for the defendants pursuant to leave reserved, on the ground that the company was being wound up under section 202 of the 25 & 26 Vict. c. 89, and that the Court of Pleas had no jurisdiction to try the case.

Prentice showed cause against the rule, and contended that there was no plea to raise the defence that the society was being wound up under the Act of 25 & 26 Vict. c. 89, and that the Court had no jurisdiction to add such a plea. He also argued that this was an action against the defendants in their personal capacity, and not as the committee of the society: *Penkivil v. Connell* (19 L. J. Ex. 305). [He was here stopped by the Court.]

McCalmont, in support of the rule.—The wording of the note shows that it was not intended that the defendants should be personally liable: *Dean v. Mellard* (11 W. R. 913; 15 C. B. N.S. 19) is distinguishable because there the society was not being wound up. The 17th section of 25 & 26 Vict. c. 87, gives a jurisdiction to the county court, and section 202 of the 25 & 26 Vict. c. 89, read in connection with the previous Act, shows that no action shall be commenced or proceeded with "except with leave of the county court." No leave was obtained here, and therefore this Court had no jurisdiction to try the case: *Henderson v. Bamber* (35 L. J. C.P. 65).

ERLE, C.J.—It is clear that this Court cannot add a plea, because it has no jurisdiction; the proper course is by motion in the Court which has jurisdiction.

The rest of the Court concurred.

Rule discharged.

CRANWORTH, L.C., May 30, June 2, 1886.

WILSON v. GRAY.

WHITTAKER v. FOX.

PIETRONI v. TRANSATLANTIC COMPANY.

BETTS v. RIMMEL.

14 W. R. 783.

Practice—Transfer of causes from one judge to another—Re-transfer.

PRACTICE. J.—Where, on the occasion of an interlocutory application prior to the transfer of a cause, the question involved in the suit has been argued and dealt with on the merits, that is sufficient ground for ordering a re-transfer to the Judge before whom such interlocutory application was heard; but it is no ground for ordering such re-transfer that a precisely similar point has been decided by such Judge in a different suit.

Semble, that every order for transfer is made subject to any application of any party; and that every order for re-transfer is, in the nature of an order nisi, and may be obtained ex parte, leaving it to the other side to move to discharge it.

All these causes had been originally set down before Vice-Chancellor Wood, and formed part of an extensive transfer which had been recently made from that Judge to Vice-Chancellor Stuart.

Fooks now asked for a re-transfer of the cause of *Wilson v. Gray*.

This cause had been three times before Vice-Chancellor Wood on motion for injunction, a motion for a receiver, and a motion to commit for breach of the injunction; and on all these occasions it had been necessary to go into the merits of the case. Vice-Chancellor Wood was therefore fully acquainted with the case, and it would have to be all gone in *de novo* before Vice-Chancellor Stuart if not re-transferred.

THE LORD CHANCELLOR.—Have you given notice of this application to the other side?

Fooks.—No, my Lord.

LORD CRANWORTH, C.—I do not think it necessary to do so; they can move to discharge this order if they are so advised. I think the grounds stated sufficient to authorise me in directing a re-transfer.

A. E. Miller then made a similar application as regarded the cause of *Whittaker v. Fox*. The cause had been practically heard on the hearing of a motion for injunction, subject only to one small question on the evidence. He had not yet applied to the Vice-Chancellors for leave, but asked for an order subject to their Honours' approbation.

LORD CRANWORTH, C.—Take the order.

June 2.—*Bedwell* applied for a similar order in the thirdly-mentioned cause on similar grounds.

F. O. Haynes for the defendants.

Malins, Q.C. (*amicus curiæ*).—Lord Westbury never allowed a re-transfer, except when suits which ought to be heard together had become separated.

LORD CRANWORTH, C.—It would be convenient before making a transfer to find out whether there is any objection in the case of any of the causes selected. That, however, of course cannot be done, the order is to take the first fifty or seventy causes, beginning at such and such a place, and therefore

it seems to me that it would be very unreasonable to refuse to entertain these applications. The order for transfer should be merely in the nature of an order to show cause why the suit should not be transferred, and if any party shows a *prima facie* ground for a re-transfer the order should be made, subject to the right of the other party to move to discharge it on notice. You may take the order.

Willcock, Q.C., and *Everitt*, now made a similar application in the fourthly-mentioned cause. This cause had not itself been yet before Vice-Chancellor Wood, but the same point had been decided by him in *Betts v. Menzies*, which had afterwards been affirmed by the House of Lords. There was also a cause of *Betts v. Neilson* now in Vice-Chancellor Wood's paper (not transferred), involving the very same question, and which would probably be heard sooner than this cause.

Malins, Q.C., and *Davey*, opposed the application.—Whichever cause came on first would, of course, rule the other; neither Vice-Chancellor would think of disregarding the order of the other in *pari materia*.

Willcock, Q.C., in reply.—The subject of this particular patent is one with which Vice-Chancellor Wood is especially familiar.

LORD CRANWORTH, C., refused the application. There was a great difference between a case where the very point had been already settled between the parties, and a case where only a similar point had been adjudicated upon. The one was something very analogous to *res judicata*, the other was merely a case in point, like any other precedent.

Motion refused. Costs to be costs in the cause.

ROMILLY, M.R., April 28, 1866.

In re RAILWAY FINANCE COMPANY.

14 W. R. 785.

Winding-up petition abandoned—Costs.

COMPANY. M.—*A creditor who had issued execution presented a winding-up petition. After the petition was presented the company disputed the creditor's claim. A new trial at law, on terms, was ordered, resulting in the petitioner's favour, whose claim was then satisfied. The petition stood over to abide the result of the new trial, and the petitioner took no further steps in the petition:—Held, that he was entitled to the costs of the petition.*

This was a question as to the costs of a petition for winding up the company, which had been presented by a creditor of the company. A creditor against the company had, in the month of December, 1865, obtained, in an action at law, execution against the company. The sheriff's return was *nulla bona*. The creditor then presented a petition to wind up the company. After the presentation of the petition the company raised a dispute as to the validity of the creditor's claim, and a new trial was ordered at law upon the terms of the company bringing the amount of the claim into court, to abide the event of the trial. An application was thereupon made to postpone the hearing of the petition until the new trial at law was decided. The new trial resulted in favour of the petitioner. The question that now came before the Court was as to the costs of the petition.

Baggallay, Q.C., asked for the costs of the petition against the company.

Swanston opposed the application, contended that this was the case of a creditor with a *bona fide* disputed claim, and the petition should have been dismissed, and cited *Re The Catholic Publishing Company* (2 D. J. S. 116); *Brighton Club and Norfolk Hotel* (13 W. R. 733; 11 Jur. N.S. 436).

LORD ROMILLY, M.R.—There is a distinction between this case and those cited. If this petition had come on in December, no winding-up order would have been made; but the petitioner did not proceed with his petition, and all I am asked now is, in effect, to say whether or not he was justified in presenting a petition. Up to the 16th December, which was the first notice he had of any dispute against his claim raised by the company, he had a right to present a petition, and he did not afterwards proceed with it, but he had a right to present it, and is entitled to his costs and the costs of this application.

ROMILLY, M.R., May 1, 26, 1866.

Re LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK
(LIMITED).

HENRY'S CASE.

14 W. R. 785; 14 L. T. 457; 12 Jur. N.S. 494.

Company—Winding-up—Contributory—Incomplete transfer.

COMPANY. M.—*W. was shareholder in a company which could refuse to register transfers. W. had contracted to assign his shares to S., and H. had applied to S. for a sub-assignment of the same shares, and had filed a bill against S. for specific performance:—Held, that though W. was registered owner, H. must be entered on the list of contributories.*

The London and Hamburg Banking Company had been ordered to be wound up in April, 1865.

Mr. Ward was registered owner of thirty shares in the company. The company was allowed by its articles of association, to refuse to register transfers until approved by the board. Mr. Ward had entered into two distinct contracts. The first was to transfer his shares to Stafford. Stafford, meanwhile, agreed to sub-assign them to Henry, a broker, but afterwards refused to complete the agreement, and Henry had filed a bill against Stafford for specific performance. The company was wound-up before Henry's bill came to a hearing, and Henry now declined to take the shares. The second contract into which Ward had entered, was to transfer his shares to Henry directly, Henry being a stockbroker, and acting for a Mr. Powell. Stafford had prevented the completion of this contract by giving the company notice that the shares were his, and must not be registered in Henry's name. A question being raised as to who should be held contributory in respect of Ward's thirty shares, the chief clerk had upon summons put Henry on the list. This decision was now appealed against.

E. R. Turner appeared for Ward, the registered owner.

Swanston, for Stafford, the purchaser under the first incomplete contract, contended that, as Henry had actually filed a bill for specific performance against Stafford, and the sub-transfer to him had not been objected to by the company, he could not now seek to throw the burden back on Stafford, and cited *Hyam's case* (4 De G. & J. 544).

Jessel, *Q.C.*, and *Caldecott*, contended that *Hyam's case*, and that class

of cases, had no application here, where the company might refuse to register transfers. Ward was still registered owner and ought to be liable: *Robinson v. Chartered Bank* (14 W. R. 71; 1 L. R. Eq. 32); *Poole v. Middleton* (9 W. R. 758; 29 Beav. 646).

Selwyn, Q.C., and *Roxburgh*, for the company, took no part in the argument.

May 24.—LORD ROMILLY, M.R.—In this case Stafford and Henry have agreed to endeavour to throw the shares back upon Ward as registered proprietor; but Ward has been always ready to complete the transfer, and I am of opinion that Henry and Stafford cannot, by agreement among themselves, throw such an obligation back upon the seller. The Court is not bound to consider the register conclusive, for if so no question of fraud could ever be inquired into. The 35th and 160th sections of the Companies Act, 1862, give me power to correct the register at any time, and on the common principles of equity I must hold that Henry is the real owner of these shares, and must be placed on the list of contributories. I have no power to make Stafford, who caused the litigation, pay the costs, but he will probably be liable for damages in an action at law.

ROMILLY, M.R., May 24, 28, 1866.

SCHOLEY v. CENTRAL RAILWAY COMPANY OF VENEZUELA.

14 W. R. 786.

Referred to, *In re Estates Investment Co., Pawle's case*, [1869] E. R. A.; 38 L. J. Ch. 318; 20 L. T. 100 (M.R.): affirmed, [1869] E. R. A.; 38 L. J. Ch. 412; L. R. 4 Ch. 497; 20 L. T. 589; 17 W. R. 599 (L. JJ.).

Identical case—Suspension of decree.

APPEAL. B.—Where an appeal, involving the identical question before the Court, was about to be heard before the House of Lords, on appeal from the Lords Justices, the same decree as that appealed from was made, but its operation was suspended till after the hearing in the House of Lords, with liberty to apply.

This was a bill for an injunction to restrain the defendants from prosecuting an action at law for payment of calls, on the ground of alleged misrepresentations in the prospectus issued on the formation of the company.

A similar suit, *Kisch v. The Central Railway Company of Venezuela*, reported 13 W. R. 1006, had, on appeal, been decided in favour of the plaintiff by the Lords Justices in July, 1865, and an appeal from that decision to the House of Lords was now pending. It was suggested that the hearing of the present suit should be postponed till after the hearing of the appeal to the House of Lords; but the plaintiff elected to take the hearing now, on the ground that, in case of the winding-up of the company, there would be an advantage in his having a decree in his favour.

The company was formed under the Act of 1862 for the purpose of constructing a railway in Venezuela. The capital was to consist of 500,000*l.* in 10,000 shares of 50*l.* each.

The principal misrepresentations complained of were those which formed the ground of the decision of the Lords Justices in *Kisch v. The Central Railway Company of Venezuela*. They were—first, the statement that, by the concession of the Government of Venezuela, a guarantee of nine per cent.

interest on all calls paid on account of the subscribed capital for a period of twenty years was secured to the company; whereas, in fact, the nine per cent. was guaranteed only whilst the line did not produce it from no default of the company; and secondly, the statement that the contractor had agreed to pay two and a-half per cent. interest on the paid-up capital during the construction of the railway; whereas, in fact, the liability of the contractor extended only to a sum of 20,000*l*.

The company was registered on the 6th July, 1864, and the plaintiff received the prospectus two days afterwards, applied for and received an allotment of fifty shares.

The bill alleged that the plaintiff remained in total ignorance of the misrepresentations till the month of July, 1865, when he saw in the newspapers the report of the former case before the Lords Justices, whereupon he refused to pay the call which afterwards became due.

Baggallay, Q.C., and *Swanston*, for the plaintiff.—This case is in all respects similar to the former. There can be no difference, because the question in both turns upon the representations contained in the same document. It is important for the plaintiff to have a decree in his favour, as his position would thereby be materially altered in case of a winding-up.

Sir R. Palmer, A.G., and *Morris*, for the defendants.—There are facts common to this case and the former, and different facts. There was no sound distinction between those points which the Lords Justices decided in favour of the former plaintiff, and those which they rejected. In this case the plaintiff's acts are inconsistent with his present application. He paid a call and received a dividend after he knew of the misrepresentation. *Ex parte Briggs* (1 L. R. Eq. 483) was quoted.

Baggallay, Q.C., in reply.—As to the question of delay he received the dividend before he knew of *Kisch's* suit.

May 28.—*LORD ROMILLY, M.R.*—I think that this case is identical with the former, and I decide this case in favour of the plaintiff, simply on the ground of the decision of the Lords Justices. I am bound by their decision until it is reversed; I offer no opinion upon it. The decree will be precisely the same. The operation of the decree will be suspended till after the hearing before the House of Lords. There will be no costs. Liberty to apply.

ROMILLY, M.R., May 28, 30, 1866.

PATENT BREAD MACHINERY COMPANY (LIMITED).

14 W. R. 787; 14 L. T. 582.

Contributory—Fully paid-up shares—Winding-up.

COMPANY. M.—*A patentee sold his patent to a limited company, receiving, as the price, some fully paid-up shares in the company:—Held, that since he could not be liable as a contributory, he was not entitled to a winding-up order.*

Stephens, the petitioner in this case, had invented and patented a machine for diminishing manual labour in the manufacture of bread, and had carried on the manufacture at his shop. In the year 1862 a company was formed for working his patent. It was provided by the articles of association that the price of the purchase of his patent should be 2,500 fully paid-up shares of the company, and that in the event of the company being wound-up,

the patent should revert to the petitioner. The company had purchased the places of business of the petitioner, and of several other bakers. The business they undertook was baking bread by the petitioner's process, and making his machines for sale. The articles of association provided that in case seventy per cent. of the capital of the company should be spent, a meeting of shareholders should be summoned to consider the propriety of winding-up. The baking business proved unsuccessful, but a meeting of the shareholders had decided to continue the machine making, which seemed likely to be eventually profitable.

Southgate, Q.C., and *Bevir*, contended that they had only to shew that it was right and equitable that the company should be wound-up to entitle them to the order. The petitioner, as a shareholder, was entitled to apply. Most of the baking places were shut up, and had resulted in loss, and by 4th February, 1865, the company had no funds in hand.

Wintle, for the company.—One of the bakeries is now going on successfully, and the losses in other cases have been caused by the petitioner's mistakes, and they paid him 5,000*l.* for the purchase of his bakery. The baking business is one not suitable for a company, but the machine making will be profitable. The petitioner's interests are adverse to those of the shareholders, inasmuch as he would receive his patents back in case of a winding-up.

LORD ROMILLY, M.R.—I think that the petitioner would not be entitled to the patent in priority to the creditors of the company.

Wintle.—By the 82nd section of the Act of 1862, a petitioner, to entitle him to a winding-up order, must be either a contributory or a creditor. Stephens cannot be contributory, for his shares are fully paid-up, and he is not a creditor, for all the money due to him has been paid. The interests of the petitioner on a winding-up are contrary to those of the other shareholders, which shews that it was for the company to decide whether there should be a winding-up.

LORD ROMILLY, M.R.—I do not think he is a creditor.

Southgate, in reply.—I have only to prove a reasonable case.

May 30.—**LORD ROMILLY, M.R.**—I cannot make the order in this case. The company was established for baking and machine making. The baking has failed, but the machine making may succeed. The shareholders and execution-creditors wish to carry on the business. The plaintiff is not liable for the company's debts, and has no interests which would entitle him to the order. The sole result of granting an order would be to vest the most valuable assets of the company in the petitioner. In my opinion, this is not a case in which he is entitled to come here and ask for a winding-up order. The petition will be dismissed with costs.

STUART, V.C., June 1, 1866.

Ex parte THE WARDEN, SCHOLARS, AND CLERKS OF ST. MARY'S COLLEGE, WINCHESTER.

14 W. R. 788; 14 L. T. 543.

Practice—Payment of dividends—Affidavit of title.

The usual affidavit of title prescribed by C. O. xxxiv. r. 8, is requisite, even though only the income of the fund is proposed to be dealt with

This was an application for the investment of 4,750*l.* in Three per Cent. Annuities, and that such Annuities should be carried to the credit of the cause, *Ex parte The Metropolitan Board of Works; In the matter of the Metropolis Improvement Act, 1863; The account of The Wardens, Scholars, &c., of St. Mary's College, Winchester*; and that the dividends and interest, as they became due, might be paid to the petitioners and their successors.

Wingfield mentioned that the petition was not supported by the usual affidavit as to title, required by C. O. xxxiv. r. 3, and asked whether such affidavit would be necessary in an application for payment of dividends and interest only.

STUART, V.C.—Yes; I must have the usual affidavit.

C. Hall, for Metropolitan Board of Works.

STUART, V.C., June 4, 5, 1866.

DYSON v. LUM.

14 W. R. 788; 14 L. T. 588.

Trustee and cestui que trust—Purchase by trustee.

TRUST AND TRUSTEE.—*The Court will, as of course, and irrespective of the adequacy of the purchase-money, set aside a purchase by a trustee of the trust property.*

This was a bill to set aside the purchase of two farms, called the Wormald and Jugs Farms, respectively, on the ground that the purchasers were trustees of the property. The lands in question were devised by one Lum to trustees on trust for sale, the defendants John Lum and Thomas Dyson being two of the trustees named. After an ineffectual attempt at a sale by auction, the lands were again put up in December, 1860, when the Wormald Farm was sold to Thomas Dyson for 817*l.*, and the Jugs Farm to a Mrs. Hamer for 300*l.* Mrs. Hamer was alleged, and sufficiently proved according to the judgment of the Vice-Chancellor, to have been a mere agent for John Lum. There was no material dispute as to the sufficiency of the purchase-money.

John Lum contended that Mrs. Hamer was not his agent, but that even if she were, the estate had now been fully administered, a full value had been given, and that the re-sale of the property could produce no benefit to any party. Dyson consented to give up the property.

Greene, Q.C., and *E. K. Karlake*, for the plaintiff.

W. F. Robinson for the defendant Dyson.

Malins, Q.C., and *C. Hall* for defendant Lum.

STUART, V.C., said that the Court had no choice but to set aside the purchases. The law was so well settled that he knew of no exceptional case. All the features of the present case which had been referred to by the defendant's counsel, viz., the sufficiency of price, and the uselessness of the litigation, had occurred in other cases, but they had not been sufficient to induce the Court to relax the rule. The property must be put up at the price purchased by the trustees, and if no more were offered they must be held to their bargain.

Costs occasioned by his purchase to be paid by John Lum; all other costs for further consideration.

WOOD, V.C., May 8, 1866.

SPARROW v. EWING.

14 W. R. 788; 14 L. T. 494; 12 Jur. N.S. 428.

Practice—Supplemental order to revive—Subpœna to hear judgment.

Where a subpœna to hear judgment has been served on a defendant, who becomes bankrupt before the decree, and upon whose assignees a supplemental order to revive is served, it is not necessary to serve a fresh subpœna to hear judgment upon the assignees.

In this suit, after replication filed, &c., and subpœna to hear judgment served on the defendants, one of the defendants became bankrupt. The plaintiff obtained the usual supplemental order to revive as against the assignees in bankruptcy (15 & 16 Vict. c. 86, s. 51). The order was served upon them, and they made no objection to it; but the plaintiff's counsel, thinking that it was not necessary to serve a fresh subpœna to hear judgment upon them, no such subpœna was taken out. The cause came on for hearing, but the assignees did not appear. The decree was accordingly taken as against them in their absence, upon affidavit of service of the order to revive.

Kay, for the plaintiff, now took the opinion of the Court on the question as to whether a fresh subpœna was necessary or not. Under the old practice, when a bill of revivor was necessary, no fresh subpœna was required—*Bray v. Woodran* (6 Mad. 72). The assignees are introduced into the suit by the supplemental order in the place of the bankrupt. They stand in his shoes for all the purposes of the original suit. The evidence, &c., has not to be taken afresh as against them. Why, then, should this one step in the cause be picked out as being necessary to be gone over again in order to affect the assignees? The rule is clear and intelligible that every proceeding of every kind taken against the defendant before he became bankrupt is to be considered as taken against the assignees when once they have been brought into the suit.

WOOD, V.C., decided that no fresh subpœna to hear judgment was necessary. He said that persons brought into a suit by supplemental order were bound to inform themselves of the exact position of the suit.

WOOD, V.C., May 8, 1866.

STEPHENSON v. BINEY.

14 W. R. 788; L. R. 2 Eq. 303; 14 L. T. 432; 12 Jur. N.S. 428.

Followed, *Allen v. Bonnett*, 1868, L. R. 6 Eq. 522; 16 W. R. 1075 (M.R.).

Practice—Evidence—Reading depositions taken in another suit in another court—Lancaster Chancery Court.

EVIDENCE.—An order of course, obtained by the plaintiff, for permission to read, at the hearing of this cause, depositions taken in the Lancaster Palatinate Court, in a cause in which he was defendant and the present defendant was plaintiff, was discharged with costs, as irregular.

This was a motion made on behalf of the defendant to discharge an order of course which had been obtained at the Rolls by the plaintiff. The order was that the plaintiff might be at liberty at the hearing of this cause to read

and make use of the documents therein specified; such documents, which included a great number of voluminous affidavits, having been filed in the Chancery of the County Palatine of Lancaster, in a cause of *Biney v. Stephenson*, between the same parties as those to the present cause, the defendant in the one being the plaintiff in the other, and *vice versa*.

The bill was filed in the Palatinate Court for the purpose of obtaining the dissolution of a partnership between the parties as hotel keepers. Vice-Chancellor James dismissed the bill with costs. Such dismissal, however, not having the effect of causing the plaintiff to relinquish the occupation of the hotel, which the present plaintiff contended that he was bound to do under a clause of the articles of partnership, this bill was filed in the High Court. It prayed that the defendant might be restrained from continuing in the occupation of the hotel in contravention of such clause, and for consequential directions. An affidavit had been filed in support of the present motion to the effect that the persons who had sworn the affidavits, which the plaintiff had obtained an order to read, were still living.

Giffard, Q.C., and *E. R. Turner*, for the defendant, contended that the order to read was irregular and could not be supported. In *Williams v. Broadhead* (1 Sm. 151), where a plaintiff in this Court, who had also been a plaintiff in a suit in the Exchequer, had obtained an order to read against a defendant in this Court, who made the same defence as had been made in the Exchequer, copies of depositions taken in the Exchequer, the order was discharged for irregularity; on the ground that the depositions could not be read except from the production of a copy of the bill and answer in the Exchequer, for the purpose of showing that the issue was the same in both causes; and that upon such production the depositions could be read without any order. They also cited *Hope v. Liddell* (No. 2), (21 Beav. 181); *Palmer v. Lord Aylesbury* (15 Ves. 299); and referred to *Dan. Chan. Prac.* 826-7; and the note to C. O. xix. r. 4, in *Morgan's Acts and Orders*, 447-8. With respect to this last authority, which says that the true test of the admissibility of depositions in one cause to be read in another when the parties in both causes are, as in the present case, the same, is whether the issues in both causes are the same, they argued that if the issues were the same in this suit and in the Lancaster suit, then the rights of the parties had been already settled; and if they were not the same, then the depositions could not be evidence.

E. K. Karlake (Rolt, Q.C., with him). for the plaintiff, in support of the order to read, contended that this suit was merely a cross cause to the cause in the Lancaster Court.

Wood, V.C., said that it was well established that when there was a cause and a cross cause in this Court the depositions taken in the one could be read in the other; and further, that if depositions were taken in a separate cause in this court, the Court would not require the attendance of any of its officers, or the production of the bill and answer, but would take notice of its own record, and, if satisfied that the issue was the same in both causes, would order the depositions in the one to be read in the other.

But, as regarded all matters of proceeding in a different Court, the case was different. This Court did not know what the record of another Court might be, and, therefore, before allowing the party to read depositions taken in another Court, it required the production of the documents which were the foundation of the proceedings in such other Court. If, upon that production, it was proved that the issues raised in both Courts were the same, the depositions taken in the other Court could then be read in this Court without an order. That was the substance of the authorities. The present order, therefore, was irregular, and must be discharged with costs.

Wood, V.C., May 29, 1866.

RISHTON v. GRISSEL.

14 W. R. 789.

Pleading—Answer—Exceptions—Correspondence.

DISCOVERY. A.—*Where a defendant is required by an interrogatory to set forth a list of all correspondence relating to a negotiation, and answers that, if he wrote or received any letters on the subject, he has not preserved them, and that he has none except those in the schedule, the answer is insufficient.*

This case has been reported before (14 W. R. 578), when it was argued on exceptions to defendant's answer to the interrogatory relating to the representations made by him as to his profits, and requiring him to set forth a list of all correspondence relating to the negotiation for the sale of his business. The defendant, by his further answer, in reply to the demand for a list of correspondence, said that, if he ever wrote or received any letter relating to the negotiations (which he did not admit that he had done), he had not preserved it; and also that, save as appeared by the schedule to this further answer, he had not any letter or draft or copy of or extract from any letter relating to the said negotiation. To this answer the plaintiff again excepted.

Willcock, Q.C., and *Hemming*, for the plaintiff, said that the further answer was also insufficient. It was quite possible that correspondence might have existed up to the time of the answer, and then have been destroyed. Probably the correspondence was conducted by a clerk of defendant.

J. Pearson, for the defendant, argued that he had traversed the interrogatory. If plaintiff wanted a list of those letters that had been destroyed, he should have framed his interrogatory differently. The answer follows the interrogatory.

WOOD, V.C. (without calling for a reply), said that something had come out when a former answer was pressed. The object was to get a list of the correspondence. The answer that, if the defendant ever wrote or received any letter, he had not preserved it, did not prevent him from setting out a list. There might have been an important document. If there had been, and it had been destroyed, it would have impressed itself on his mind. He did not find a full traverse to the interrogatory. The better way would be to examine the defendant at chambers, where the matter would be cleared up in two or three minutes. Defendant must attend at his own expense.

[CROWN CASE RESERVED.]

June 9, 1866.

REG. v. STUDD AND OTHERS.

14 W. R. 806; 14 L. T. 633.

Forcible entry—Re-stating case.

CRIMINAL LAW. C.—(1) *One V.*, the prosecutor, having been in possession of a house from May to October, the defendants called there, and, insisting that V. had no title, proceeded to take the keys out of the room doors. Upon their doing that V. gave them into custody for stealing the keys; but the magistrate before whom they were taken refused to detain them. They then returned to the house, and having procured a sledge-hammer, forced the inner

door of the hall, and some having entered that way, and some by a staircase-window, overpowering the prosecutor's opposition, and furnished with a hatchet and other weapon, after a struggle which caused a disorderly crowd to assemble, they ejected the prosecutor and his servants. From the commencement of the proceedings till the conclusion a female servant of the prosecutor's was in the kitchen:—Held, assuming the title of the prosecutor to have been bad, and that the defendants had acted by the orders of those who had a good title to the premises, that the evidence was sufficient to support a conviction of the defendants for a forcible entry and riot.

CRIMINAL LAW. D.—(2) *Where a case reserved had been re-stated by order of the Court, an application, supported by affidavit, to have it again re-stated was refused.*

Case:—“ George Deeks, Alfred Studd, and eight other defendants who were named, were tried before me at the Middlesex Sessions, in November, 1865, upon an indictment which charged them with a forcible entry into certain premises, and a riot.

“ George Deeks was acquitted, and the other defendants were found guilty upon the count charging a forcible entry, subject to the opinion of this honourable Court upon the following case:—

“ The prosecutor, John Vincent, was in possession of the premises in question from May, 1865, and there carried on his business of a house agent until October in the same year, when several of the defendants called at the house and said they had come to take possession. They produced an opinion which they said had been taken on the subject, by which they were advised that the parties of whom Vincent had bought a term had no legal right to assign it, and they said that if possession was not given, they should use force. They proceeded to take out the keys of the room doors, upon which the prosecutor sent for a police constable, and gave them in charge for stealing the door-keys. The magistrate before whom they were taken refused to detain them, and they returned to the house, accompanied by the other defendants. During their absence the prosecutor had fastened and barricaded the premises, but the defendants procured a sledge-hammer and forced the inner door of the hall, and some of them then entered, whilst other of the defendants entered by a staircase-window, overpowering the prosecutor's opposition. They had a hatchet and other weapons, and after a considerable struggle, which caused the assemblage of a large disorderly crowd, they succeeded in ejecting the prosecutor and his servants from the premises. A female servant of the prosecutor was in the kitchen of the house from the commencement of the proceeding, and remained until the conclusion. The office furniture and books of the prosecutor were also left on the premises when possession was forcibly taken as before described.

“ The counsel for the defendants contended that the prosecutor had no legal title to the premises, and that as the defendants had got in and taken the keys, they were in lawful possession; that the charge of felony improperly removed them from the premises, and that they were legally entitled to use the force they had used in consequence of the prosecutor's refusal to admit them.

“ The counsel for the defendants relied on this objection, and declined to address the jury on the facts. I told the jury that if it were shown that the title of the prosecutor was objectionable, and that the defendants acted by the orders of parties who could show a legal title to the premises, that such proof would not justify the conduct of the defendants, or furnish any answer to the indictment.

“ The question on which I solicit the opinion of this Court is whether my direction, in point of law, was correct. If it were, the conviction is to stand;

but if not, it is to be reversed; and the defendants have been severally admitted to bail pending the decision.

“ W. H. BODKIN, Assistant Judge, Middlesex Sessions,
December 19th, 1865.

“ Re-stated by order of the Court of Criminal Appeal, April 16th, 1866.

“ W. H. BODKIN.”

Ballantine, Serj. (Lanyon, with him), applied that the case, as re-stated, might again be sent back to the Assistant Judge for amendment, and handed to the Court an affidavit in support of his application. He desired that it should be stated in the case—1. That the defendant had a clear title to the possession of the premises. 2. That they had obtained peaceable possession of the premises before the charge against them had been dismissed by the magistrate? [ERLE, C.J.—What do you mean by obtaining peaceable possession?] That the doors being open, the owner peaceably went in with his servants, and took possession of the keys, and ordered out those who were in the house. [ERLE, C. J.—It is stated in the case that the prosecutor's cook was down stairs all the time, and was never off the premises. That makes all the difference, because the premises were never in the possession of the defendants, whilst the cook and the prosecutor's furniture were there, and *ex hypothesi* Vincent had no idea of letting you in.] The points reserved are not stated in the case, and as it now stands, I cannot argue it. [MARTIN, B.—For my part it seems to me that it was for the judge who tried the defendants to state the case for this court, and it was right if the defendants' counsel was not satisfied with the manner in which it was stated, that he should suggest to the judge in what way it should be amended. Here the case has been re-stated by the judge, and I do not think we ought to send it back.]

Metcalfe for the prosecution was not called on.

The COURT affirmed the conviction.

Conviction affirmed.

ROMILLY, M.R., May 23, 1866.

WILKINSON v. TURNER.

14 W. R. 813.

Absconding defendant—Bill taken pro confesso.

For the purpose of having a bill taken pro confesso against an absconding defendant, it must be shown that, at the time of making the application, the defendant cannot be found.

This was an application under the 22nd General Order, rule 4, to have a bill taken *pro confesso* against a defendant who had absconded. An attachment had issued against the defendant in 1864, and had been returned *non est inventus*, and the application was made on an affidavit of those facts.

Bovill appeared in support of the application.

LORD ROMILLY, M.R., refused the application on the ground that it must be shown that the defendant cannot be found now.

ROMILLY, M.R., June 5, 1866.

HENRY v. NAGHTEN.

14 W. R. 814.

Rectification of settlement—Written instructions.

SETTLEMENT.—*A memorandum by a solicitor of verbal instructions will not be treated as written instructions so as to prevent a decree for rectification of a settlement made in accordance with the memorandum.*

This was an application to rectify a marriage settlement by excluding some property from its operation, which, it was alleged, was not intended to have formed part of the settled property.

The marriage in question took place at Paris on the 9th of August, 1865. The wife was possessed of 500*l.* Railway Stock, and some property expectant on the death of her grandmother, which, it was believed, was strictly settled. The marriage was very hurriedly arranged, and on the 8th of August it was suggested that a settlement of the wife's expectant property should be made to provide for the case of her grandmother's property not being effectually settled, and to settle after-acquired property. The husband and wife accordingly instructed a Mr. Moore, a solicitor residing at Paris, to prepare a settlement. He was disinclined to do so at one day's notice, but, as there was no possibility of delay, he consented to prepare one by the next day. His note of the instructions, which were otherwise verbal, was "present and future property." The settlement was in general terms, and thereby included the 500*l.* Stock. The wife was afterwards much surprised to find that she could not sell out any portion of the Stock on account of the settlement. She had not mentioned the Railway Stock to Mr. Moore.

Cotton, for the plaintiff.—It was never intended to include this property in the settlement, and it was only by reason of the unavoidable haste that it was not expressly excluded.

Owen, *contrà*.—The memorandum of the solicitor was equivalent to written instructions, and the Court will not rectify a settlement which is in accordance with written instructions.

LORD ROMILLY, M.R.—Mr. Cotton, you must take a decree. The fact of the immediate application by the wife for the 500*l.* Stock shows that there was a mistake. The existence of the grandmother's property is quite a sufficient reason for a settlement of present property. The question was whether there should be no settlement, or a settlement executed in twenty-four hours. Nothing was said about the Railway Stock, and therefore the settlement was silent about it. The memorandum of the solicitor does not amount to written instructions. The plaintiffs will have to pay costs as between solicitor and client. The decree will be to rectify the settlement by saying that it is not to extend to the Railway Stock. Let that be indorsed on the settlement.

ROMILLY, M.R., June 7, 1866.

GARRETT v. SALISBURY AND DORSET JUNCTION RAILWAY.

14 W. R. 816; L. R. 2 Eq. 358; 12 Jur. N.S. 495.

Contractor—Injunction—Use of plant—Construction of works.

WORK AND LABOUR.—*A company will be restrained by injunction from selling plant belonging to a contractor who has made default, where they have power in that case to take possession of the plant at a valuation, and to allow it in account with the contractor, and have also power to use it in the construction of the line, unless it appears that there is a balance of account actually due from the contractor.*

This was a motion for an injunction to restrain the defendants from removing certain plant which had been used by the plaintiff, a railway contractor, in the construction of their line.

The plaintiff had contracted to make the defendants' line, which was a short junction line. The contract contained a clause giving the railway company power, in case of the failure of the contractor to complete his contract, to take possession of the works, and to take the plant at a valuation, and allow the value in account with the contractor. It contained also a clause giving them power to use such plant in completing the works left incomplete by the contractor.

The contractor commenced the works, and carried them on for some time. He was afterwards sued for a debt, and, being unable to pay, was sent to prison. By this means it became impossible for him to continue the works, and he afterwards became insolvent. He had, in consequence of the delay in completing, rendered himself liable in damages to the company. He had instituted a suit before Vice-Chancellor Wood, but the accounts applied for in that suit, and other matters in dispute between the parties, had been referred to arbitration. A new contractor named Jackson had been appointed to continue the works, which were now nearly completed. Jackson had taken away a shed which formerly belonged to the plaintiff, and four waggons had been moved off the line. The removal of the shed had been rendered necessary to prevent the spread of the small-pox which had broken out there, and had been done without the authority of the company. The removal of the waggons was said to be a temporary measure. The defendants intended, on the completion of the line, to sell the plant for the purpose of clearing the line for traffic, and account for the proceeds of the sale in their account before the arbitrator. The injunction was prayed to prevent their selling the plant.

Jessel, Q.C., and Stock, for the plaintiff.—The company are not entitled to sell the plant. They can only take possession of it and use it for the purpose of construction. Until the account is taken it does not appear that there is anything due to the company. We say that there is a balance due to the contractor.

Selwyn, Q.C., and Townsend, for the company.—The contractor has made default, and we are absolutely entitled to the plant. We have been put to loss and inconvenience by his failure to complete the works. It will be necessary to remove the plant before the line is opened, and the proceeds of the sale will be brought into the account before the arbitrator. The Court will not interfere between a contractor and a railway company on an interlocutory application: *Garrett v. The Banstead and Epsom Downs Railway Company* (13 W. R. 878); *Munro v. The Wivenhoe and Brightlingsea Railway Company* (13 W. R. 880).

LORD ROMILLY, M.R.—I shall not restrain you from using the plant. If there is a balance due to the plaintiff the property belongs to him.

Baggallay, Q.C., and Fitzhugh, for Jackson, the new contractor.—This

matter ought to go before the arbitrator. [LORD ROMILLY, M.R.—The reference was of the matters in dispute. This was not in dispute at the time.] The injunction asked for would restrain us from using the plant for the purpose of the works.

LORD ROMILLY, M.R.—The cases cited appear to me to be in favour of the order I am going to make, unless they show that the Court will never interfere on an interlocutory proceeding between a contractor and a railway company. They merely mean that the Crown will not pre-judge a case between a contractor and a railway company. When the company establish that they are creditors of the contractor they will be entitled to sell the plant; but if the contractor is proved to be the creditor of the railway company he will be entitled to have his plant back again. When the contractor failed to perform his contract he entitled the railway company to possession, and, as it is said by the company, to take the plant at a valuation, and then allow it in account with the contractor. But if so, what is the meaning of the clause giving them power to use the plant when it was their own property? It is obvious that it did not become their property; it was only to be their property so far as to provide for losses caused by the contractor's default. The company may use the contractor's property, they may also take the plant which they find on the works at the time of the default, which, in my opinion, will become the property of the company so far as shall be necessary for providing for the losses and expenses incurred by reason of the default. There is an inquiry going on to ascertain what these losses are, and the plaintiff claims the right to remove these things and dispose of them. In my opinion such a claim cannot be sustained in these courts. A price must be ascertained and the money paid into court to abide the results of the arbitration, or else there will be an absolute injunction against selling the plant, and an injunction to restrain the removal except so far as is necessary for the completion of the works, and for preventing any impediment to working the line when completed. The plaintiff will have his costs.

ROMILLY, M.R., June 7, 1866.

Re LONDON AND HAMBURG BANK. WATKINS' CASE.

14 W. R. 817; 14 L. T. 696.

Contributory—Stock broker—Undisclosed principal—Transferee—Costs.

COMPANY. M.—*A shareholder had made a bonâ fide sale before the petition for winding-up was presented, but the purchaser's broker did not disclose his principal at first, and afterwards a question arose as to who was really the principal:—Held, that the Court could not strike off the transferor's name until some person was found clearly liable as a contributory. Who was the real transferee could only be determined by a suit.*

The Court refused the costs of the transferee's broker.

This was an application to substitute the name of a transferee of some shares in the company for the transferor, who had been placed on the list of contributories.

Watkins, the applicant, had taken sixty shares in the company at the end of the year 1864. On the 13th of March, 1865, he went to his broker's for the purpose of selling his shares. He believed the concern at that time to be quite solvent. A *bonâ fide* transfer was made to a broker named Henry, who did not at the time disclose his principal.

On the 14th of April, 1865, Watkins applied, through his broker, to Henry for the name of his principal. He gave the name of W. Hussey (who was a costermonger, and wholly without property) as the purchaser of fifty shares. As to the other ten shares no question arose. He afterwards stated that the real purchaser was his brother-in-law, and that Hussey was a mere trustee for him. A few days after the transfer, viz., on the 25th March, 1865, the petition for winding up the company was presented, and the advertisements were issued on the 11th of April.

Baggallay, Q.C., for Watkins.—There was a *bond fide* sale before the issue of the advertisements. As Henry did not disclose his principal in proper time, he ought to suffer the consequences, and to be made a contributory in respect of these shares.

LORD ROMILLY, M.R.—I have laid down a rule in the exercise of my discretion that I should treat the time of the issue of the advertisements as the time for determining who is to be made a contributory. The transfer, therefore, in this case, is in plenty of time; but the difficulty is, who is the real transferee? It was pointed out to me some time ago that questions involving difficult points of law and equity would arise in these cases. The question here can only be determined by a suit. Mr. Baggallay suggests that I should take Watkins' name off, and put Henry's on; but I cannot do that. I must have some person clearly liable to be put on.

Caldecott for Henry, then applied for costs.—It was stated in the affidavit of Henry that it was the common practice on the Stock Exchange to put forward a false person as real owner.

LORD ROMILLY, M.R.—It is the common practice of the Court of Chancery not to give costs in such a case.

Selwyn, Q.C., and *Roxburgh*, for the official liquidator, were not called upon.

June 9, 1866.

PRATT v. LATIMER.

14 W. R. 818.

Divorce—Life interest of wife—Decree of Judge Ordinary.

The Court of Chancery cannot act upon an order of the Judge Ordinary which extinguishes a divorced wife's life interest on a fund in court.

This was an application to have the dividends on a fund in court, in which a wife who had been divorced at the suit of the husband had a first life-interest, paid to the husband, as if the wife were dead.

A settlement had been made, on the marriage, of a fund in Court, which was the property of the wife. The wife was entitled to the first life interest under the settlement, and the husband was entitled for life after her death. The Judge Ordinary had pronounced a decree of divorce at the suit of the husband, and had made an order for the payment to the husband of the settled fund, as if the wife were dead. The order had been made by the authority of 22 & 23 Vict. c. 61, s. 5, which provides in general terms for inquiring into the existence of settlements made on the marriage of parties affected by the decree, and for making such orders as to the Court should seem fit for the benefit of the children or parents.

Longley appeared in support of the application. He cited also 21 & 22 Vict. c. 85, s. 45.

LORD ROMILLY, M.R.—I cannot make an order to extinguish a wife's life estate. A wife's property cannot be taken away in that manner. You must mention the matter to the Lords Justices.

Wood, V.C., May 25, 1866.

GRIGGS v. GIBSON. }
MAYNARD v. GIBSON. } No. 3.

14 W. R. 818.

4 & 5 Vict. c. 35 was repealed by the Copyhold Act, 1894 (57 & 58 Vict. c. 46).

Infant lady of the manor—Appointment of a valuer by her guardian—
4 & 5 Vict. c. 35, s. 11.

COPYHOLD INFANT.—*A female infant tenant for life in possession of a manor, but subject to a legal term of 1,000 years vested in trustees for securing annuities, and also subject to a provision for the receipt by the same trustees of the rents during the minority, and for the application of a certain limited sum thereout for her maintenance, was held to be the lady of the manor.*

And, although the trustees had the usual power of sale, yet it was held that, on notice given by tenants to apply for enfranchisement, her guardian was the proper person, and not the trustees, to appoint a valuer.

This was an adjourned summons.

The plaintiff in the second suit, Frances Evelyn Maynard, an infant, was, under the trusts of the will of her late grandfather, Lord Maynard, tenant for life in possession of his estates, but subject to the trusts in the will respecting the receipt of the rents and profits of the estates by the trustees of the will during the minority of any person for the time being entitled to the possession or to the rents and profits of the estates, whereby the trustees were directed, out of such rents and profits, to pay and apply any annual sum or sums of money, according to the age of such minor, not exceeding the clear annual sum of 400l., for or towards the maintenance and education of such minor, and to accumulate the surplus of such rents and profits in the manner and for the purposes therein specified.

Over-riding all the other trusts of the will was a term of 1,000 years, vested in the same persons as were appointed to receive the rents during minorities, upon trusts for securing the payment of certain life annuities given by the will. The will also contained a power of sale by the trustees, with the usual consent.

Some of Lord Maynard's estates were held by tenants as copyhold, and some of these tenants had recently intimated their intention of applying for enfranchisement. The question now in dispute was as to who had the right to appoint a valuer on behalf of the infant plaintiff under the provisions of the Act 4 & 5 Vict. c. 35. The plaintiff's mother and guardian, the honourable Blanche Adeliza Maynard, took out the present summons for the appointment of a valuer by her, as such guardian. The trustees opposed, on the ground that the appointment should be made by them.

The 11th section of the Act on which Mrs. Maynard relied is, so far as material, as follows:—"Whenever the lord or tenant of a manor, or any person interested in any question or right connected with any commutation, or enfranchisement under this Act, shall be a minor, idiot, lunatic, *feme covert*, or under any other legal disability, or shall be beyond the seas, the guardian, trustees, committee of the estate, husband, or attorney of such person respectively, shall, for the purposes of this Act, be substituted in the place of such lord, tenant, or other person."

Amphlett, Q.C., and *Walford*, in support of the summons, argued that the infant plaintiff was the lady of the manor. The trustees had raised two objections to this view. First, that the term of 1,000 years would prevent her from being lady of the manor, and secondly, that she would be so prevented by the fact that, during her minority, she was limited to 400l. a-year out of the rents. To the first objection there were two answers, viz., that the Court would not

allow the trustees to set up their legal title against a beneficiary; and that if it were held good, then a mortgagee of a manor with a legal estate would be lord of the mortgaged manor, which was not the case. With respect to the second objection, it might be argued that, the mere receipt of rents by the trustees during minority, gave them no estate. The committee of a lunatic lord of a manor, was held not to be lord of the manor himself, though entitled to receive the rents.

Rolt, Q.C., and *Faber*, for the trustees, contended that an enfranchisement was, in effect, a sale, and that by the will the power of sale was given to the trustees. They cited 6 & 7 Vict. c. 23, s. 14, and 15 & 16 Vict. c. 51, s. 36.

Wood, V.C., said that the young lady was undoubtedly the lady of the manor. The only question was as to the words of the Act 4 & 5 Vict. c. 35, s. 11. He thought that by the principle *reddendi singula singulis* the word "guardian" should be referred to the word "infant." The summons, therefore, would be allowed, and Mrs. Maynard would have the appointment of a valuer.

Wood, V.C., June 2, 1866.

BANK OF TURKEY v. OTTOMAN COMPANY.

14 W. R. 819; L. R. 2 Eq. 366; 14 L. T. 884.

BANKER AND BANKING COMPANY. TRUST AND TRUSTEE.—*Where money has been paid in to the ordinary banking account of a company, not being in any way ear-marked, the company will not, on an allegation that the money is impressed with a trust, such allegation not being admitted by the company, be restrained, on motion, from dealing with the money.*

This was a motion to restrain the defendants from withdrawing a sum of 5,000*l.* from their account at the London and Westminster Bank, and transferring it to Turkey. This sum had been paid by the Bank of Turkey to the Ottoman Company for promotion-money.

The bill alleged that the Bank of Turkey was projected by the defendants Farley, Palmer, and Barnes and others, (who were directors of the Ottoman Company), and that the Ottoman Company relied on an agreement alleged to have been come to between the two bodies of directors, that the company should introduce the bank to the public, the price to be paid for this service being the 5,000*l.* in question.

It appeared that the company had in fact been promoters of the bank. Payment was made by order of Farley, Palmer, and Barnes and other defendants, directors of the bank, by a cheque drawn by the bank. The plaintiffs alleged that this payment to the company was a gross breach of trust. This cheque was paid in by the company to their bankers to their ordinary current account, and was not in any way distinguished from the ordinary assets of the company. The defendants (the company) said that the 5,000*l.* had all been drawn out from their bankers, more than that amount having been drawn from their balance since it was paid in. They denied that the 5,000*l.* was about to be sent out to Turkey.

The 94th article of association of the Bank of Turkey contains, amongst others, the following clause:—

"In their management of the business of the company the directors, without any further power or authority from the shareholders, may do the following things, viz., they may and shall pay out of the funds of the company such sums as they shall think proper to be paid in satisfaction for all costs, charges, and expenses not hereinbefore provided for, and which shall have been

or shall be hereafter incurred or sustained in or about the formation and establishment of the company, or the obtaining the capital, or in any matter in relation thereto; and they may appropriate and pay such reasonable amounts by way of commission or otherwise as they may think fit to any person or persons in respect of any services performed or benefits derived by or through such person or persons in relation to the formation or bringing out of the company."

Rolt, Q.C., and *Lindley*, for the plaintiffs, supported the motion, citing *Ernest v. Croysdill* (6 Jur. N.S. 740); *Pennell v. Deffell* (1 W. R. 499; 4 D. M. G. 372).

W. M. James, Q.C., and *A. E. Miller*, for the company, and *Roxburgh*, for the directors, were not called upon.

Wood, V.C., said that the plaintiffs alleged there were trust moneys in the hands of the defendants. If they could get an admission of this from the defendants, then they might have the money paid into court as a matter of course. Here, however, there was a question to be tried at the hearing, viz., whether the defendants had the trust moneys or not. It had been determined that those who subscribed to these companies must be taken to have notice of the articles of association. [His Honour then referred to article 94, which he considered gave the directors of the Bank of Turkey power to pay promotion-money.] It was not astonishing that the directors should pay the 5,000*l.*, when the name of the Ottoman Company appeared prominently on the prospectus of the bank, which also gave the names of influential banks as agents for the new bank. His Honour said that he was now asked to restrain people from dealing with what they claimed as their own money till the issue of the suit was known. The money had been paid in to the general account of the bank, not as trust money. It was like the case of a bill against trustees who had paid money to A. B. for their private debts, and A. B. was alleged to know of the trust, but denied it. You would never dream of restraining A. B., by interlocutory injunction, from dealing with the money. He could not possibly restrain the defendants from dealing with the money. The motion must be refused with costs.

Wood, V.C., June 11, 1866.

WASHOE COMPANY v. FERGUSON.

14 W. R. 820; L. R. 2 Eq. 371; 14 L. T. 590.

Followed, *City of Moscow Gas Co. v. International Financial Society*, [1872] E. R. A.; 41 L. J. Ch. 350; 26 L. T. 377; 20 W. R. 394 (L. JJ.).

PRACTICE. M.—*Practice—Security for costs—Companies Act, 1862, s. 69—Adjourned summons.*

Bedwell asked, under 25 & 26 Vict. c. 89, s. 69, that the plaintiff, the company, might find security for costs, on the ground that there was reason to believe that if the defendants were successful in their defence, the assets of the company would be insufficient to pay their costs. The company had had a bill drawn on them by their manager in America, and had returned it unpaid from want of funds to meet it. They afterwards called two meetings, the first for the purpose of obtaining powers to raise additional capital, and the second to obtain leave to borrow a large sum of money. The new capital was not raised, nor the money borrowed. The defendants only received notice of the ultimate failure of these two plans for raising money on or after the last day for

putting in their answer. While these negotiations were proceeding, the defendants asked for and obtained further time for putting in their answer. For the defendants it was submitted that they had not waived their right to security for costs, as they had done no voluntary act since they knew of the failure of the negotiations.

Elderton, for the company, resisted the summons, on two grounds—first, that this was a cross suit; secondly, that the defendants had waived their rights. The defendant *O'Connor* had filed a bill against the company to restrain them from registering a transfer of shares. The answer of the company in that suit alleged fraud, and claimed the shares. The present bill was filed by the company to obtain a declaration that the defendants were trustees for the company of the shares. The defendants had waived their rights by asking for further time to answer after they knew the company was in a doubtful condition. *Dyott v. Dyott* (1 Madd. 187); *Macon v. Gardiner* (2 Bro. C.C. 609).

WOOD, V.C. (without calling for a reply), said that the present case was totally different from that of a plaintiff being abroad. Under the Act you are allowed to ask for security for costs "If it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence, the assets of the company will be insufficient to pay his costs," and therefore a person was not justified in taking any steps until he knew whether the company was insolvent. If he did, he would do so at considerable peril. His Honour then went into the circumstances of the attempts to raise money, and the notice given of these to the defendants, and said that if the defendants had applied before either of the meetings, the Court would have been disposed to hold its hand. He could not compare this to the case of a plaintiff abroad. Under these circumstances, could he say that the putting in of the answer on the day when the letter was posted giving the defendants notice of the final failure to raise money was a waiver of their rights? To do so would be to extend the rule of waiver to an extent he could not do. He must now hold that the assets would be insufficient to pay the defendants their costs if successful. The doctrine that there could be no right to security for costs in a cross suit did not apply to the present case as the defence was here complete without the cross bill. The plaintiff must give security for costs or pay 120*l.* into Court.

[ADMIRALTY.]

THE "FAIR HAVEN." *

May 8, 1866.

14 W. R. 821; L. R. 1 A. & E. 67.

Bottomry bond—Prior charges on ship.

SHIPPING. C.—*Leave to bondholders to pay such prior charges, and to be held to have a lien on the ship, cargo, and freight in respect of such payments.*

This was a motion on the part of the legal holders of a bottomry bond on the brig *Fair Haven*, her cargo and freight in the sum of 5,500*l.* The ship and cargo were arrested, and were under arrest at Liverpool, at the time of the motion, the ship had been abandoned to the bondholders, and there was a probability that the ship and cargo would not be sufficient to satisfy the bond.

* Before Dr. Lushington.

There were charges in respect of towage, pilotage, &c., which had precedence over the bond.

C. P. Butt, on the part of the plaintiffs (the bondholders), now moved the Court for permission to pay all the prior liabilities of the ship, so as to avoid the expense of suits on behalf of the claimants, and to have a lien upon the ship, cargo, and freight in respect of such payments. The motion was grounded on an affidavit of one of the bondholders specifying the principal payments which it was desired to make.

Dr. Lushington.—I could not have granted this motion but for the affidavit which specifies the charges you desire to pay; nothing must be paid beyond those charges, and you must take the responsibility on yourself to see they are correct payments. On looking at the smallness of the amount I grant the motion.

Motion granted

LORDS JUSTICES, June 2, 8, 1866.

Ex parte SAMPSON. *Re* COBHAM.

14 W. R. 824; L. R. 1 Ch. 476.

Bankruptcy—Adjudication on bankrupt's own petition—Bankruptcy Act, 1861, s. 93—Statement of debts—Gen. Ord. 1861, rule 4.

Semble, that the statement required by section 93 of the Bankruptcy Act, 1861, and rule 4 of the General Orders of 1861, to be filed by a debtor petitioning for an adjudication of bankruptcy against himself, need not include such debts of secured creditors as are fully covered by the securities held by them.

In this case Cobham had been adjudged bankrupt upon his own petition, upon the 18th January, 1866. On the 22nd January he filed the statement of his debts and liabilities, required by section 93 of the Bankruptcy Act, 1861. On the 6th February assignees were chosen. On the 21st February a Mrs. Macdonald, one of the creditors who had proved her debt, gave notice of motion to annul the adjudication, upon the ground that the statement of debts made by the bankrupt was inaccurate, inasmuch as he had omitted to include therein the debts of two creditors which were fully covered by some securities held by them. On the 5th March the commissioner adjourned the hearing of this application, giving leave to the bankrupt to file an amended statement. On the 15th March the bankrupt filed an amended statement; and on the 11th April the commissioner dismissed the bankrupt's petition with costs, thus annulling the bankruptcy.

The assignees now appealed.

Bacon, Q.C., and *Reed*, for the appellants.

De Gez, Q.C., and *Nalder*, for the opposing creditor, the respondent.

KNIGHT BRUCE, L.J., said that if the respondent had proceeded with more diligence and more consistency, there might possibly have been some ground for granting the application; but so much time had elapsed as in equity to have precluded her title to impeach the bankruptcy, even if that title ever existed. He thought the bankruptcy ought to stand.

TURNER, L.J., said that he was of the same opinion. This was not a question upon the construction of the statute, but of the general orders made thereunder, and it was always within the power of the Court to hold that

the circumstances might be such as to take a case out of those orders. In a case of fraud he should be very unwilling to interfere with the commissioner's discretion; but this was merely a question as to the form in which the bankrupt's account ought to be made out. He thought that, looking at section 93 and rule 4, if the value of the security held by the creditor exceeded the amount of his debt, *prima facie* such a debt need not be included in the statement. He could not see that any fraud could be imputed by reason of this omission, nor that any benefit could result to the creditors from the annulling of the bankruptcy.

The order of the commissioner must be discharged. There would be no costs of the appeal, but the respondent must pay the costs of the original application.

[LORDS JUSTICES.]

June 9, 1866.

Ex parte HARDING. *Re* WILLIAMS.

14 W. R. 825.

Practice—Bankruptcy—Making order of House of Lords an order of this court in bankruptcy.

BANKRUPTCY, F.—*In a case where the House of Lords, upon an appeal held that a bankruptcy ought to be annulled, and remitted the matter to this court, the Court, upon motion, ordered that the order of the House of Lords be made an order of this Court in bankruptcy, that the bankruptcy be annulled, and that the proper advertisements be inserted in the London Gazette.*

This case is reported on appeal before the House of Lords, [1866] E. R. A. 986, where the facts are fully stated. The House of Lords, reversing an order of Lord Westbury, held that the bankruptcy could not be supported, and remitted the matter to this Court.

Higgins, for Mr. Williams, now asked that the order of the House of Lords might be made an order of this Court, and that the bankruptcy might be annulled, and, if necessary, that the matter might be remitted to the commissioner in bankruptcy. He also asked that the deposit paid by the appellant in the appeal in this court might be repaid to him, it having been paid out to the respondent.

Roxburgh for Mr. Harding.

THE LORDS JUSTICES ordered that the order of the House of Lords should be made an order of this Court in bankruptcy; that the bankruptcy should be annulled; and that the necessary notices should be given in the *London Gazette*. The appellant to have his costs of this application.

ROMILLY, M.R., June 9, 1866.

Re THE STOCKBRIDGE RAILWAY COMPANY.

14 W. R. 826; L. R. 2 Eq. 364; 12 Jur. N.S. 465.

Practice—Signature of Deputy-Speaker—Return of deposit.

PARLIAMENT.—*The signature of the Deputy-Speaker is sufficient, in the absence of the Speaker, for the return of the Parliamentary deposit.*

This was a petition for the return of the Parliamentary deposit, the bill for the construction of the railway having been withdrawn.

The signature of the Speaker is required, by Act of Parliament, to the certificate of a bill having been withdrawn for the purpose of the return of the deposit-money.

The Stockbridge Railway Bill was withdrawn during the illness of the Speaker, and the certificate was signed by Mr. Dodson, the Deputy-Speaker. The question was whether his signature was sufficient.

By the Standing Orders of the House of Commons, p. 91, the Deputy-Speaker is empowered to act for the Speaker in his absence.

Russell Roberts appeared for the company.

LORD ROMILLY, M.R.—I have no doubt the certificate will do. It is only by taking cognisance of the Standing Orders of the House of Commons that I can know who the Speaker is. I can therefore recognise them so far as to notice the appointment of a Deputy-Speaker.

ROMILLY, M.R., June 9, 11, 1866.

Re GENERAL EXCHANGE BANK.

14 W. R. 826; 14 L. T. 582; 12 Jur. N.S. 465.

Company—Winding-up—Creditor's petition—Bonâ fide dispute as to debt—Costs.

COMPANY. M.—*A winding-up order will not be made on a creditor's petition where there is a bonâ fide dispute as to the petitioning creditor's debt. A creditor's petition for winding-up a company was dismissed with costs. Some of the shareholders appeared separately:—Held, that they could not have their costs, as their interests were fully represented by the company.*

This was a creditor's petition for winding-up the General Exchange Bank.

The petitioners, Messrs. Clinch & Smith, claimed to be entitled to the winding-up order in respect of a sum of 4,704*l.* 2*s.* 7*d.*, alleged to be due to them upon a common deposit note, dated September, 1865, which was in the following terms:—

“Received of Messrs. Clinch & Co. 4,704*l.* 2*s.* 7*d.*, at not less than six months. Note.—This amount can be drawn by cheque at any time.”

This deposit note was part of a transaction by which the company endeavoured to purchase the business of a company at Alexandria and other places in the Mediterranean. Messrs. Scicluna & Borg negotiated the purchase, and Messrs. Clinch & Smith were their agents. The purchase-money was 10,000*l.*, which was to be paid partly in cash and partly in bills, and the balance by the deposit note in question. Two bills for 1,250*l.* each had been

given to the petitioners, and afterwards discounted by the bank, and some transactions had taken place in reference to the cash; but it appeared that, in fact, only a small sum, which was due for interest, had actually been paid to the petitioners. After negotiating for some time, the Exchange Bank decided that the arrangement was not within the scope of their articles of association, and it was now at an end. The contention of the company was, that as the arrangement had fallen through, there was nothing due upon the note, and the petitioners were not entitled to the order.

Jessel, Q.C., and J. Napier Higgins, for the petitioners.—The note is a sufficient debt to entitle the petitioners to the order, unless the company can show that there is a *bonâ fide* dispute as to the debt. They really make no defence at all. It is clear that the debt is due independently of the failure of the negotiation. This is the case of an infant and struggling bank. They might have paid the money into court. The winding-up order is a matter of course upon the refusal to pay the deposit note. It is no use setting up the case of agency here. Our affidavits show that we were not agents at all. They quoted *Bowes v. The Hope Life Insurance Company* (11 H. L. Cas. 389); *Re The Catholic Publishing and Bookselling Company (Limited)* (12 W. R. 538; 2 D. J. S. 116).

Selwyn, Q.C., Roxburgh, and Cotterell, for the company.—The affidavits of the petitioners show that they were only the agents of Messrs. Scicluna & Borg, and there is nothing at all now due to them. Even if the transaction were now continuing they would not be entitled to anything, as they were only the agents of Messrs. Scicluna and Borg. But it has come to an end, and the payment was only conditional on the arrangement being carried out. The deposit note is therefore valueless. There never was any debt such as that alleged in the petition. There is no sufficient allegation of the insolvency of the company. It is not sufficient to prove that there is a debt due, you must also prove that the company is unable to pay it. They might have brought an action upon the deposit-note. The petition does not fairly state the facts. It says nothing about the agency of Messrs. Scicluna & Borg. The case of the Hope Life Insurance was that of a judgment debt.

Swanston appeared for the holders of 200 shares.

Caldecott for sixty-eight shareholders.

Jessel in reply.—We are entitled, even if we are the agents of Scicluna & Borg.

June 11.—LORD ROMILLY, M.R.—In my opinion this is not a case for a winding-up order. There is no evidence of insolvency. The petitioners apply upon the first part of section 80 of the Companies Act, 1862, which provides for the case of the refusal to pay a debt for twenty-one days. This provision was not intended to enforce payment where there is a *bonâ fide* dispute as to the existence of the debt. The remarks of Lord Justice Turner, in the case of the Catholic Bookselling and Publishing Company apply here. It must be shown that there was an inability to pay debts at the time the petition was presented, and that has not been done here. Here there was a *bonâ fide* dispute as to the debt, and the company was justified in refusing to pay the claim. There was a question whether the sum claimed was due at all.

There is an apparent inconsistency between the affidavits of the petitioners and that of Mr. Bradley the manager of the bank. The petitioners say that they believe there was no dispute at all as to the money being due, whether the agreement took effect or not. This is directly denied by the manager's affidavit, and, it is said, that to say that there was a dispute is equivalent to saying that the petitioners have committed perjury. In my opinion, this conclusion does not necessarily follow. I am not now in a position to decide whether there was or not nothing due in case of the failure of the agreement;

but, in my opinion, there is a *bond fide* question as to whether anything was or not due. This can only be determined by a suit. The petitioners must pay the costs as against the company. I cannot give the shareholders who have appeared separately their costs. Their interests are fully represented by the company.

ROMILLY, M.R., June 11, 1866.

FELTHOUSE v. BAILEY.

14 W. R. 827.

Deposition of witness—Signature of examiner.

EVIDENCE. H.—*The examiner to the Court before whom a witness had been examined died without having signed the deposition. The deposition was ordered to be filed without any signature.*

This was an application to have the deposition of a witness filed without the signature of the examiners, or to have a *subpœna* issued for a fresh examination.

The deposition had been taken before Mr. Kenyon Parker, and he died before it was signed. The signature of the examiner to the deposition of a witness is required by 15 & 16 Vict. c. 86, ss. 32 and 34.

Chitty, in support of the application, cited *Bryson v. Warwick and Birmingham Canal Company* (1 W. R. 124), where a similar course had been taken.

LORD ROMILLY, M.R.—I think the order may be made. It will be that the deposition be transmitted without the signature of the examiner.

His Lordship directed it to be communicated forthwith to the plaintiff, and said that he would hear any objection he might have to make. The costs of the application to be costs in the cause.

STUART, V.C., June 5, 6, 1866.

CLARKE v. HILTON.

14 W. R. 827; L. R. 2 Eq. 810; 15 L. T. 64; 12 Jur. N.S. 721.

In re Baillie, 1886, 2 T. L. R. 660 (Ch. D.).

Will—Construction—Trustee—Beneficiary.

EXECUTOR AND ADMINISTRATOR.—*Where a testator bequeathed all his personal estate to A., his executors, administrators, and assigns, "subject to the payment of his debts, funeral, testamentary expenses, and legacies, and to the trusts thereafter mentioned," and then proceeded to declare trusts in the usual form, but which trusts did not exhaust the estate:—Held, that in the absence of anything in the context of the will showing a contrary intention, A., after the fulfilment of the trusts, took the residue of the estate beneficially.*

This cause came before the Court on further consideration. The main question raised was whether the defendant, John Cook Hilton, the sole trustee, and one of four executors of the will of one John Cook, took the residue of the said testator's personal estate beneficially or otherwise.

The testator, by his will, bequeathed "all his personal" estate to which

he should be entitled at his decease to his grandson, the defendant John Cook Hilton, his executors, administrators, and assigns, *subject* to the payment of his debts, funeral, testamentary expenses, and legacies, and to the trusts thereafter contained." The testator then proceeded to declare trusts of the said "trust moneys" in favour of his two daughters and their children to the extent of 400*l.* per annum and a sum of 9,000*l.* in each case; a trust of the interest of a sum of 400*l.* to one Elizabeth Pickford for life, the *corpus* to be paid to her children (if any) living at her death, and failing such issue, the testator declared a trust of the said principal sum in favour of his said grandson John Cook Hilton absolutely. The testator, after creating another small annuity in favour of one Mary Ann Deane, directed his trustee or trustees, or trustee for the time being of his will, to set apart a sufficient sum for the purpose of meeting the various annuities, such sum to be charged with the said annuities in exoneration of his personal estate, and then proceeded to direct that "such sum shall, subject to the said annuities, form part of the ultimate surplus of my personal estate."

In creating the specific trusts the testator throughout the will used the words "upon trust."

There were four executors of the will, of whom the defendant was named one.

Bacon, Q.C., and *Lewin*, for the plaintiff, and *Malins, Q.C.*, and *G. O. Morgan*, on behalf of those interested in making the defendant's position wholly fiduciary, argued that, no doubt, if a man gives all his estate to A. B. subject to his debts, the donee, after payment of debts, would take everything; but if he goes on to declare trusts, more particularly when the form is the usual one, that presumption is rebutted, and the Court will regard the donee as a mere trustee. The case here was stronger, for the testator had, in the gift of the 400*l.*, contingent on Elizabeth Pickford's death without issue, given the defendant a part of that which it was sought to maintain he was entitled to as a whole. This was imputing an unreasonable intention. Further, the direction that the sum set apart to meet the annuities should form part of the "ultimate surplus" of the testator's estate, led to the inference that the original gift was not a present and beneficial one to the defendant. The monies are also intitled "trust moneys"; and if all are intitled trust moneys, no part can be free from a trust, and when all the designated trusts fail there must be a resulting trust of the residue in favour of the next-of-kin. They cited *Salmarsh v. Barrett* (29 Beav. 474); *Mapp v. Elcock* (2 Phil. 793, and 3 H. L. Cas. 492); *Barrs v. Fewkes* (2 H. & M. 60).

Renshaw, for an executor of one of the next-of-kin in the same interest, took no part in the argument.

Greene, Q.C., and *Little*.—The whole tenor of the will is to give John Cook Hilton an immediate provision. The gift is to him, his executors, administrators, and assigns. The word assigns would not be used in the ordinary creation of a trust. The words "subject to" must be read as "charged with" and these words would clearly give the donee a beneficial interest in the residue. They cited *Dawson v. Clarke* (15 Ves. 409, on appeal 18 Ves. 247); *Williams v. Roberts* (8 Jur. N.S. 18).

Bacon, Q.C., in reply.

STUART, V.C.—This is a case belonging to a class which has exercised to the utmost degree the learning and ingenuity of lawyers, and that of some of the wisest judges that ever sat in court. In *Dawson v. Clarke* two such men as Lord Eldon and Sir William Grant entirely differed in opinion, and the latter continued to hold his own view after his attention had been drawn to Lord Eldon's opinion.

The difficulty is apparent. In the case of *Denison v. King* (1 Ves. & Beam. 260)—argued long and ably on the one side by Sir S. Romilly, and on the other by Mr. Leech—Lord Eldon entered at length into the distinction

between gifts and devises by will upon trusts, and gift and devises by will subject to trusts, that is, by way of charge. And he uses this language: "If I give to A. and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose and nothing more, and the effect of these two modes admits just this difference—the former is a devise of an estate of inheritance for the purpose of giving the devisee a beneficial interest subject to a particular purpose; the latter is a devise for a particular purpose with no intention to give him a beneficial interest." Nothing can show more clearly the subtle refinements on which these cases have turned. Here, however, the testator has, in the plainest language, given "all his personal estate to John Cook Hilton, *subject* to debts and legacies, and to the trusts thereafter mentioned"; and afterwards, in mentioning these trusts, the words "upon trust" occur as a matter of course. If the property is given to J. C. Hilton subject to trusts hereinafter mentioned, it cannot, one would think, be subject to any other trusts; and if, after performing the trusts mentioned, no trust is found touching the surplus, that part necessarily remains subject to no trust, and there can be no resulting trust in favour of the next of kin. On the best consideration I can give the present case, it seems to me that it is impossible to find any trust to touch any ultimate surplus except those particularly declared. In *Mapp v. Elcock*, cited by Mr. Malins, no part of the property was uncovered by the trust, and there it was held that the donee took nothing but a dry legal estate. But even if the words were a gift to A. B. of all the testator's estate "upon trust," the context may supply words from which the Court will infer that it was only given "subject" to certain trusts. For example, in *Dawson v. Clarke*, also cited in the argument, where property was given upon trust, but chargeable with debts and legacies, the Court held that the trust was only to extend to the amount of those charges. That decision was of the highest authority. Sir W. Grant notices a case in "*Chancery Precedents*," p. 31, as also a remarkable case as showing how far the Court has gone in holding that a person named as trustee was to take beneficially. The case is *Cunningham v. Mellish*. Lord Hardwicke afterwards mentions it in *Hill v. Bishop of London* (1 Atk. 618), with approbation.

I will mention a case before Lord Cowper—*Hobart v. Suffolk* (2 Ver. 644)—as an illustration of the refinements which have been drawn on this subject. In that case lands were devised to three persons, and their heirs, to the use of them and their heirs, upon the trusts thereafter mentioned, and the testator gave directions to convey a life estate to A., and an estate tail to B., but gave no direction as to the remainder in fee. There the fact of there being three persons led the Court to the inference that there must have been a resulting trust intended, although two of the three trustees were related to the testator. But there is a clear principle governing all these cases. Where an estate is given to one, subject to trusts, there is no right in any one but the donee after those trusts are exhausted. But if the estate be given to a person in the character of a trustee, with nothing to show that any beneficial interest is intended in that case, there must be a resulting trust. Here the most serious ground of difficulty occurs in the use of the expression on trust to stand possessed of the said "trust moneys," to pay such and such persons. Doubtless, if all the moneys were trust moneys in the strict application of language, there would be no part of them free from the obligations of trusts. But we must take the whole context of the will and reconcile one expression with the other. There is, however, no real inaccuracy in talking of the whole fund as trust moneys, where there are certain trusts to be performed out of them. There is nothing to attach a trust to the ultimate surplus. My opinion is that the property goes absolutely to John Cook Hilton, subject to the trusts declared by the testator. The costs will be provided for out of the estate, which, under the circumstances of this case, is the same thing as directing John Cook Hilton to pay them.

STUART, V.C., June 9, 1866.

MARSHALL v. GILLIARD AND OTHERS.

14 W. R. 830; 14 L. T. 618; 12 Jur. N.S. 483.

Demurrer—Multifariousness—Want of Equity.

EXECUTOR AND ADMINISTRATOR.—Where a legatee filed a bill for an account against the trustees of the testator's will, making an alleged purchaser of a part of the testator's estate a party, the bill alleging alternatively "that the sale by the trustees was a colourable and fictitious sale," or "that if any such sale were made the defendant (one of the trustees) was himself the real purchaser, and that such purchase by him, being a trustee, could not be sustained."—Held, on a demurrer by the alleged purchaser for multifariousness and want of equity, that he was wrongly made a party.

This was a suit to administer the estate of one George Marshall, of Craike, in the county of York.

The bill was filed by the widow of the testator against the trustees of his will and an alleged fictitious purchaser of a portion of the property sold by the trustees under a trust for sale.

The alleged purchaser demurred for multifariousness and want of equity, and at the bar *ore tenus* for want of parties. The demurrer *ore tenus* was not argued. The statement of facts by the bill was as follows:—After setting out the testator's will, making a bequest of furniture, and a further bequest of all the testator's personal estate to two of the defendants, John Gilliard, of Welton, and Philip Gilliard, of Craike, on trust, to sell and to apply the proceeds of such sale to the benefit of the plaintiff for life, and after her decease to the benefit of her children, and a power to the said trustees to carry on the testator's farming and grazing business, if they should think fit to do so rather than sell the same—the bill alleged that the said John Gilliard, of Welton, and Philip Gilliard took possession of the said testator's farm a few years after his death, and carried it on until the year 1863, up to which time no proper accounts of the rents and profits of the same had been rendered; and (par. 10.) "that in the month of April, 1863, the said defendants put up the stock and crops in and upon the said farm for sale by public auction, and they were ostensibly purchased by the defendant John Gilliard, of Craike, a son of the defendant Philip Gilliard. The defendant John Gilliard, of Craike, at the time of the alleged sale, was only a labourer on the said farm, and he was possessed of no means whatever, and was wholly incapable of paying the purchase-money for the stock and crops, and at the time of the said sale no money was paid to the auctioneer, nor was any money paid to him after the said sale, nor has any money passed between the said defendant Philip Gilliard and his son the said John Gilliard, of Craike, since the said sale; that since the said sale or alleged sale the defendant Philip Gilliard remained in possession of the said stock and crops which were purported to be sold to his said son; and after the said sale or alleged sale he acted as if he had become the owner of the said farm, and turned the plaintiff and her family off the said farm." The plaintiff further charged, in par. 11, "that such sale of the said stock and crops was not a *bonâ fide* sale, but was only a colourable and fictitious sale, or that if any such sale was made the defendant Philip Gilliard was himself the real purchaser, and that such purchase by him, being a trustee of the said testator's will, could not be sustained and was void."

The bill prayed, *inter alia*—(1) That the trusts of the will of the said testator might be carried into execution under the direction of the Court; (2) that the said sale might be declared void; (3) that an account should be taken of the gains and profits made by the defendants John Gilliard, of Welton, and Philip Gilliard, in carrying on and working the said farm; (4) that the said

defendants respectively might be fixed with an occupation rent during the time they respectively had been in occupation of the said homestead on the said farm; (6) that said defendants might be made to pay the costs of the suit.

Bacon, Q.C., and Crossley, for the demurrer, argued that there was no equity as against their client. The allegation of the bill was that he was a fictitious purchaser, and this must be taken to be true. The defendant therefore has nothing, and there could in such case be no possible equity as against him. The bill was multifarious, the plaintiff seeking relief in respect to matters separate and distinct: *Salvidge v. Hyde* (5 Madd. 138, on app. Jac. 153).

Malins, Q.C., and C. Herbert Smith, contra.—As to want of equity, the allegations in paragraph 10 make a clear case of fraud against the demurring defendant, and this is not displaced by anything inserted alternatively in the subsequent pleading. The utmost the defendant can do is to adopt against us which of the alternative allegations he pleases: *Mit. on Plead.* 5th ed. p. 48. A defendant against whom fraud is alleged may be made a defendant, although the object is only discovery and that he may be made liable for costs: *Beadles v. Burch* (10 Sim. 332). As to multifariousness, had Lord Eldon, in *Salvidge v. Hyde*, had the allegations in the bill properly put before him, he would not have allowed the demurrer. The observations of Lord Cottenham in *The Attorney-General v. Cradock* (3 My. & Cr. 96), confirm this. In the latter case, collusion being alleged, the purchaser from a trustee was held rightly joined as a defendant in a bill for an account against the trustee. The allegations here are equally strong.

STUART, V.C.—I think this bill is clearly multifarious, and insufficient to show a case of equity against this defendant. The facts alleged in the bill must be taken to be true. Here the allegation is that the trustees and executors of the will improperly took certain portions of the testator's estate and sold them, and at that sale this demurring defendant was the purchaser, but that the sale was a fictitious one, and the demurring defendant never entered into possession. Now, on the question of equity, if it is to be taken to be true that this was a fictitious sale, there was no sale at all. I have already intimated that this John Gilliard, of Craike, who was, as I think, improperly made a defendant, might very properly have been called as a witness; but it is clear to me that there is no equity against him. There are here no circumstances affecting him. There is nothing to discover, as was said in the case cited by Mr. Smith (*Beadles v. Burch*), although there is a general allegation that all defendants may pay costs, there are no charges to show that he is a proper party for the purpose of discovery, or that one in that character ought to be made to pay costs. His name is not mentioned in the prayer of the bill, although there are general words which, if he had any of the estate in his hands, might justify the argument found in the *Attorney-General v. Cradock*; but as there is nothing of the kind, I cannot see any case for bringing him before the Court. Then as to multifariousness, I consider that the case of *Salvidge v. Hyde* has established the great principle—that if there be a suit for the administration of the assets of a testator, and the bill allege that the trustees or executors have improperly entered into a contract for sale, under circumstances such as ought to afford grounds to set such sale aside, the question of the validity of that contract is a question entirely separate from the object of the suit, namely, the administration of the estate. In *Salvidge v. Hyde*, Lord Eldon says, "If an executor having a power to sell, agrees to sell to A. B., can a bill be filed against him, and also for a general administration of the estate? He may have made infinitely too good a bargain with the trustee to sell—one that this court would not allow to stand—but that is no ground for making him a party to the general administration. The case must depend on the charges of the bill. They may be such as to unite persons ordinarily disunited. If the allegations in

the bill connect the other party with the purchaser by collusion, I do not dispute that he is properly joined; but here is a failure of that ground, because the bill does not allege any connection between the purchaser by Culliford and the purchase by Laying. The case must depend on the charges in the bill. They may be such as to unite the parties ordinarily disunited." That is the general doctrine, on the correctness of which I have not the slightest doubt. I admit I thought at one time that Lord Eldon had gone too far and omitted to give sufficient weight to the charges in the bill in *Salvidge v. Hyde*, but on a more mature consideration I am quite clear that Lord Eldon's judgment was correct as to every part of the bill. In the present case I am of opinion that the purchaser has been improperly made a party to this bill. The allegation in the bill is that he is a fictitious purchaser, and if so, there is no pretence for making him a party.

[IN THE COMMON PLEAS.]

June 6, 1866.

**RIGG, Administratrix, v. THE MANCHESTER, SHEFFIELD, AND
LINCOLNSHIRE RAILWAY COMPANY.**

14 W. R. 834; 12 Jur. N.S. 525.

Negligence—Railway—Dangerous structure—Opinion of witnesses.

CARRIERS. B.—A., a passenger, was running arm-in-arm with another man along a platform belonging to a railway company, and used as a footpath from the station to a steamboat pier. The platform was 4ft. 3in. broad, with a fence at the back, and a curb, 9in. high between it and the rails. A. fell on the rails and was run over by a train:—Held, in an action by A.'s administratrix, that there was no evidence of negligence on the part of the railway company to go to the jury, inasmuch as the platform was reasonably safe for persons using it in a reasonable manner, and that the mere opinion of witnesses that it was dangerous, unsupported by any reasons, should not be left to the jury.

The plaintiff sued as administratrix of John Rigg under Lord Campbell's Act (9 & 10 Vict. c. 93), and she sought to recover damages consequent upon her husband being killed, through the alleged negligence of the defendants, for the benefit of his family. At the trial before Keating, J., at Leeds, the following facts were proved:—

The defendants had a railway to New Holland, in Lincolnshire, where they had a station, and from this station the railway was continued to a pier on the Banks of the Humber, from which their steamboats started. The distance from the station to the pier was 330 yards, and a platform, which belonged to the defendants, ran parallel to, and 2ft. 2in. from the line of the rails from one point to the other. The platform was 4ft. 3in. broad, with a railing on the side furthest from the rails, and a curb, 9in. high, on the side nearest to them, and the platform itself was 9in. above the rails. There was also a notice-board warning passengers not to go too near the edge of the platform. The platform was used as a pathway from the station to the pier, and also for passengers to get in and out of the railway carriages; and it had been used in the same way for twenty years without accident. Trains passed along by the side of the platform at about seven miles an hour. The

deceased and another man were passengers by one of the defendants' steam-boats, and were lawfully on the platform, on their way from the station to the pier, before dark, on the 13th of August, 1865. They had both been drinking, but it was said by the survivor, they could take care of themselves. Hearing the bell ringing for the train to start from the station to the pier, they ran arm-in-arm along the platform towards the steam-boat, when the deceased stumbled and fell on the rails, and was run over and killed by the passing train.

The jury having returned a verdict for the plaintiff for 200*l.*, a rule was obtained, pursuant to leave reserved, to enter it for the defendants, on the ground that there was no evidence of negligence to go to the jury.

Wills showed cause.—The construction of the premises alone is evidence of negligence—first, on account of the narrowness of the platform; and, secondly, on account of the absence of protection between the platform and the rails. [*WILLES, J.*—Suppose there were a path of the same breadth along the bank of a river, and a man chooses to read the newspaper and so walks into the water, could he claim to have a fence put up?] This is not like the case of an ordinary footpath, where you can trespass *extra viam* to escape the danger.

The following cases were cited:—*Bilbee v. The London, Brighton, and South-Coast Railway Company* (13 W. R. 779; 34 L. J. C.P. 182); *Crafter v. The Metropolitan Railway Company* (14 W. R. 334; 1 L. R. C.P. 300); *Longmore v. The Great Western Railway Company* (19 C. B. N.S. 183).

Manisty, Q.C., and *Kemplay*, were not called on to support the rule.

ERLE, C.J.—This rule must be made absolute, because there is no evidence of want of due care on the part of the defendants in the performance of their duty. No doubt a person in a proper state, and with proper care, could walk safely along this platform. The complaint is that it was too narrow for two abreast. The facts are, that the two men were running along arm-in-arm, and that each of them was deprived of some part of his power and caution by drink; but there is no evidence of want of due care in the construction of the platform itself. It is idle to say that a man cannot walk on a platform 4ft. 3in. broad, and it is idle to say that a railway company is bound to provide one on which you can walk arm-in-arm. It might as well be said that there ought to be room for three abreast. Many witnesses said that the platform was, in their opinion, dangerous; but that simple expression is no evidence to go to the jury. They should say that it was dangerous because it was slippery, or for some other reason, and then that reason would be a fact for the jury. It is unnecessary to go into the question of contributory negligence.

WILLES, J.—I am of the same opinion. It ought to have been shown that the platform was unsafe for use by a human being; or that in practice it had been found dangerous. On both those points the evidence is in favour of the defendants. It was not shown that it would make people giddy to walk along the platform, or anything of that sort; and the only evidence of its being dangerous was, that a child once got into a position of danger upon it, but that people who are grown up could take care of themselves. As to the opinions of witnesses that the place was dangerous, if that were made evidence it would be putting them in the place of the jury. On that point, I entirely concur with what was laid down by *Smith, J.*, in *Crafter v. The Metropolitan Railway Company*.

KEATING, J.—I am of the same opinion. It is not always very easy to say what amounts to evidence to go to the jury, but on the whole I now clearly think there was none in this case. The obligation on the company is to make a platform reasonably safe, and they do that, if people using it in a reasonable way can traverse it in perfect safety.

MONTAGUE SMITH, J.—I am of the same opinion. As I said in *Crafter v. The Metropolitan Railway Company*, it is not merely evidence suggestive of improvement which will constitute evidence of negligence to go to the jury. The defendants were bound to provide a way which persons not using extraordinary but ordinary care could traverse in safety. There was here no secret danger, and the construction of the platform was perfectly obvious to every one who used it.

Rule absolute.

[IN THE COURT OF EXCHEQUER.]

April 19, 1866.

DIXON v. BATY AND ANOTHER.

14 W. R. 836; L. R. 1 Ex. 259; 12 Jur. N.S. 1024.

Ejectment—Landlord and tenant—Waste land—Adverse occupation—Twenty years' title.

LIMITATIONS (STATUTES OF).—*The presumption of law that a tenant of a close occupying waste lands contiguous to his close does so for the benefit of his landlord, does not apply where the tenant is in occupation of the waste land before entering upon his tenancy.*

This was an action of ejectment brought to recover possession of a strip of land, lying between the plaintiff's close and the highway. It was tried at the Newcastle Spring Assizes, before Mellor, J., when a verdict was found for the defendants.

The facts, so far as they are material for the purposes of the present report were these—The *locus in quo* had been adversely occupied by Peter Elliott, predecessor of the defendants, who at that time lived in a house on the other side of the road, and he had erected thereon a garth, carpenters' shop, and saw-pit. Subsequently Peter Elliott became tenant of the close adjoining the *locus in quo*, then in the possession of Dixon, one of the predecessors in estate of the plaintiff. The defendants set up a twenty years' adverse possession of the land claimed, and in evidence showed that Peter Elliott had occupied it some eight or nine years before he became tenant of the plaintiff's close, which took place some seventy-one years ago. There was a great deal of contradictory evidence given. The learned Judge directed the jury that it was not necessary to prove twenty years' adverse possession before the tenancy of the plaintiff's close, but that if the occupation of the defendants had been adverse since, as well as before that event, they were entitled to a verdict. The jury found that the defendants' possession, and that of those from whom they claimed, was adverse throughout, and that they had never paid any rent for the *locus in quo*.

Temple, Q.C., moved for a new trial on the ground of misdirection. He also moved for a new trial on the ground of surprise. The defendants have set up as a defence to this action, an adverse possession of twenty years; and in point of fact they can only show such adverse possession for eight or nine years, as the moment they became tenants of the plaintiff's close, the presumption of adverse possession was at an end, and the defendants presumably occupied the *locus in quo* for the benefit of the plaintiff. [MARTIN, B.—The occupation of the defendants' adverse at first would continue so after the tenancy in the absence of evidence to the contrary.]

The fact of the defendants accepting a lease from the plaintiff is sufficient to show that he admitted the plaintiff's title. When a tenant encroaches upon waste land contiguous to his tenement, he is presumed to do so for the benefit of the tenement.

MARTIN, B.—You are not entitled to a rule on this point. You may take a rule on the ground of surprise.

POLLOCK, C.B., and PIGOTT, C., concurred.

Rule accordingly.

[IN THE COURT OF EXCHEQUER.]

June 4, 1866.

THE EUROPEAN AND AUSTRALIAN ROYAL MAIL COMPANY v.
THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

14 W. R. 843; 14 L. T. 704; 12 Jur. N.S. 909.

Referred to, *The Gas Float Whitton No. 2*, [1896] E. R. A.; 65 L. J. P. 17; [1895] P. 301; 73 L. T. 319 (P. D. & A. Div.): reversed, [1896] E. R. A.; 65 L. J. P. 24; [1896] P. 42; 73 L. T. 698; 44 W. R. 263 (C. A.): the latter decision affirmed, [1897] E. R. A.; 66 L. J. P. 99; [1897] A.C. 337; 76 L. T. 663 (H.L.).

Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 53, 55—*Ship—Transfer—Bill of sale.*

SHIPPING. A.—*A registered ship may cease to be a ship transferable only by bill of sale in other ways than those provided for by the Merchant Shipping Act, 1854, s. 53. And whether a vessel has ceased to be a ship or not is a question of fact.*

This was a special case stated for the opinion of the Court without pleadings. The material facts of the case were the following:—

The defendants were a steam navigation company, and in 1853 carried mails, passengers, and goods between England and ports in the Indian Ocean and Australia. They had a coaling station at King George's Sound, Western Australia. In 1853 they purchased the *Larkins*, an old three-masted wooden vessel, till then used as a sailing vessel, and at that time duly registered as such. The defendants caused her to be newly registered, and immediately afterwards loaded her with coals and sent her out to King George's Sound, where she arrived 11th July, 1853, having made the voyage in the same manner as any ordinary sailing ship. Immediately upon her arrival all her masts, spars, and rigging (except the lower masts and standing rigging) were taken down, sent on shore, and warehoused; she was moored fore and aft by two anchors; and her officers and crew were all discharged except two men. From this time forward the *Larkins* remained in the same position, and was used as a coaling hulk and workshop, and had never since been used in any other way.

The plaintiffs' company was incorporated in 1856, and in the latter part of that year they undertook the service between England, the Indian Ocean, and Australia, in place of the defendants, who gave it up. At this time a written agreement was entered into between the two companies, by article 2 of which the plaintiffs agreed to purchase, and the defendants to sell, "the coal hulk *Larkins*," for 6,000*l.* The *Larkins* was then handed over to the

plaintiffs. On the 7th May, 1857, an invoice was sent by the defendants to the plaintiffs, in which the *Larkins* was described as "the hulk *Larkins*." In October of the same year the plaintiffs accepted a bill for a sum which included the price of the *Larkins*, and this bill was never paid. The defendants, in May, 1859, regained possession of the *Larkins* without the consent of the plaintiffs, and refused to re-deliver her, but converted her to their own use. The Court was to draw inferences of fact.

The plaintiffs contended that the property in the *Larkins* had passed to and vested in them in May, 1859, and that the defendants were not entitled to resume possession.

The defendants contended that the property never passed to the plaintiffs, or else that the defendants were entitled to retake possession.

The question for the Court was whether, under the circumstances, the plaintiffs were entitled to recover.

Horace Lloyd (Maude with him), for the plaintiffs.—This is, in substance, a question between the general body of the plaintiffs' creditors, and the defendants, unpaid vendors. The question is whether the property in the *Larkins* passed by the sale to the plaintiffs or remained in the defendants. And this depends upon whether she was a ship within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 55, so as to be transferable only by bill of sale, or was a mere hulk capable of being transferred like any other chattel. This is a mere question of fact, and the *Larkins* had, in fact, for three years, been dismantled, ceased to be a ship, and become a mere floating hulk and workshop. According to the contention on the other side, if a ship were turned into a landing-stage, or even were brought on shore and used as a dwelling-house, it would still be a ship for the purpose of the Act. And the Act (section 2) confines the word ship to "vessels used in navigation."

Mellish, Q.C.—The true principle is that a registered ship remains a ship, for all the purposes of the Act, so long as she may sail the seas without any fresh registry. And here it is clear that no penalty would have been incurred if the *Larkins* had put to sea (which she was perfectly capable of doing) without a fresh registry. So that, according to the plaintiffs' argument, she was entitled to all the privileges of a British ship without any of the liabilities. The temporary use of a ship for some other purpose than navigation cannot change its character. [*CHANNELL, B.*—Here there was not a mere temporary suspension of the use of a ship as such, but a permanent abandonment of it.] Section 53 really governs the case. That section provides that "if any registered ship is actually or constructively totally lost, taken by the enemy, burnt or broken up, or if by reason of a transfer to any persons not qualified to be owners of British ships, or of any other matter or thing, any such ship as aforesaid ceases to be a British ship," notice is to be given, and the certificate of registry delivered up. This section clearly contemplates that when any of the contingencies mentioned occurs, the certificate shall be delivered up; and that, except as there provided for, the ship shall be a registered ship for all purposes, subject to the burdens, as well as enjoying the benefits, belonging to such ships.

Horace Lloyd replied.

POLLOCK, C.B.—I think the *Larkins* had ceased to be a ship at the time of the sale.

MARTIN, B.—I am of the same opinion. I think the *Larkins* was what the parties described it to be—a hulk. It had once been a ship, but four years previously it had been prepared as a coaling hulk and workshop. Then it was sold as a hulk; and the invoice describes it in the same way. And

there is no indication that the parties intended ever to use it in any other way. Section 55, which provides for the transfer by the bill of sale, applies only to "British ships." And the form of transfer (Form E) clearly shows that nothing is meant which is not to be propelled by steam or sails. At any rate, it is not open to the defendants, who sold this as a hulk, to contend that it was a ship.

CHANNELL, B.—Mr. Mellish argues that, as matter of law, a registered ship continues to be so, and to be transferable only by bill of sale, until it has ceased to be a registered ship in some of the ways provided by the 55th section. And we have to say whether that is so, or whether we are at liberty to treat the question as a question of fact. I think the question is one of fact, and that this was not a ship.

Judgment for the plaintiffs.

[IN THE BAIL COURT.]

June 12, 1886.

BAIN v. GREGORY.

14 W. R. 845; 14 L. T. 601.

Bill of exchange—Notice of dishonour.

BILL OF EXCHANGE. G.—*A bill of exchange was accepted payable at the office of a person who, on the day upon which the bill became due, was the holder of it. Before the close of the day, the bill not having been taken up, he wrote to his indorser as follows:—"Yours and Packer's note of hand is now due, and your attention to same will oblige":—Held, that this letter was a sufficient notice of dishonour.*

Action on a bill of exchange for 20l., drawn by the defendant upon Packer, accepted by him payable at the office of the plaintiff, and indorsed by the defendant to the plaintiff.

Second plea.—That the defendant had not had due notice of the dishonour of the bill. Issue thereon.

The cause of action not exceeding 50l., Blackburn, J., made an order in accordance with the 19 & 20 Vict. c. 108, s. 26, sending the cause to a county court for trial.

At the trial it appeared that the plaintiff was at his office, where the bill was made payable, during the whole of the day upon which it became due, and that some time before the close of that day he wrote a letter to the defendant in the following terms:—

"Sir,—Yours and Packer's note of hand is now due, and your attention to same will oblige.—Yours, &c."

No other notice of dishonour was given.

The verdict was in substance for the defendant, but the county court judge, with the return of the registrar certifying the result of the trial, sent up a special verdict which, upon the second plea, found that there was no due notice of dishonour.

A rule having been obtained to enter the verdict for the plaintiff on the ground that the letter was a sufficient notice of dishonour,

Macnamara showed cause against it, and contended that the letter

contained no statement that the bill had not been paid, and that no case had gone so far as to say that a notice not containing any such statement either expressly or by implication would be good. He cited *Hartley v. Case* (4 B. & C. 339) as an authority that a notice of dishonour must show that payment had not been made by the acceptor.

H. Matthews, in support of the rule.—*Baily v. Porter* (4 M. & W. 44) is conclusive in favour of the plaintiff, and has been cited with approval in *Paul v. Joel* (6 W. R. 632; 3 H. & N. 455; s. c. in Ex. Ch. 7 W. R. 287; 4 H. & N. 355); *Hartley v. Case* (4 B. & C. 339) is not in point, for in that case the defendant could not gather from the circumstances that the bill had not been paid as he could have done in the present case. *Solarte v. Palmer* (7 Bing. 530; 2 Cl. & Fin. 93) is the strongest case against the plaintiff, but that case has been much restricted by the later decisions: *Caunt v. Thompson* (7 C. B. 400).

LUSH, J.—I think that the verdict should be entered for the plaintiff, on the ground that the letter was a sufficient notice of dishonour. The decision in *Baily v. Porter* is in accordance with common sense, and the principle which it lays down should be followed. I think that only such a notice is necessary as would show to men of business habits that the bill had not been paid. In the present case the defendant knew that the bill was payable at the plaintiff's office, and the terms of the letter were, in my opinion sufficient to show him that the bill had not been paid.

Rule absolute to enter the verdict for the plaintiff.

[LORDS JUSTICES.]

June 8, 1866.

Re CHAUNCEY.

14 W. R. 849.

Trustee Act, 1850—Lunatic trustee—Vesting order.

TRUST AND TRUSTEE.—*Out of four trustees of a settlement one was a lunatic, so found by inquisition, and another was, through ill-health, unfit to act,*

The Court appointed two new trustees in their room, and made an order that the real estates subject to the settlement should vest in the new trustees jointly with the two continuing old ones, and that the right to call for a transfer of some stock, also subject to the settlement, should vest in the same persons.

This was a petition in lunacy, and under the Trustee Act, for the appointment of new trustees of a settlement, and for a vesting order. There were four trustees in whom the trust property was vested. Of these one was a lunatic, who had been found so by inquisition, and another was in a state of health which rendered him unfit to act in the trust.

Graham Hastings, for the petitioners, cited *Re Davies* (3 M. & Gor. 278); *Re Omerod* (7 W. R. 71, 3 De G. & J. 249); *Re Stewart* (8 W. R. 297).

W. W. Karslake for a respondent.

The LORDS JUSTICES made the order prayed for, appointing the two persons proposed as new trustees, and vesting the real estate, subject to the settlement, and the right to call for a transfer of the stock subject thereto, in the new trustees jointly with the two continuing trustees.

ROMILLY, M.R., May 23, 1866.

ABINGTON v. GREEN.

14 W. R. 852.

Lost deed—Secondary evidence.

EVIDENCE. D.—*Where a deed has been lost, it is not necessary to prove the actual fact of the loss.*

A policy had been mortgaged to secure a debt, and the deed was missing after the death of the mortgagee, but had been in existence a short time before. The Court refused to assume that the mortgagee had cancelled the deed when in extremis, and allowed secondary evidence of its existence.

The plaintiff in this case was the executor of Joseph Mayor, who had employed the defendant as his agent. The defendant had deposited with the testator a policy granted, in 1818, originally for 2,000*l.*, but now of the value of at least 4,500*l.* The policy was endorsed "Pay contents to Joseph Mayor, Harley, Staffordshire." On the 12th of June, 1851, a deed was executed securing on the policy 2,500*l.* This deed was missing after the death of the testator, which happened in June, 1860. Secondary evidence was put in to prove the deed. The original draft and a copy were produced, and it was proved that, six months before the testator's death, he had sent the deed to be stamped, and had paid the penalty. He had also given notice of the charge to the insurance office. The bill prayed for accounts of what was owing upon the security, and to have the policy sold.

Southgate, Q.C., and White, for the plaintiff, contended that the facts were sufficient to rebut any presumption that the testator had destroyed the deed in his lifetime.

Walford, for the defendant, contended that there was no allegation of the deed having been actually lost, and that it was probable that the testator had only intended to keep the security on foot during his lifetime, and had it destroyed when he was in extremis, with the intention of cancelling the debt. He insisted that the servants in the testator's house at the time of his death ought to have been examined.

LORD ROMILLY, M.R.—I think the plaintiff is entitled to the decree prayed for. It is not necessary to prove the actual fact of the loss. I am perfectly satisfied that if the servants had been examined they would not have given any evidence bearing upon the question. The decree will be for an account of what is due for principal, interests, and costs, and for a sale of the policy, with power to make an arrangement out of court.

It was stated that an arrangement would probably be made between the parties to avoid a sale.

ROMILLY, M.R., June 12, 1866.

Re ALEXANDRA PARK COMPANY, SHARON'S CLAIM.

14 W. R. 855; 12 Jur. N.S. 482.

Contract—Payment in shares—Subsequent winding-up.

WORK AND LABOUR.—*A company stipulated with a contractor that he should accept part payment for his work, if and when required, in paid-up shares of the company:—Held, that they could not force him to accept shares*

in such part payment after a winding-up order had been made, as they had not exercised their option to do so previously to the winding-up.

Mr. Sharon had contracted for certain remuneration to make roads for the above-mentioned company.

The roads had been handed over to the company in September, 1864. Mr. Sharon claimed his remuneration. The company claimed to make a deduction on account of a clause in the contract, which provided that Mr. Sharon should "if and when required by the company" accept payment of two-thirds of the amount of his remuneration in fully paid-up shares of the company, equal in nominal value to the said two-thirds.

The company having now been wound up, the question arose whether Mr. Sharon was bound to receive any part of his payment in paid-up shares (which were much depreciated) under a notice to that effect served on him since the winding-up.

Baggallay, Q.C., and *Roxburgh*, for Sharon the applicant, contended that the company could not pass off worthless shares on the contractor, such not having been the original intention of the agreement.

Selwyn, Q.C., and *Stevens*, for the official manager, contended that subsequent events could have no effect on the original contract: *Gibson v. Goldsmid* (3 W. R. 79; 5 D. M. G. 757).

LORD ROMILLY, M.R., held that as the shares were very much depreciated, and the company had not exercised their option to make part payment in shares previously to the winding-up, they could not now exercise such option, and give what was practically worthless in return for services for which they had contracted to pay value, and the contractor must be allowed to prove for the whole amount of his claim.

KINDERSLEY, V.C., June 30, July 2, 1866.

Re LEEDS BANKING COMPANY, Ex parte CLARKE.

14 W. R. 856; 14 L. T. 789.

Winding-up—Companies Act, 1862 (25 & 26 Vict. c. 89, s. 160)—G. O. under the Act, rr. 49, 50.

COMPANY. M.—*The Court or judge in chambers has jurisdiction to rescind a compromise made with a contributory by the official liquidator under section 160, if obtained by misrepresentation.*

This was a summons adjourned from chambers.

The Court had, under section 160 of the Act, sanctioned a compromise between the official liquidator and the contributory, which had been accordingly carried into effect. The official liquidator now sought to have the compromise set aside, alleging that it had been obtained by the misrepresentation of the contributory, who had underrated the value of his property.

Wickens, for the contributory, objected that the Court had no jurisdiction to set the compromise aside unless a bill had been filed. The jurisdiction here was not the ordinary equitable one, but statutory.

Glasse, Q.C., and *Cotton*, for the official liquidator, referred to *Garstin's case* (10 W. R. 457).

KINDERSLEY, V.C., thought that in matters which might be compromised without the sanction of the Court, the Court would have no jurisdiction to set aside a compromise in the manner now asked; but where, as in the present case, the sanction of the judge in chambers was necessary before the compromise could be made, he thought the judge had jurisdiction afterwards to set it aside. The fraud, if any, had brought the parties before the Court for its approval.

Wood, V.C., June 21, 1866.

SIMPSON v. CHARLESWORTH.

14 W. R. 857; 14 L. T. 699.

Practice—Exceptions to answer—Word mis-spelt in interrogatory—Costs.

DISCOVERY. B.—*Where an interrogatory is too sweeping in its terms, an exception to the answer overruled on a mere technicality will be overruled with costs.*

Exceptions to answer.

The bill was filed to restrain the defendant from infringing the patent, of which plaintiff was the assignee, for an invention for "improvements in preparing colouring matters for dyeing and printing."

One of the interrogatories was as follows:—"Has not the defendant within the last twelve months purchased some, and what quantities of *rosaline*,¹ roseine, magenta, iodine, &c. (here follow the names of other chemicals), and also some, and what quantity of iodine and bromide, or some, or one, and which, of such substances or ingredients? Let the defendant set forth the date upon which each portion of the said ingredients, or of any and what compound of them, or any of them was delivered on the defendant's premises. Let the defendant set forth the name and address of each person who sold, and each person who delivered each of the said substances, ingredients, and compounds, to or at the defendant's premises. Let the defendant set forth the sum paid by him, and any servant, clerk, or agent of his, and also the sum agreed to be paid by him and any servant, &c., of his in respect of each of the said substances, ingredients, and compounds. Let the defendant set forth the use which the defendant, his servants, &c., have made of each of the said substances, &c., and let him fully account for each packet and parcel of the same, and of the application, use, and disposal thereof. Let the defendant state what manufacture of colouring matter he has carried on during the last twelve months, and what are the ingredients used in manufacturing each article of colouring matter manufactured by him, and what number of articles he has manufactured, and what quantity of materials or ingredients (specifying the exact name and description) he has used in the manufacture of each article manufactured by him. Let the defendant set forth a full and true account of all the substances, ingredients, and materials used in the manufacture of dyes which the plaintiff now has upon his premises, and when, and under what circumstances and for what purpose he required the same."

To this interrogatory the defendant answered as to the quantities of iodine, and other chemicals, with the exception of the "*rosaniline*," and as to the dates of the delivery; but submitted that he ought not to be compelled to answer as to the names and addresses of any persons who sold or delivered any roseine, &c., or as to the sum paid by him, &c. The plaintiff therefore excepted to the answer for insufficiency. In the copy of the interrogatories served upon the defendant, the word "*rosaniline*" was mis-spelled "*rosaline*."

Giffard, Q.C., and *Swanston*, in support of the exceptions.—The answer carefully excludes the "*rosaline*," which is one of the most important substances.

Rolt, Q.C., and *G. Waugh*, for the defendant.—The exceptions are clearly wrong, as we were not required to answer as to "*rosaniline*," the word in the copy of the interrogatories served upon us being "*rosaline*," and not

(1) *Sic*.

"rosaniline." The exception is so very trumpery, that we are entitled to insist on this mere technicality. Rosaniline, roseine, and magenta are practically the same thing.

Giffard, Q.C., in reply.

Wood, V.C., said he must overrule the exceptions, as they were technically wrong, though, looking to the substance and merits of the case, it was important for the plaintiff to be informed about "rosaniline," which was different from roseine and the other substances. As to the costs, he could not conceive anything more oppressive than this interrogatory. [His Honour then read the interrogatory, commenting on its sweeping nature], and he must, therefore, overrule the exceptions with costs.

[IN THE QUEEN'S BENCH.]

June 21, 1866.

PARSONS v. HIND.

14 W. R. 860.

Fixtures—Hydraulic press—Mode of annexation—How much—Object and purpose of.

FIXTURES.—A hydraulic press was fixed by means of bricks and mortar to the floor of a factory. The press in question was not essential to the carrying on of the works at the factory, but merely a convenience:—Held, that such a press remained a chattel, and did not become a part of the freehold.

This was a rule *nisi*, obtained by O'Brien, Serjt., calling on the plaintiff to show cause why the damages given on the verdict obtained, should not be reduced by the sum of 50*l.*, pursuant to leave reserved, on the ground that the property in the hydraulic press never vested in the plaintiff, but continued in the defendants until the time of the removal.

The declaration charged the defendants with breaking and entering the plaintiff's premises, and with the conversion of plaintiff's goods.

Verdict for the plaintiff: 3*l.* damages, for the breaking and entering; 50*l.* damages, for the conversion.

The facts of the case were as follows:—The plaintiff, the owner of a factory in Nottingham, on July 28, 1863, contracted to sell it to two persons, by name King & Ellis, respectively. King & Ellis entered into possession of the factory, but there was no conveyance and no payment of the purchase-money. On June 5, 1865, King & Ellis were adjudicated bankrupts. The assignees elected not to adopt the contract of King & Ellis to purchase the factory. The effects of King & Ellis were, by order of the assignees, sold by auction; but a hydraulic press, which is the subject of the present action, was not sold. Subsequently to the auction, Henry Hind, one of the defendants, bought the press of the auctioneers for 35*l.* The plaintiff refused to allow the press to be removed, on the ground that it was so fixed as to be a part of the freehold, and that the property in it had never vested in the assignees in bankruptcy. The three defendants thereupon broke into the factory, and removed the press.

Wills (Digby Seymour, Q.C., with him), now shewed cause. He cited *Weeton v. Woodcock* (7 M. & W. 14), *Walmsley v. Milne* (8 W. R. 138; 29 L. J. C.P. 97).

O'Brien, Serjt., and L. Cave, in support of rule, cited *Hellawell v. Eastwood* (6 Ex. 295), *Lancaster v. Eve* (7 W. R. 260; 5 C.B. N.S. 717), *Martin v. Roe* (5 W. R. 263; 7 E. & B. 248).

BLACKBURN, J.—This rule must be made absolute. The rule is to reduce the damages by 50l., and it must be made absolute on the ground that the press never was a part of the freehold, but always a mere chattel. Whether or no a thing remains a chattel, or becomes a part of the freehold, is often difficult to decide, turning as it does on a question of more or less. We think, however, that the press in question was clearly a chattel. In the case of things built into the wall of the freehold, it is often doubtful whether or no they become a part of the freehold. It is certain, of course, that bricks and such like things, which are brought on a wall and there fixed, become a part of the freehold. It is equally certain that mere moveables which are fixed to the freehold for convenience do not become a part of the freehold. But there are also the intermediate cases, which are not so clear, and about which the distinction is often fine. There are generally three classes—first, those cases where a chattel still remains a chattel, being merely fixed for convenience, like the clock in court, which, though firmly fixed, and though, probably, it could not be moved without disturbing the plaster, yet no one could doubt that it remains a chattel, and does not become a part of the freehold. Then there is another class where chattels are fixed for the better enjoyment of the freehold, but subject to a right to remove them. These are what are generally called fixtures. Then there is a third class where chattels are fixed to the freehold, and which cannot be removed. The second class must be removed in a reasonable time; and unless we had thought that the press in question belonged to the first class, we should have had to have decided whether the reasonable time for removal had not elapsed, but we do think that the press remains a mere chattel. *Hellawell v. Eastwood* gives the two guiding points to determine whether or no the article remains a chattel. Nevertheless the question must always be one of more or less. The guiding points in *Hellawell v. Eastwood* are these—1. The mode of annexation, and how much; 2. The object and purpose of the annexation. Under the second point the question is whether the chattel is annexed *perpetui usus causâ*, for the improvement of the freehold, or whether the annexation is merely for the sake of the better enjoyment of the chattel? The second point is of almost as great importance as the first point, viz., the degree of fastening. I find that in the case of *Lancaster v. Eve* (7 W. R. 260; 5 C.B. N.S. 717), where certain piles had been fixed in a navigable river, Mr. Justice Williams says, “No doubt the maxim ‘*Quicquid plantatur solo solo cedit*,’ is well established, the only question is, What is meant by it? It is clear the mere putting a chattel into the soil by another cannot alter the ownership of the chattel. To apply the maxim there must be such a fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil.” The language here would seem to shew (and the learned judge was always very accurate in the use of his language) that it is of very great importance, where a thing is planted in the soil so that it becomes part of it, to see what is the object with which the thing has been so attached to the soil. If it is attached to improve the soil, then even if there is a right to remove it, it becomes a part of the premises. So in *Reg. v. Lee* most of the things in question were necessary for the gas-works. The object was to improve the premises, and there was the intention to incorporate the things with the freehold. Again, in *Martin v. Roe* (5 W. R. 263; 7 E. & B. 248), Lord Campbell applies the same test of intention, he says, “When, however, the cases between executor of tenants for life and remaindermen are looked into, they will be found to turn each on its peculiar circumstances—the character, the use, the mode of attachment, the facility of severance, the injury to the freehold by severance. In regard to an ecclesiastical benefice, the character and object of the building to which the chattel is attached seem of very great consequence in determining

whether there was any intention to separate it permanently and irrevocably from the personal estate. Here there is an erection in itself purely a matter of luxury and ornament, which the testator might have pulled down, but which he probably wished to enjoy as long as he lived, and therefore did not remove. To this, and for the purpose of completing that luxurious and ornamental creation, a chattel is so attached that it may be detached without injury to the freehold. We think that the inference is, that it never ceased to be a chattel during the testator's life, and that it continued to be so at the moment of his death, and therefore passed, as part of the personal estate, to the executors." Lord Campbell, therefore, in considering whether the mortar made the chattel a part of the freehold, looks at the object with which the chattel was fixed with mortar. Could one reasonably infer, as Williams, J., says in *Lancaster v. Eve*, an intention to incorporate the chattel with the freehold? Now, apply the rule laid down in these cases to the present case. It appears that there was some fixing with mortar, but not much. The press itself was great and bulky; hence, whether or no it was mortared down, the joists would have had to be removed in order to apply machinery sufficiently strong to move it, so the removal of the joists is not very important; and we have seen mere annexation is not enough; but after it has been seen how much annexation there is, we must see what is the object of the annexation. Now the object, it seems to us, was not to improve the premises, nor was the press in question essential to the carrying on of the factory-works, like most of the things in the gas-work case, *Reg. v. Lee*, nor was it a thing like a fireplace, but a machine brought into the factory for convenience, just like an ordinary table. Therefore we think the mortaring did not make the press a part of the factory. It was not a part of the freehold, therefore the property of the press was in the assignees, and the plaintiff can recover no damages for the seizure of the press, though he can for wrongful entry.

MELLOR, J.—I am of the same opinion. I think that the press in question was a chattel, and not a part of the freehold. From the evidence given at the trial the press appears to have been just one of those chattels which require steadyding, and for that purpose are fixed to the freehold; and then on the facts it appears that the press, being so far attached for the purpose of steadyding it, was by the defendants removed, without doing any real damage to the inheritance. If one could see, as in the gas-works case, an intention that the chattel should remain fixed to the factory so long as the factory remained a factory, then we might think the press to be sufficiently fixed to become a part of the freehold, but here we see no such intention. The press here was a mere additional convenience brought into the factory for temporary uses, and not changing or affecting the character of the building. Therefore, although at one time I doubted, from the insufficient evidence before us, as to the nature of the factory, and the purposes for which the press was used, I am clearly of opinion that the press did not become a part of the freehold, but remained a chattel.

SHEE, J.—I am of the same opinion, neither of the tests makes out that this press is a fixture. It was not brought in to add to the value of the inheritance; it was fixed for the more convenient use of it. It was a chattel, moreover, which could well be used in many other businesses than that carried on in the factory in question. The evidence shewed that such presses were constantly sold second-hand. It could be removed without damage to the freehold.

Rule absolute.

[IN THE COURT OF EXCHEQUER.]

May 28, 1866.

HATTERSLEY v. BURR.

14 W. R. 864; 4 H. & C. 523; 14 L. T. 565; 12 Jur. N.S. 894.

Referred to, *Hall v. Nixon*, [1875] E. R. A.; 44 L. J. M.C. 51; L. R. 10 Q.B. 152; 32 L. T. 87; 23 W. R. 612 (Q.B.); *Baker v. Portsmouth Corporation*, 1877, 3 Ex. D. 4; 37 L. T. 381; 25 W. R. 677 (Ex. D.): affirmed, [1878] E. R. A.; 47 L. J. Ex. 223; 3 Ex. D. 157; 37 L. T. 822; 26 W. R. 308 (C. A.).

Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 34 *Bye-law—Notice of intended building.*

LOCAL GOVERNMENT. D.—*The Local Government Act, 1858* (21 & 22 Vict. c. 98), s. 34, empowers every local board “to make bye-laws (inter alia) with respect to the structure of walls of new buildings;” “and further to provide for the observance of the same by enacting therein any such provision as they may think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to erect new buildings,” and certain other matters:—Held, that this section does not empower a local board by a bye-law to require persons to wait a month after the giving of notice and deposit of plans and sections before beginning to build.

This was a case stated by the justices of the West Riding of Yorkshire. The material facts disclosed by the case were the following:—

At petty sessions holden for the division of Keighley, an information was preferred, on the 1st December, 1864, by the respondent, the clerk to the local board for the district of Keighley, against the appellants, under the twenty-fourth bye-law of the board, made the 19th July, and confirmed by the Secretary of State the 24th August, 1864.

The information charged the appellants that they, on the 4th October, 1865, at the parish of Keighley, before beginning to erect a certain new building situate at Mill Hill, in Keighley, &c., did neglect to leave with the clerk to the board a written notice of one month at least, at one of the monthly meetings of the board, accompanied by detail plans and sections of such building as required by bye-law 24, contrary to such bye-law, and contrary to the statute.

The appellants were convicted and fined five shillings.

The terms of the bye-law, so far as they are material, were as follows:—“Before beginning to dig or lay the foundation of or for any new house or building, or to re-erect any house or building, a written notice thereof of one month, at the least, shall be left with the clerk at one of the monthly meetings of the board, accompanied with detail plans and sections of every floor of such house or building, drawn to a scale of not less than an inch to every eight feet, shewing, &c., accompanied therewith shall also be a block plan drawn to a scale of not less than one inch to every thirty feet, shewing &c., and the said descriptions, plans and sections, when approved, or a correct copy or tracing thereof shall be left with the board.” “And whosoever shall neglect or refuse to give such said notice and description accompanied with the proper plans and sections, or to leave with the board such description and plans and sections, or correct tracings thereof, or shall erect or re-erect any house, building, or convenience otherwise than in accordance with the descriptions, plans, sections, and arrangements, approved, fixed, settled, and attested by the board, or in any other way offend against this bye-law, shall be liable for every such offence to a penalty not exceeding 5l., and to a further penalty of

forty shillings for every day during which he, she, or they shall suffer such said house or building or convenience, built, rebuilt, or constructed contrary to the order of the board, so to continue, and the board may, if they think fit, cause such house, building, or convenience, so improperly constructed, to be altered, pulled down, or otherwise dealt with, as the case may require, and the expenses incurred by them in so doing shall be repaid by the offending party, and be recoverable in a summary manner."

It was proved that on the 10th October, 1865, the surveyor of the local board received a notice and plans of building from the appellants, and laid them before the board at one of its meetings, which were held monthly. Afterwards, on the 21st October, the surveyor found on the site of the proposed building a temporary building in progress, consisting of pillars to support the roof, within the line of the intended walls, boarded round and fixed in foundations of stone. The plans were subsequently passed by the board on the 7th November, previously to the laying of the information.

It was contended by the appellants that the bye-law was unreasonable in requiring a month's notice, and in requiring it to be at a monthly meeting, and in fixing no time for the approval of the plans. The questions submitted to the Court were—1. Whether the bye-law was bad upon any of the above grounds. 2. Whether the erection was a building within the meaning of the bye-law. 3. Whether the board had condoned the offence, if any.

Kemplay, in support of the conviction.—The Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 34, enacts that "every local board may make bye-laws (*inter alia*) with respect to the structure of walls of new buildings, for securing stability and the prevention of fires. And they may further provide for the observance of the same by enacting therein any such provision as they may think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws." The bye-law under which this conviction took place is a provision as to the giving of notice and the deposit of plans and sections within the meaning of the section. And it is perfectly reasonable. As to the second point—this was clearly a building within the meaning of the bye-law; the pillars were of a permanent nature. As to the supposed condonation by the subsequent approval of the plans, that approval could have no such effect, for the offence consisted, not in building in an improper manner, but in beginning to build within a month after notice.

A. *Wills*, for the appellant, was not called upon.

Per Curiam.*—The conviction cannot be sustained. The Act empowers the local board to make bye-laws with respect to the structure of the walls of new buildings; and by way of enforcing their observance, to provide for the giving of notices and deposit of plans and sections. But it does not enable the board to control the liberty of persons building, to any further extent. The board cannot, therefore, compel any person to wait for a certain time after notice before beginning to build. Their proper remedy is by pulling down or altering what is built, if it be not in accordance with the bye-laws.

Judgment for the appellant.

[ADMIRALTY.]

May 29, 1866.

THE "FAIRLINA."*

14 W. R. 869.

Salvage—Costs.

SHIPPING. E.—*The costs of salvors, incurred in taking affidavits before issue joined, are allowed when the defendants have not unreservedly admitted the facts pleaded in the petition and supported by the affidavits.*

This was a motion in a cause of salvage, instituted by the owners, master, and crew of the steam-ship *Newton Colville* against the brig *Fairlina*, her cargo and freight.

The salvage services were rendered on the 17th October last, when the *Fairlina*, from Stockholm to Liverpool, with a cargo of iron, was descried in a state of great distress by the *Newton Colville*. On the *Newton Colville* approaching the *Fairlina*, a boat, with two or three men, appeared to be hanging on to her lee quarter, and there were two men on board her. Such boat and men belonged to the ship *Southampton*, which was hove to at a short distance. After much difficulty the *Newton Colville* got a tow-rope fast to the brig, and took her in tow. Part of the crew of the *Fairlina* were taken on board the *Southampton*, and the remainder were put on board the *Newton Colville* by a boat belonging to the *Hermann*, of Bremen, another ship which was hove to at a short distance. The *Newton Colville* then towed the brig into Weymouth Roads.

The 11th article of the plaintiff's petition stated that, by means of the services set forth, the steamer saved the *Fairlina* from loss.

The defendants, in their answer, admitted the general truth of the allegations in the petition, but said that article 11 must be taken with the qualification that two other ships named in the petition, the *Southampton* and *Hermann*, were near to render assistance to the *Fairlina*, and that the *Southampton* was actually engaged in rendering salvage services to her when the *Newton Colville* came up.

At the hearing of the cause a tender of 500*l.* was overruled, and the judge awarded 700*l.* for salvage and costs of suit, but of his own accord directed that the costs of plaintiff's affidavit should not be allowed, inasmuch as the facts stated in the petition were substantially admitted in the defendant's answer. Plaintiff's bill of costs was filed and taxed according to the directions of the Court, but after taxation the plaintiff's proctor presented, as out-port charges, an account of expenses amounting to 15*l.* 16*s.* 9*d.*, incurred in engaging a tug, which assisted in rendering the salvage services. This the Registrar refused to allow, and the taxation was adjourned at the plaintiff's request, for the purpose of an application being made to the Court on the subject.

Deane, Dr., Q.C., now moved that the plaintiffs should be allowed the expenses incurred, and also the costs of, and incidental to, obtaining the affidavits filed in support of their claim.

C. P. Butt, for the defendants, contended that, as the depositions were taken by the plaintiffs before issue was joined, they were taken for their own benefit; that from the admission made by the defendants they had become unnecessary; and that it would be unjust to tax the defendants with the costs of them.

Dr. LUSHINGTON.—I think the expenses incurred by the salvors should be allowed. With respect to the affidavits, it is usual for salvors to take

* Before *Dr. Lushington*.

beforehand such depositions of those who may be going out of the country as they think may be needed in support of their claim. If those depositions become needless, the salvors must pay the costs of them. In a former case I gave it as my opinion that such costs should be disallowed. This case, however, does not quite fall within the principle, because the facts pleaded are not unreservedly admitted; I therefore allow such costs of the affidavits as were incurred in meeting the qualifications of the defendants' answer. It was imprudent on the part of the advisers of the salvors to print so much of the affidavits. The costs of printing will not therefore be allowed, nor the costs of this motion.

[HOUSE OF LORDS.]

June 8, 1866.

CULLEN v. THE ATTORNEY-GENERAL FOR IRELAND.

14 W. R. 869; L. R. 1 H.L. 190; 14 L. T. 644; 12 Jur. N.S. 531.

Discussed, *Kenny v. Att-Gen.*, 1883, L. R. 11 Ir. 253 (M.R.). See *R. v. Income Tax Commissioners*, 1888, 22 Q.B. D. 296; 60 L. T. 446 (C. A.): affirmed, (*sub nom. Income Tax Commissioners v. Pemsel*), [1892] E. R. A.; 61 L. J. Q.B. 265; [1891] A.C. 531; 65 L.T. 621 (H.L.). See, *In re Maddock*, [1902] E. R. A.; 71 L. J. Ch. 567; [1902] 2 Ch. 220; 86 L. T. 644; 50 W. R. 598 (C. A.).

Legacy duty, Ireland—Exemption—Charity—Secret trusts—56 Geo. 3, c. 56—5 & 6 Vict. c. 82, s. 38—8 & 9 Vict. c. 76, s. 4.

DEATH DUTIES.—*A legacy, absolute on the face of the will, but bound by a secret trust for charity accepted by the legatee in the lifetime of the testatrix, and such as the Court of Chancery would enforce against the legatee, is not exempt from legacy duty as being a charitable legacy under the Acts regulating the payment of legacy duty in Ireland.*

This was an appeal against a decree made by the Court of Exchequer in Ireland, by which the appellant, as administrator of the goods and chattels of Bridget Fitzgerald, deceased, which were left unadministered by her executors, was declared liable to pay legacy duty at the rate of 10l. per cent., in respect of the residue of personal property bequeathed by the will and codicils of the said Bridget Fitzgerald to the Rev. Patrick Joseph Doyle and the Most Reverend Daniel Murray.

The testatrix made her will on the 10th of February, 1829, and, after various other bequests, she gave all the rest, residue, and remainder of her real and personal property to Patrick Doyle and the Most Reverend Daniel Murray, and the survivor of them, his heirs, administrators, executors, and assigns, and she also appointed them her executors. The testatrix made five several codicils to her will, which, however, left the above residuary bequest unaffected.

Contemporaneously with the execution of her will, the testatrix sent to Patrick Doyle and the Most Reverend Daniel Murray, respectively, three letters, in which she directed them to hold the property given to them by the residuary bequest in her will for certain charitable purposes therein mentioned. The executors in the lifetime of the testatrix fully accepted the trusts imposed on them by these letters.

The testatrix died on the 5th of May, 1850, without having revoked or altered the above residuary bequest. The Most Reverend Daniel Murray died

in February, 1852, and Patrick Doyle died in December, 1852, having by his will appointed the appellant his executor. Administration of the unadministered personal estate of the testatrix was, on the 20th June, 1854, granted to the appellant by the Court of Prerogative in Ireland.

On the 14th of April, 1862, an information was filed by the Attorney-General for Ireland on the equity side of the Court of Exchequer in Ireland, which, after setting out the above facts, prayed that the appellant, as administrator *de bonis non* of the testatrix, and also as executor of Patrick Doyle, or in one or other of those capacities, might be decreed to pay legacy duty at the rate of 10*l.* per cent. in respect of the residue of personal estate bequeathed by the will of the testatrix.

The appellant filed his answer on the 13th of January, 1863, which, though admitting the facts stated in the information, submitted that, as a matter of law, no legacy duty was payable, on the ground that the bequest was for charitable purposes, and therefore entitled to exemption.

The cause was set down to be heard on information and answer, and on the 29th of June, 1863, the Court being of opinion that bequests given on secret trusts for charity in Ireland were not exempt from legacy duty, made the decree complained of in this appeal.

The question therefore to be decided was whether a legacy in Ireland, absolute upon the face of the will, but bound by a secret trust for charity such as the Court of Chancery would enforce against the legatee, is exempt from legacy duty, as being a legacy given for charitable purposes, and therefore entitled to exemption by virtue of the provisions of the Acts regulating legacy duty in Ireland, viz., 56 Geo. 3, c. 56; 5 & 6 Vict. c. 82, s. 38; and 8 & 9 Vict. c. 76, s. 4.

Rolt, Q.C., and Bagshawe, for the appellant.—In the schedule, part 3, annexed to 56 Geo. 3, c. 56, amongst other exceptions from legacy duty, are “legacies given for the education or maintenance of poor children in Ireland, or to be applied in support of any public charitable institution in Ireland, or for any purpose merely charitable.” By 5 & 6 Vict. c. 82, s. 38, extending 56 Geo. 3, c. 56, to Ireland, this exemption is continued. Had the trusts declared by the letters appeared on the face of the will, then without doubt no legacy duty would be payable, and whether a binding parol trust be imposed on the legatees or an express trust declared in the will itself is immaterial.

The Attorney-General for Ireland, and *Barry, Serjt.*, (of the Irish bar), for the Crown.

LORD CRANWORTH, C.—This is a question which lies within the narrowest compass. This lady, Bridget Fitzgerald, by her will and several codicils, gave the residue of her property to two gentlemen, both of whom have died, and who are now represented by the appellant, the Most Reverend Archbishop Cullen. By her will she gave the property to these two persons *simpliciter*, but then it must be taken as an admitted fact that she gave it to them upon their having, in her lifetime, validly undertaken that they would hold it upon certain charitable trusts. Now, in that part of the Stamp Act relating to Ireland which refers to testamentary instruments, and the duty payable upon wills or administrations, there is an exemption which does not exist in England, namely, in favour of “any legacy given for the education or maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purpose merely charitable.” There is no doubt that, if you are to couple that which was undertaken by these gentlemen with the legacy, this gift comes within the exemption; for it is admitted on all hands that it was a gift which, coupling the will with the undertaking of the legatees, amounted to a gift for purposes merely charitable. The question is, whether—inasmuch as the gift did not, on the face of it, purport to be a gift merely charitable, but was apparently a gift to the legatees themselves,

for their own benefit, you can, for the purposes of legacy duty, couple that legacy with the fact that the legatees had undertaken to hold it for merely charitable purposes. I think it is extremely important that rule should be laid down on this subject; and, undoubtedly, the more convenient rule is that which has been adopted by the Court below, because it is a rule which imposes no difficulty upon executors (administrators are out of the question in this case) when they come to pay the duty, in knowing what the amount of duty is to be. I cannot disguise from myself that the rule, so laid down, is one which may enable parties (unless the Succession Duty Act alters it, and I am not sure how that may be) always to evade or rather to avoid the payment of any legacy duty. Because if the testator is a married man, he may leave the whole of his property to his wife, taking an undertaking from her which does not form part of his will, that she, at his death, will dispose of the property in such and such a way. He can probably trust her, and whether he can trust her or not, if he take measures to secure that it shall be forthcoming at his death, she will be bound to execute the trust, and therefore, no duty will be payable because *ex facie* of the will it is all given to her. I observe that one of the learned Judges—Baron Fitzgerald, I think—rather alludes to a case of that sort, and says he doubts whether, in such a case, the Court might not find the means of compelling the party beneficially interested to pay the full duty. I own I cannot follow that, and the Attorney-General for Ireland, to whom I put the question, did not contend for it. The rule, therefore, as laid down is open to the objection that it may, according to the present state of the law, lead to parties escaping from the payment of legacy duty altogether, or very nearly so, by a testator giving the property to his wife, in which case there is no duty payable, or to a child, in which case the duty is only one per cent., although it may really be intended to be given to strangers, the duty upon such a bequest being ten per cent. in England, and five or six per cent. in Ireland. That duty of ten per cent. or of five per cent., as the case may be, would therefore be avoided, and a duty of one per cent. only, or nothing at all, would be paid, according as the property was given on the face of the will to a child or a wife. No doubt there is considerable difficulty in that view of the question. Perhaps the only answer to it is that the statute has not contemplated such a case, and that is the real answer to the question which was put two or three times at the bar in the course of the argument. What is the meaning of the words “legacy given,” in the proviso? Do they mean given by will, or do they mean so given that coupling the gift to the legatee with the obligation which the law imposes upon it, the two together are to be taken as the legacy. I own that I have had considerable doubts upon the subject, but the rule laid down by the Court below is certainly the more convenient of the two, and as I know that both my noble and learned friends who have heard this case, consider the decision to be perfectly right, I do not feel it necessary to state any further the doubts which have arisen in my own mind. Under the circumstances I think the decision which has been come to by the Court below in the case of this will is right. I have, therefore, to move your Lordships that the judgment of the court below be affirmed.

LORD CHELMSFORD.—The question to be decided is whether the gift of the residue by the will of Bridget Fitzgerald to the Rev. Mr. Doyle and Archbishop Murray is exempt from legacy duty by reason of its being made applicable to trusts for charitable purposes, by certain letters contemporaneous with the will, and which trusts were accepted by the legatees. Confining myself entirely to the words of the Acts of Parliament, I have little difficulty in coming to a conclusion in favour of the Crown. The definition of a legacy given by the 38th section of 5 & 6 Vict. c. 82, and the 4th section of the 8 & 9 Vict. c. 76, is “a gift by any will or testamentary instrument of any deceased person which by virtue of any such will or testamentary instrument shall have effect or be satisfied out of the personal estate.” It is clear upon the

definition that the gift can be a legacy only to the person named in the will, because he alone takes by virtue of the will. Bearing this in mind, in turning to the exemption in the 38th section of the 5 & 6 Vict. c. 82, on which the question turns, the proper construction appears to me to be obvious. That exemption is, "that nothing herein contained shall extend or be construed to extend to charge with duty in Ireland any legacy given for the education or maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purpose merely charitable." What is the meaning of the words "any legacy?" It is a gift which, by virtue of the will, is to have effect out of the personal estate. Now the residue in this case is not by virtue of the will given for charitable purposes, but by virtue of the trust imposed by the letters contemporaneous with the will. The duty is chargeable upon a legacy given by will; the exemption applies to a legacy given, or to be applied for charitable purposes. From the comparison of the definition of a legacy with the terms of the exemption which I have made, I can come to no other conclusion than that the legacy for charitable purposes must be expressly so given by the will itself to exempt it from duty. Upon these grounds, therefore, I think the judgment of the Court below is perfectly right, and that it ought to be affirmed.

LORD WESTBURY.—My Lords, having regard to the argument upon this case, I think it very material to point out that where there is a secret trust, or where there is a right created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to a fraud, the title of the party claiming under the secret trust, or claiming by virtue of that personal confidence is a title *dehors* the will, and cannot be correctly termed testamentary. The question then arises—What is the meaning of the words in the statute that has been referred to? The object of that portion of the statute is to charge testamentary gifts with certain rates of duty, according to the relation, or the absence of relation, between the testator and the donee. Now a gift by will, or a legacy by will, involves of necessity certain things—not only a description of the subject given, but also a nomination or description of the individual to take, or the purpose which is to be answered by the legacy. If there be therefore a gift to A., and if there be a collateral matter which renders A. bound to apply the subject of the gift to some purpose not to be found within the expression of the gift, and the obligation arises, not on the face of the will, or by virtue of the will, but arises from something *aliunde*, it follows of necessity that the person or the purpose to be benefited cannot with any correctness of language be dominated a legatee or a testamentary purpose. When therefore we are adverting, as we have here to advert, to the effect of the exemption out of legacies charged with duties, we find the words of the exemption to be "a legacy for a purpose merely charitable." If that be so, does it not of necessity follow that the purpose merely charitable being in reality the real donee of the legacy must, by every rule to be derived from the nature of the subject and from the language of the statute, be a purpose expressed on the face of the will. The exemption is intended to be applied only to testamentary bounty, and testamentary bounty to a charity; but you cannot say that this is bounty to a charity, when the charity has no place, and is not to be found either in anything that is expressed in the will, or in anything that is so referred to in the will, as by that reference to be made part of the will. The words unquestionably would not include a person taking by anything other than a testamentary title, otherwise there would be no limit. A legatee taking a sum of money by virtue of a will might declare a trust a day or a month after the death of the testator, and the whole of the reasoning that we have heard to-day would be equally applicable to a charitable purpose expressed in that trust, and it might be held equally to exempt the property so first given by will, and afterwards dedicated to charitable purposes, from being amenable to the duty. I think the conclusion arrived at by the Court below is quite a correct conclusion. In matters of this kind relating

to the interpretation of fiscal Acts we are not at all to have regard to what the effect of the decision may be with reference to the fiscal duties. Our duty is limited only to this, to inquire whether the tax imposed does attach, or whether, when the tax is imposed with an exemption, the particular case comes within the fair, proper, and legal meaning of that exemption. Whatever may be the result upon other fiscal duties is not properly a subject of judicial reference upon the occasion of determining a question of this kind. I therefore undoubtedly concur in the opinion of my noble and learned friend on the woolsack that the judgment of the Court below ought to be affirmed.

LORD CHELMSFORD.—The costs follow as a matter of course.

Bagshawe.—Perhaps your Lordships would allow me to mention that the Lord Chief Baron thought it was a proper case to take before your Lordships; in fact he said he should desire that the decision should be reviewed.

LORD CHELMSFORD.—I do not think that ought to have any effect in this case. The costs must follow the appeal.

Decree affirmed, and appeal dismissed with costs.

[LORDS JUSTICES.]

July 3, 1865.

TAYLOR v. SPARROW.

14 W. R. 881; 15 L. T. 150; 12 Jur. N.S. 593; reversing, [1866] E. R. A. 2639; 14 W. R. 124; 13 L. T. 494 (V.C.).

Will—Construction.

VESTED, CONTINGENT AND FUTURE INTERESTS.—*T., by his will, gave his residuary real and personal estate on trust for S. for life, and after her death equally among twelve nephews and nieces named, and he directed that if any of them should die before the period of distribution, the share of the person so dying should go to all and every the children by their first marriage of any of his said nephews and nieces who should have departed this life, equally between them at twenty-one. And he declared that if any of the said nephews and nieces should die before the period of distribution, leaving issue, and such issue should die before twenty-one, the share of the nephew or niece so dying should go equally among the surviving nephews and nieces:—Held (reversing Stuart, V.C.), that the issue of a nephew, who died in the testator's lifetime leaving issue, were entitled to share in the fund.*

This was an appeal from an order made by Vice-Chancellor Stuart upon a petition, which involved a point of will construction. The case is reported on the hearing before the Vice-Chancellor (14 W. R. 124), where the facts are sufficiently stated.

J. Pearson and *W. Renshaw* for the appellants, the children of John Taylor, cited *Humberston v. Stanton* (1 V. & B. 385), *Willing v. Baine* (3 P. W. 113), *Walker v. Main* (1 J. & W. 1), *Hannam v. Sims* (2 De G. & J. 151; 6 W. R. 347), *Loring v. Thomas* (1 Dr. & Sm. 497; 9 W. R. 919).

Bacon, Q.C., and *T. Renshaw*, for the surviving nephews and nieces, cited *Thornhill v. Thornhill* (4 Mad. 377), *Smith v. Smith* (8 Sim. 353), *Butter v. Ommaney* (4 Russ. 73).

O. Morgan for the representatives of Jacob.

J. Pearson in reply.

Their LORDSHIPS held that the children of John, the nephew, were entitled to share in the fund.

ROMILLY, M.R., June 22, 1866.

ROWLANDS v. EVANS.

WILLIAMS v. ROWLANDS.

14 W. R. 882.

Partnership—Dissolution by act of God—Costs.

PARTNERSHIP.—*When a dissolution of partnership is caused by the act of God, the costs after the hearing will be paid out of the partnership property. The costs up to the hearing will be paid out of the partnership property, or by each party, according to circumstances.*

This was a question as to the payment of the costs of a suit for the dissolution of a partnership on the ground of the lunacy of one of the partners.

The cause in an earlier stage was reported in 10 W. R. 186, 30 Beav. 302. The suits had now been wound up, and the only remaining question was who should pay the costs.

Selwyn, Q.C., and *G. Colt*, for Rowlands, the plaintiff in the first suit, contended that as he had substantially gained what he contended for he ought to be allowed his costs. There could be no rule as to the costs of a suit for the dissolution of a partnership, for the question must often depend upon the amount of assets.

Phear appeared for some of the defendants.

Southgate, Q.C., and *King*.—This is a case of a dissolution by the act of God, and the rules for the cases of dissolution where one or more of the parties are in the wrong do not apply. The costs ought to be paid out of the partnership estate. They quoted 1 Lindley on Partnership, 183.

LORD ROMILLY, M.R.—The usual rule in dissolutions of partnership is that each party pays his own costs up to the hearing, and that the costs after the hearing come out of the partnership estate. I think I must follow that course here. The general rule in the case of dissolutions by the act of God is that all the costs are paid out of the partnership property. There are, however, peculiar circumstances here, and the proper rule will be for each party to pay his own costs up to the hearing, and after the hearing the costs to be paid out of the partnership property. Let the money be paid before the last seal.

STUART, V.C., June 11, 12, 1866.

PEDLEY v. DODDS.

DODDS v. PEDLEY.

14 W. R. 884; L. R. 2 Eq. 819; 14 L. T. 823; 12 Jur. N.S. 759.

Distinguished, *Hardwick v. Hardwick*, [1873] E. R. A.; 42 L. J. Ch. 686; L. R. 16 Eq. 168; 21 W. R. 719 (L.C.).

Will—Construction—Words of description—Falsa demonstratio.

WILL.—*Where A. purchased an estate called Arkley Hall Farm, situated in the parish of Ridge, and subsequently added thereto two pieces of land in the contiguous parishes of Shenley and Barnet respectively, occupying the whole as one farm, and then by his will devised all his freehold estates, consisting of*

Arkley Hall Farm in the parish of Ridge, upon certain trusts, with a devise of his residuary real and personal estate over:—Held, that only the lands in the parish of Ridge passed under the devise of Arkley Hall Farm.

By indentures of lease and release dated respectively the 24th and 25th November, 1802, one William Dodds became entitled to certain lands and hereditaments therein described as Aukley House, *alias* Arkley Hall, and several pieces of land, together amounting to 111 acres, all situate in the parish of Ridge, in the county of Herts. In the year 1813 the said William Dodds purchased in fee seven other pieces of land, amounting to about forty acres, situate in the parish of Shenley, in the said county of Herts; and in the year 1815 he purchased a further piece of freehold waste land, in the parish of Barnet, amounting to about four acres. The lands purchased in Shenley and Barnet were contiguous to the lands in the parish of Ridge, and the whole was occupied by the said William Dodds as one farm. In the year 1817 the said William Dodds, by his will dated the 12th August, devised as follows:—"As to, for, and concerning all and singular my freehold estates, consisting of Arkley Hall Farm, in the parish of Ridge, in the county of Hertford, a farm called Aldridges, in the parish of Fryerning, in the county of Essex, with the marshland near Barking, in Eastbury Level, a messuage and premises, No. 19, Little Shire Lane, Carey Street, in the county of Middlesex, a messuage and premises, No. 22, College Hill, London, and also my copyhold and customary houses and cottages at Great Ilford, the corner of Barking Lane, in the said county of Essex, and all and singular other my said real estates whatsoever and wheresoever, and also all the rest, residue, and remainder of my personal estate, money, stock, funds, securities for money, and effects, whatsoever and wheresoever, not hereinbefore disposed of, together with all such property and effects as shall fall into my residuary estate and effects by virtue of this my will, upon the death of my said wife, and of my said grandson, and granddaughter, and every of them respectively," unto trustees upon trusts thereafter declared, "that is to say, as to, for, and concerning my said farm called Arkley Hall Farm, upon trust to permit my son Thomas William Dodds to receive and take the rents and profits thereof during the minority of my grandson William Dodds, and from and immediately after my said grandson William Dodds and his assigns shall attain the age of twenty-one years, then upon trust for my said grandson William Dodds and his assigns, for and during the term of his natural life," and after his death with limitations over in favour of the said grandson's children. There were trusts of the residuary estate in favour of the other children of Thomas William Dodds. The said lands in the parishes of Ridge, Shenley, and Barnet, were occupied together by one tenant as one farm, and the testator's son and grandson, for a period of forty years, received the rents and profits of the whole of the lands. On the death of the grandson intestate in 1851, an administration suit was instituted, and subsequently questions arose between the residuary devisees, the trustees in whom the lands were vested, and the personal representative of the grandson William Dodds, as to the legality of the payments to the said William Dodds of the rents and profits of the lands not situate in the parish of Ridge. Bills were filed by the remaining trustees and the residuary devisees respectively, for the administration of the trusts of the will of the testator, under the direction of the Court.

Druce opened the case for the plaintiff (the surviving trustee of the testator's will) in *Pedley v. Dodds*.

Bacon, Q.C., and *Hanson*, for the representatives of William Dodds the grandson, argued that it was clear from the facts of the case that the whole of the lands were intended to pass under the devise. The lands in the three parishes were let to one tenant at one entire rent. If the testator had devised all his Arkley Hall Farm without the words "in the parish of Ridge," the case was clear. These latter words were mere words of additional description, and as such were a false description merely. They cited *Goodtitle d. Radford*

v. *Southern* (1 M. & S. 299); *Doe d. Beach v. Lord Jersey* (1 B. & Ald. 550); *Down v. Down* (7 Taunt. 348); *Harrison v. Hyde* (4 H. & N. 805); *Cunningham v. Butler* (3 Giff. 37).

Malins, Q.C., and *Surrage*, in the same interest, cited *Welby v. Welby*, (2 Ves. & B. 187); *Oxenforth v. Cawkwell* (2 Sim. & St. 558); *Webber v. Stanley* (16 C. B. N.S. 698).

STUART, V.C.—The rule seems to me very clear. It is that words of description are not to be limited by mere words of suggestion. That is what I understand the principle in *Doe v. Lord Jersey* to go to.

Greene, Q.C., *Joshua Williams, Q.C.*, and *Blackmore*, for those interested under the residuary devise, cited *West v. Lawday* (11 H. L. Cas. 375); *Ricketts v. Turquand* (1 Cl. & Fin. 491); *Doe d. Oxenden v. Chichester* (4 Dow. 65, 90, and 96); Bacon's *Maxims*, xiii. Ed. of 1737, p. 76. *Webber v. Stanley* is a case in our favour. The description here limits the lands devised to those in the parish of Ridge. The rule of law is clear, that where the words are clear, capable of full effect, and there is no repugnancy in other parts of the will, they pass only that described by them. This is so here. The evidence as to occupation is not enough to take the case out of the rule.

Bacon, Q.C., in reply.

STUART, V.C.—I cannot say that I have any doubt about this case, because I think the facts are clear, and where this is so there is not much doubt about the law. The facts are these:—That in 1802 this testator bought a farm and lands in the parish of Ridge, which farm and lands were called Aukley House or Arkley Hall, and known by description as in the parish of Ridge, and no other parish; and before the year 1813 could have included no lands but those in the parish of Ridge. It happened that this testator occasioned this question by purchasing, about the year 1813, two years before he made his will, certain lands in the parish of Shenley. These he added to Arkley Hall Farm only by farming them with it. The same observation applies to the lands subsequently acquired in the parish of Barnet. By his will he devises "Arkley Hall Farm in the parish of Ridge," and it is said that when he so describes it there is a false demonstration. He did not mean Arkley Hall Farm proper, but Arkley Hall Farm, not only in the parish of Ridge, but with the additions he had made to it in the parishes of Shenley and Barnet. Is this a mere mistaken description? Lord Justice Erle, in delivering the unanimous judgment of the Court of Common Pleas in *Webber v. Stanley*, states the law in words which were not exactly those used by other judges, but are to the same effect. He says, "as to the case where there is property in respect of which all the facts of description are found to be true, so that the property exactly fits the description, the whole of that property and nothing more passes. As to the case where there is property in respect of which none of the facts of description are true, no property passes. Where the inquiry results in the third alternative, viz., where there is property in respect of which some of the facts of description are true and some not, there the Court must inquire whether the part of the description which applies to the property is a complete definition of a subject of devise, so that the misdescribing part may be justly regarded as a mistake, and rejected as a false demonstration in order to prevent a total failure of the devise. If this latter inquiry results in an affirmative answer, the property which is so found to be completely defined passes, notwithstanding a partial failure of the applicability of the whole of the description. It is in the case of this third alternative that the doctrine relating to the rejection of false demonstration is brought into use, but it never can be properly applied where there is a property which every part of the description fits, and on which every word thereof has full effect." Now what the testator has given is Arkley Hall Farm, in the parish of Ridge. That describes a subject certainly known, and the addition of lands in another parish is no reason, upon any principle of construction that I know, to say that

he meant lands added to that farm but situated in other parishes. Where property is found which exactly fits the description in the will, nothing more passes than the property which so fits the description. Lord Bacon's Maxims have been referred to, and he says, with reference to that one—*non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*—"the law will never intend error or falsehood;" but the whole argument here is to impute error or falsehood. He says further, "If the parish of Hurst do extend into the counties of Wiltshire and Berkshire, and I grant my close called Callis, situate and lying in the parish of Hurst, in the county of Wiltshire, and the truth is that the whole close lieth in the county of Berkshire, yet the law is that it passeth well enough, because there is a certainty sufficient that I have given it a proper name which the false reference does not destroy, but in the principal case, if the close called Callis had extended part into Wiltshire and part into Berkshire then only that part had passed which lay in Wiltshire." That is this very case and you cannot make any distinction. Now the whole of the efforts of counsel were directed to extend the words of the testator beyond their precise meaning, but I think they entirely fail in showing that there is anything false or mistaken in the way he has used the words "in the parish of Ridge." And as the law is, this Court cannot infer that he made any mistake or that he gave more than he expressly said he intended to give. There is no warrant for saying that a single acre or rood of land passed by this will out of the parish of Ridge. Declare therefore that the lands in Shenley and Barnet pass by the residuary clauses.

STUART, V.C., June 19, 1866.

OSBORN v. DUKE OF MARLBOROUGH.

14 W. R. 886; 14 L. T. 789; 12 Jur. N.S. 559.

Specific performance—Lease by tenant in tail not under seal—32 Hen. 8, c. 28—5 Anne, c. 3.

ESTATE. LANDLORD AND TENANT.—*Where A., a tenant in tail male in possession of lands, the subject of a settlement by a special Act of Parliament, made a lease by an agreement not under seal, the power of leasing given by the Act requiring leases of the kind to be made under the provisions of the 32 Hen. 8, c. 28:—Held, that such agreement had no power to bind the issue in tail, notwithstanding certain acts of acquiescence and confirmation on his part, and that the lessee was not entitled to any equitable relief.*

This bill was filed by a tenant of the defendant to compel him to grant him a lease in conformity with the terms of an agreement entered into between the plaintiff and the defendant's predecessor, the late Duke of Marlborough.

The facts of the case were briefly as follows:—

The late Duke of Marlborough was, by virtue of a certain Act of Parliament passed in the reign of her Majesty Queen Anne, entitled as tenant in tail male in possession of the Blenheim Estates, without power of barring the entail, but with certain powers of leasing, to be executed in compliance with the terms of the Act.

The power of leasing was as follows:—

"And be it further enacted by the authority aforesaid that the Duke of Marlborough, and after his decease the said Duchess of Marlborough, shall have full power and authority by deed indented to make any lease or leases in possession of all or any of the said manors, hundred, messuages, lands, tenements, and hereditaments aforesaid (other than and except the house called Blenheim

and the park of Woodstock), for any number of years not exceeding twenty-one years, or for any number of years determinable upon one, two, or three lives, reserving the best and most improved rent that can then be had for the same without taking any fine, provided that neither the said Duke of Marlborough, or the heirs male of his body, nor any of his daughters, or the heirs male of their bodies, or any other person to whom the premises shall come and descend by virtue of the limitations aforesaid, shall have any power by fine or recovery, or any other act, assurance, or conveyance in the law to hinder, bar, or disinherit any the person or persons to or upon whom the said manor house, lands, tenements, or hereditaments, or premises, are hereby vested or limited from holding or enjoying the same according to the limitations before in this Act mentioned, other than and except such leases as the said Duke and Duchess may make by virtue of the powers hereinbefore mentioned and such other leases as the tenants in tail may and are enabled to make by virtue of the statute made in the thirty-second year of Henry 8th, and grants of lands or tenements held by copy of court roll according to the customs of the respective manors aforesaid but all such fines, recoveries, acts, assurances, and conveyances, other than such leases and grants by copy aforesaid, shall be and are hereby declared and enacted to be void."

On the 16th November, 1855, the plaintiff and the late Duke executed an agreement, whereby *inter alia* it was stipulated that the defendant should hold his farm for a term of fourteen years from the 29th day of September then last. On the death of the late Duke in 1857, the present Duke came into possession as tenant in tail male. Quarrels arising between the parties with reference to the destruction of the rabbits, and as to the nature of certain team work to be done by the plaintiff, an action of ejectment for a breach of covenant in respect of the team work was brought by the Duke, in which, however, he was defeated. Subsequently a notice to quit was served on the plaintiff, on the footing of his being a tenant from year to year only. He refused, however, to comply with it. Upon a second action of ejectment being brought by the Duke, the plaintiff obtained an injunction to stay execution until the question of his right to a lease was decided. There had been an acceptance of rent by the defendant from the plaintiff for many years, and the correspondence showed that previous to questions arising between the parties, the plaintiff had been treated on the footing of a lessee for years. The questions raised were (1) whether the agreement by the late Duke, not being by deed, could bind his issue in tail, and (2) whether the acts of the defendant had not so confirmed the acts of his predecessor as to make them binding upon him.

Wickens for the plaintiff.—The position of the defendant was that of a tenant in tail under the act of 32 Hen. 8, c. 28, and although the agreement was not a lease strictly within the provisions of such Act so as to bind the issue in tail, yet a Court of Equity might execute it. But where there had been acquiescences and confirmation by successive tenants in tail, such acts of acquiescence and confirmation would at least bind them. Here the defendant confirmed the agreement by successive receipts of rents, brought an action on an alleged covenant, thus treating the agreement on the footing of a lease by deed. This is such a confirmation of agreement as will entitle a plaintiff in equity to a specific performance: *Doe v. Jenkins* (3 Moo. & P. 59); *Ross v. Ross* (1 Chan. Cas. 171). He has been a good tenant, and the Court will exercise its jurisdiction in his favour.

Bacon, Q.C., Malins, Q.C., and Cotton, for the defendant, were not called on.

STUART, V.C.—It is much to be regretted that disputes between landlord and tenant lead to litigation, but this case seems to me very clear. The plaintiff files his bill for the specific performance of an agreement to lease him a farm for fourteen years, signed by the late Duke of Marlborough. The late Duke of Marlborough was tenant in tail in possession under that particular Act

of Parliament which regulates the succession to his estates. The Act of Henry VIII. is perfectly clear as to what is to be done in order to bind tenants in tail, their issue, and remaindermen. Here is an agreement not under seal, and it is said, in the face of this statute, that that agreement binds the present defendant and gives the plaintiff a right to a lease. It is not necessary to enter into the question of confirmation beyond this, that there seems to be great ground for considering that as between issue in tail and ancestor in tail, this agreement not being under seal, is not capable of confirmation. No doubt the decision in *Doe v. Jenkins*, as the law is laid down in that case, is that, as against issue in tail, an agreement of this kind is only voidable and not void, and being only voidable is capable of confirmation. With that case I am not inclined to agree, but if I were the Acts of confirmation are too equivocal, and this Court could not give them such effect as to bind the defendant. The jurisdiction of this Court is of a discretionary kind, and I do not think I should be exercising the discretion of the Court in a proper way if I gave the plaintiff the relief he seeks. The bill must be dismissed with costs.

Wood, V.C., June 9, 11, 1866.

In re MAINWARING'S SETTLEMENT TRUSTS.

14 W. R. 887; L. R. 2 Eq. 487.

Applied, *In re Portadown, Dungannon, & Omagh Junction Railway*, 1867, I. R. 1 Eq. 293 (M.R.). Distinguished, *In re Anutt*, [1883] E. R. A.; 52 L. J. Ch. 299; 22 Ch. D. 275; 48 L. T. 155; 31 W. R. 469 (Ch. D.). Explained, *Scholfield v. Spooner*, [1884] E. R. A.; 53 L. J. Ch. 777; 26 Ch. D. 94; 51 L. T. 138; 32 W. R. 910 (C. A.).

Marriage settlement—Assignment by wife of all her present and future property—Covenant by husband to settle after-acquired property—Gift to wife, after the marriage, of separate estate by an instrument taking notice of the settlement.

SETTLEMENT.—By an ante-nuptial settlement the intended wife assigned to trustees all her then present personalty, "and all other the personal estate to which she might at any time thereafter become entitled in any way howsoever," upon the usual trusts, and the intended husband covenanted to settle all her after-acquired property. After the marriage, a testatrix, by her will, left the wife a sum of money. By a first codicil the testatrix desired that the money given to the wife by the will should be paid over to the trustees of the settlement, and that no part thereof, except the interest, should be paid to the wife or husband, and that the principal should forthwith be assured by the husband in pursuance of his covenant. By a second codicil the testatrix authorised her executors, before paying over the principal to the trustees, to pay such part thereof to the wife as she might require for her separate use.

After the testatrix's death the wife required a portion of the principal to be paid to her for her separate use. The acting executor paid the required portion into court, and, on a petition by the wife for payment to her for her separate use, the prayer of the petition was granted.

This was a petition presented by Emma E. Mainwaring, the wife of Arthur Mainwaring, asking for the payment to her of a sum of money which had been brought into Court under the Trustee Relief Act.

The facts were as follows:—By an ante-nuptial settlement, dated July

11th, 1843, and made between the petitioner, then Emma E. Warren, spinster, of the first part, her then intended husband of the second part, and trustees of the third part, after reciting that the petitioner was entitled to the personalty specified in the schedules thereto either in expectancy or in possession, and that it had been agreed that she should, in consideration of the then intended marriage, transfer and assign the same to the trustees thereof, the petitioner accordingly assigned, and Arthur Mainwaring confirmed unto the trustees the said specified personalty, "and all other the personal estate to which the said E. E. Warren now is entitled in possession, remainder, contingency or otherwise howsoever, or to which she may at any time hereafter become entitled, in any way howsoever, and all the estate, right, title, interest, property, possibility, benefit, claim, and demand whatsoever, both at law and in equity of her the said Emma E. Warren of, in, and to the same and every part thereof respectively," upon trust for the petitioner absolutely until the marriage, and afterwards, upon certain trusts for the petitioner, her husband, and children. The settlement also contained a covenant by Arthur Mainwaring, to settle all the property which might be acquired by the petitioner after her marriage, upon the trusts of the settlement. The marriage took place shortly after the date of the settlement. There was no issue of the marriage.

The petitioner's mother, Penelope Warren, by her will, dated December 24th, 1860, bequeathed 2,700*l.* to the petitioner. By a codicil, dated June 5th, 1863, Penelope Warren desired that all the money given to the petitioner by her will, should be paid over to the trustees of her marriage settlement upon the trusts thereof, and that no part thereof, except the interest, should be paid to the petitioner or her husband; and she desired that the principal moneys should be forthwith assured by the petitioner's husband in pursuance of his covenant in the settlement. By another, and undated, codicil to her will, the petitioner's mother authorised her executors, before paying over the principal moneys given by her to the petitioner to the trustees of her marriage settlement, as directed by the first codicil, to pay such part of the same to the petitioner as the petitioner might require for her separate use, independent of her said husband, and to be free in all respects from his debts, control, and engagements.

The testatrix died November 22nd, 1865, and on April 7th, 1866, her executor appropriated the sum of 3,085*l.* 14*s.* 3*d.* 3*l.* per cent. Consols, to answer the legacy of 2,700*l.* sterling to the petitioner. After such appropriation, and before any part of the Consols had been transferred to the trustees of the settlement, the petitioner required that the sum of 2,308*l.* 16*s.* Consols, part of the said sum of 3,085*l.* 14*s.* 3*d.* Consols should be sold, and the proceeds paid to her for her separate use. The executor, doubting whether he ought to comply with the petitioner's requirement, transferred the required sum of Consols into court, and the present petition was presented.

Little, for the petitioner, pointed out that the settlement contained no recital of an agreement to settle after-acquired property, and contended that looking at the whole instrument, the assignment by the petitioner of "all other the personal estate, &c.," ought to be read as an assignment of what the petitioner might become entitled to in the interval between the execution of the settlement and the marriage. For, if all the after-acquired property of the petitioner fell within the assignment, there would be nothing for the husband's covenant to operate upon. The husband's covenant alone would not bind the fund in question, for it was certain that a covenant by a husband to settle after-acquired property, only referred to the marital right. The Court, moreover, would look at the words of donation used by the testatrix, which clearly show an intention that the petitioner should be at liberty to withdraw a portion of her legacy from the operation of the settlement. He cited *Re Stephenson's Trusts* (3 D. M. G. 969); *Douglas v. Congreve* (1 Keen, 410); *Travers v. Travers* (2 Beav. 179); *Ramsden v. Smith* (2 Drew, 298; 2 W. R. 435); *Grey v. Stuart* (2 Giff. 398); and *Thornton v. Bright* (2 Myl. & Cr. 254).

F. Bacon, for the petitioner's husband, was stopped by the Court.

Wolstenholme, for the trustees of the settlement, said that the settlement would, beyond all question bind this fund were it not for the words of the will. Now those who claimed under the settlement had nothing whatever to do with the words of the will. The legacy once given to the petitioner must be subject to all her contracts. One could not give a gift to a person absolutely, and at the same time freed from that person's engagements. [Wood, V.C.—Suppose the testatrix had said "I am aware of my daughter's marriage settlement, and I do not wish what I give her to be subject to it. If I give her anything it must be on condition that it is not settled." In that case would the gift still be subject to the settlement?] Yes.

Wood, V.C., said that the words of the settlement were, no doubt, wide enough to embrace everything to which the petitioner might at any time after the marriage become entitled. The husband's covenant was useful in case of legal interests, the wife's assignment being merely a contract. As regarded the testatrix's intention, however, it was clear that she gave the legacy to the petitioner upon the express condition that the latter should be able to free any portion she liked from the effect of the settlements. The question, therefore, was whether the Court should consider a gift of that sort as bound by the settlement. He was of opinion that the true rule was that, if from a comparison of the settlement and the instrument under which the married woman took, it was plain that the subject of the gift was not of the nature of the property to which the settlement was intended to apply, the Court would not apply the settlement to the gift. The argument was just that property could not be given to any one free from his engagements. But here, in holding that the petitioner was entitled to have the sum in Court paid to her for her separate use, as he thought he was bound to do, the Court would proceed merely on the ground that the engagement entered into by the petitioner in the settlement was not applicable to the sort of gift of which the sum in Court was part. The costs of the petition would be paid out of the fund, and the residue handed to the petitioner as prayed by the petition.

Wood, V.C., June 19, 1866.

SURR v. WALMSLEY.

14 W. R. 888; L. R. 2 Eq. 439; 14 L. T. 621.

Practice—Examination ex parte previous to the hearing—Examiner's objections to questions.

EVIDENCE. H.—*Although, by the order of the Court on evidence, dated February 5, 1861, the examination, before an examiner, of a witness called ex parte in order that his evidence may be used at the hearing of a cause, is to be deemed an affidavit, the examiner is not on that account bound to take down the answers to improper or irrelevant questions. He should not, however, refuse to take down answers, except when it is clearly evident that such answers could not possibly be evidence.*

This was a motion made on behalf of the plaintiff that the examiner might be ordered to proceed with the examination of a witness called *ex parte* by the plaintiff in order that his evidence might be used at the hearing of the cause.

The chief point in question in the suit was as to the solvency or insolvency of the late firm of John and James Walmsley at the time when the

partnership ended. Of the two partners John was now dead. The plaintiff contended that the firm was at that time insolvent, and called as a witness the person who had made out the amount of the stock of the late firm, and who had refused to make an affidavit. John was the partner who had given the witness his instructions to draw up this account. On the face of the account the firm was solvent. The plaintiff's case was that this account was erroneous, and known to be so by the witness and the partners. On the examination, the witness was asked what instructions were given to him by the partners as to the making out of the impeached account, and particularly whether John told him that he was going to show it to James, and what John told him that James had said on seeing it. The examiner had refused to take down the witness's answers to these questions, on the ground that they could not possibly be evidence, and the present motion was made.

De Gex, Q.C., and *Roxburgh*, in support of the motion, referred to Rule 6 of the Order of the Court on Evidence (February 5th, 1861), and made in pursuance of 15 & 16 Vict. c. 86, and 23 & 24 Vict. c. 128 (see *Morgan's Chancery Acts and Orders*, p. 181), whereby it was ordered that every examination taken *ex parte* for the purpose of being used at the hearing should be deemed to be an affidavit. The force of an affidavit was not affected by containing some things that might not be evidence; and the examiner should consider himself, when taking examinations of this kind, as in fact drawing an affidavit. Surplus matter in an affidavit was only a matter of costs, and if the examining party chose to risk the expense, it was not an affair for the examiner. [*Wood, V.C.*, said that he could not hold that an officer of the court would be acting properly if he loaded the records of the court with what he knew could not be evidence. As to superfluous matter in affidavits, he had frequently had occasion to animadvert in severe terms on the impropriety of a solicitor putting into affidavits what was not evidence, and he had on many occasions felt himself bound to make the solicitor pay the costs occasioned by the insertion of such matter.] In the present case it was important to show the impression of the witness's mind when he set about making the account, and that was our object in asking him the questions objected to by the examiner. At *Nisi Prius* the Court would, in many cases, give you time to show the materiality of the evidence after the examination of the witness had been taken. It would be most inconvenient if, where evidence was taken before the examiner, every question put to the witness was to be a subject of discussion with the examiner, who knew nothing of the issues in the cause. And serious expense might be occasioned by his making a mistake, as in the present case, where the witness was brought from Macclesfield at an expense of 15*l*.

Wood, V.C., said that considering the circumstances of the case, it was possible that the first two questions were proper to be put to the witness; because the plaintiff's case being that the account was erroneous, and known to be erroneous, it might be of importance to ascertain the principle on which it was made out. As to the third question, however, he was clearly of opinion that what John, in James's absence, said that James had said, could not by any possibility be evidence. He should therefore direct the examiner to proceed on the first two questions; and of course the plaintiff could, subject to the examiner's objections, proceed generally with the examination. He should be sorry to lay down a rule that the examiner was bound to take down answers to every sort and kind of question; but still there should be no possible doubt on the propriety of a question before the examiner objected to it.

April 28, 1866.

MYERS v. GIBSON.

14 W. R. 901.

Will—Attesting witnesses denying signatures—Evidence of attorney who was present and others proving its genuineness—Conflict of evidence.

WILL.—Where two persons' names appeared as attesting witnesses to a will, and the attorney who drew the will, and who was present during its execution, swore that these persons had duly signed the will as attesting witnesses, and other persons who knew their handwriting swore that the writing was theirs, but they themselves, though admitting a striking resemblance between the signatures to the will and other signatures of theirs produced, denied having signed the will, and swore that the signatures to it were forgeries.

The Court, being satisfied that the signatures were genuine, notwithstanding the denial of the witnesses, admitted the will to probate.

The testator, William Broclebank, made a will, dated the 8th of January, 1858, under the following circumstances, which are related in the evidence of the plaintiff. He had been long acquainted with the plaintiff, Mr. John Postlethwait Myers, an attorney at Broughton-on-Furness. Towards the end of the year 1857 the testator first spoke to him about making his will, and, shortly afterwards gave him verbal instructions for this purpose. He (Mr. Myers) dictated these instructions to his clerk, who prepared a draft will in accordance with them, and this draft was afterwards copied. On the 8th of January, 1858 (the date of the will) the testator and Mr. Myers met by appointment at a place called Lylecroft, at or near which the testator resided. They both went to a private room in the Albert Hotel at that place; and there the will produced (being the copy made by the clerk) was distinctly read over by Mr. Myers to the testator, and thereon the bell was rung, and the landlord of the hotel, a Mr. Henry Myers, and his daughter Mary Myers (no relatives of the plaintiff) were requested to witness his signature. They complied, and he signed it in their presence, and they then attested his signature. Several witnesses, who swore that they were acquainted with the signatures of the attesting witnesses, deposed as to their belief that the signatures to the will were genuine.

Spinks, Dr., for the plaintiff, having intimated that it was not his intention to call the attesting witnesses, as he understood they were hostile to the plaintiff.

Sir J. P. WILDE said that where the attesting witnesses were living, and could be brought forward, it was incumbent on whoever propounded a will, which was opposed on the ground of want of due execution, to put them into the box.

Henry Myers was then called, and swore that on the 8th of January, 1858 (the date of the execution of the will) he was absent from home from an early hour in the morning till late at night; that the signature to the will could not under those circumstances be his, but that it was very like his writing. He could not remember where he had been on the 8th of January.

Mary Myers examined, swore that the signature of her name was not written by her but was forged. She admitted a strong resemblance between the signature to the will and her signature to her marriage certificate, but persisted that the former was not her writing. She admitted that the plaintiff Mr. Myers and the testator had been at her father's house on the 8th of January, 1858, and had gone to the private room together as mentioned in the evidence of the plaintiff.

Sir J. P. WILDE.—This is the first case which has come before me where the attesting witnesses deny the genuineness of their own signatures. The law, no doubt, is that the attesting witnesses are the first sources of information, and those to whom the Court first turns for proof of the execution. But they are not the only sources, and when they deny having signed, it is in the power of the Court to investigate the truth in such a case just in the same way it does in any other. The framers of the statute intended that the signatures of attesting witnesses should be for the protection of testators, but not that the solemn acts of testators should be at the mercy of attesting witnesses in such manner that they, after the testator's death, may have it in their power by mere denial, either from prejudice or self-interest, to set at nought the testator's intentions. The evidence of the two attesting witnesses amount to a charge of forgery against the executor, the plaintiff, who takes no interest whatever under the will, while the total amount of the property is only about 300*l.* Viewing the whole evidence, and taking into account the probabilities of the case, I must say I am entirely convinced of the perfect truth of the plaintiff's evidence and that that of the attesting witnesses is wilfully untrue. I will therefore grant probate of the will to the plaintiff as executor.

[PRIVY COUNCIL.]

June, 18, 1866.

GOREE MONEE DOSSEE AND OTHERS *v.* JOZENDRO NARIAN CHOWDRY AND OTHERS.*

14 W. R. 904; 12 Jur. N.S. 477.

Practice—Leave to appeal—Insufficient statements in petition.

COLONY. C.—*Special leave to appeal will not be granted except where it appears from a full statement of facts in the petition, duly verified by affidavit, that there is a substantial case on the merits, and a point of law proper to be determined on appeal.*

This was a petition to set aside an order of the High Court of Fort William, in Bengal, refusing leave to appeal to this board. It appears from the statements contained in the petition, that the petitioners complained of certain irregular proceedings which had been taken on a judgment obtained in 1837, in the Zillah Court; and that the High Court of Fort William refused leave to appeal against a decision pronounced in the cause by that Court. There was also a general allegation of the facts, and of the effect of the judgment in the Court below.

E. P. Wood (Sir R. Palmer, A.G., with him) for the petitioner, now asked the committee for leave to appeal.

Judgment.—The Committee were of opinion that the statements, both of law and fact, contained in the petition, were too general to warrant their Lordships in granting special leave to appeal; and that the petition must either be dismissed with liberty to present another petition, or amended, all the facts to be properly verified by affidavit.

* Before Sir J. L. Knight Bruce, L.J., Sir G. Turner, L.J., Sir E. V. Williams, and Sir L. Peel.

[LORDS JUSTICES.]

July 3, 4, 1866.

Re THE UNIVERSAL BANK (LIMITED).

14 W. R. 906: on appeal from 14 W. R. 705 (M.R.).

Winding-up—Voluntary or compulsory—Petition by an alleged creditor—Disputed debt.

COMPANY. M.—*A company had passed a resolution in favour of a voluntary winding-up. A petition for a compulsory winding-up order was afterwards presented by a person alleging himself to be a creditor of the company. The alleged debt arose upon some promissory notes of the company, which had, after they were overdue, been indorsed to the petitioner for value. The validity of these notes was disputed by the liquidator under the voluntary winding-up:—Held, that the petition ought to stand over, with liberty to the petitioner to bring an action at law on the notes. All the costs to be reserved.*

This was an appeal from an order made by the Master of the Rolls, dismissing with costs a petition which sought to have this company compulsorily wound up. The facts of the case sufficiently appear from the report, 14 W. R. 705.

Jessel, Q.C., and Darby, for the appellant.

Baggallay, Q.C., and Caldecott, for the voluntary liquidator.

The LORDS JUSTICES thought the proper course was that the petition should stand over, with liberty to the petitioner to bring such action upon the promissory notes as he should think fit. All costs to be reserved, with liberty to apply.

[LORDS JUSTICES.]

July 5, 1866.

DOWNES *v.* JACKSON.

14 W. R. 907.

Practice—Chancery Court of Lancaster—Statute 17 & 18 Vict. c. 82, s. 7.

COURT.—*An injunction was granted by the Lords Justices, as the Court of Appeal from the Chancery Court of Lancaster, against a person out of the jurisdiction of that Chancery Court.*

This was an application to the Court, as the Court of Appeal of the Chancery of the County Palatine of Lancaster, to restrain a creditor of Jane Parsonage, deceased, from prosecuting an action, which he had commenced in the Queen's Bench, against her executors. A decree had been made for administration of her estate in the Chancery Court of Lancaster. The creditor in question being out of the jurisdiction of the Lancaster Court, it became necessary to make the present application to the Lords Justices, as the Court of Appeal of the Lancaster Court, under the provisions of the statute 17 & 18 Vict. c. 82, s. 7.

Bardswell, for the executors, now applied accordingly.

F. North, for the creditor.

Their LORDSHIPS made the order asked for.

Note.—The affidavits in this motion were headed “In the Court of Appeal of the Chancery of the County Palatine of Lancaster”; and were filed at the Duchy of Lancaster Office in London.

ROMILLY, M.R., June 28, 1866.

Re NATIONAL FINANCIAL CORPORATION.

14 W. R. 907; 14 L. T. 749.

Winding-up petition—Joint-stock companies—Amalgamation.

COMPANY. I.—*Two companies, A. and B., were carrying on business. A. had power by its articles of association to buy up other companies. An arrangement was effected for amalgamating the two companies:—Held, that even if the arrangement were not binding on a dissentient shareholder of B., he was not entitled to a winding-up order on the ground that since the amalgamation B. had ceased to carry on business. His remedy was by bill.*

This was a petition for winding up the company, on the ground that it had ceased to carry on business.

The company was formed with a capital of 500,000*l.* in shares of 20*l.* There was a power in the articles of association to buy up other concerns and pay for them by cash or shares, or partly by one and partly by the other. The Oriental Commercial Company was a company with a capital of 500,000*l.* in 10,000 50*l.* shares. Resolutions were passed at a meeting of the shareholders of the Financial Company with a view to form a new company, to be called the Oriental Commercial Bank, by amalgamating the two old ones. The capital of the new company was to be 3,000,000*l.* in 20*l.* shares. 5*l.* had been paid upon the shares in the Oriental Company, and it was part of the arrangement that the value of the shares in the Financial Company should be taken at 5*l.* The arrangement was to be conditional on carrying out the transfer.

The petitioner held shares in the Oriental Company, and objected to the transfer. He now applied for a winding-up order on the ground that the company had ceased to carry on business.

Baggallay, Q.C., and W. F. Robinson, for the petitioner.—The business which the Oriental Company was started to carry on has in fact ceased through the arrangement, and the petitioner is thereby entitled to the winding-up order. He is entitled to know what is the state of the property in which his money has been invested. *Re Imperial Bank of China, &c.* (14 W. R. 594; 1 L. R. Ap. 339).

Selwyn, Q.C., and Swanston, for the company, were not called upon.

Brooksbank appeared for some other parties.

LORD ROMILLY, M.R.—This is a petition for winding up, presented for the purpose of enabling a shareholder to determine his position in reference to the concern. The case does not come within the act. The company either does not exist at all, or it has been carrying on business since April in last year. If the company has suspended business, it has become part of another concern, and the winding-up order will not be made for the purpose of enabling the petitioner to ascertain his position. The proper remedy of the petitioner is by bill, and he may file any bill he is advised. I assume, for this purpose, that the arrangement for amalgamation of these two companies will not bind dissentient shareholders.

ROMILLY, M.R., June 27, 1866.

RICH v. WHITFIELD.

14 W. R. 907; L. R. 2 Eq. 583.

Will—Codicil—Realty—Personalty—Power to convert—Charge of legacies on real estate.

CONVERSION AND RECONVERSION. WILL.—*A will contained a power to sell some real estate, and a power to re-invest in real estates, to be settled in a particular way. Personalty to belong absolutely to the first tenant in tail. The property was personalty during the whole of the life of the first tenant in tail:—Held, that it went to her personal representative at her death. A codicil directed that legacies given by the will should be paid in proportion, and according to the deficiencies in the testator's real and personal estate.—Held, that they became charged upon the real estate.*

There were two questions of construction in this suit on further consideration.

Thomas Whitfield, by his will, dated the 22nd of July, 1779, specifically devised certain real estate in strict settlement upon his daughter, Sarah Whitfield, and the person she might marry for successive life estates, with remainder to her first and other sons successively in tail male, with remainder to all her daughters in tail, with remainders over. He directed that the interest and proceeds of any personalty which might remain in certain events should be paid by his trustees unto the same person or persons who, for the time being, should be entitled in possession to an immediate freehold estate of and in his freehold hereditaments and premises; and that the principal money of such personalty should ultimately become the absolute property of such person or persons as should be entitled to an estate tail or become seized in fee simple of his freehold estates. Amongst the testator's real property was a moiety of some cotton mills and a corn mill, which the testator gave his trustees power to sell. The will also contained a power to invest personalty in real estates in Cheshire and Staffordshire to be settled to the same uses. The testator died on the 25th of December, 1779. In the year 1805 the trustees sold the mill property, and invested the proceeds in 3,570*l.* New Three per Cents. The testator's daughter Sarah married in 1809, and died in 1863. She had one daughter born in 1810, who only lived a few days. Her husband had predeceased her. The question was whether the effect of the trust for investment was to make the property descend as real estate to the heir-at-law of the infant, or whether her personal representative was entitled to it.

The second question was on a codicil to the will of John Whitfield, dated the 22nd of July, 1808, whereby he directed that the several legacies and bequests by his will given and bequeathed should be paid by his executors in proportion and according to the deficiencies, if any, that might happen to be in his real and personal property, and that each of his said legatees should respectively bear a proportionable share in such deficiency, and he confirmed his will in all other respects. The question was whether this codicil constituted the legacies given by the will a charge upon the testator's real estate.

Selwyn, Q.C., Cole, Q.C., Southgate, Q.C., E. F. Smith, Q.C., Lewin, Chitty, A. T. Watson, and Rowcliffe, appeared for the various parties.

LORD ROMILLY, M.R., as to the first question said—The conversion of the property took place in 1805. The infant was not born till 1810, and became entitled on her birth to the 3,570*l.* Three per Cents. She died a few days afterwards while the property still remained in the condition of personalty. The trustees had no power after her death to re-convert it. It belonged to the personal representative of the infant. There must be a declaration that in the

events which have happened the infant became entitled to it as personal estate. On the second question his Lordship said—In my opinion this is a charge on the real estate of all the legacies. The codicil amounts to a declaration of the testator's intention to have the legacies paid proportionately out of his real and personal estate.

KINDERSLEY, V.C., July 2, 1866.

HENDERSON v. DODDS.

14 W. R. 908; L. R. 2 Eq. 532; 14 L. T. 752.

See, *Ferguson v. Gibson*, [1872] E. R. A.; 41 L. J. Ch. 640; L. R. 14 Eq. 379 (V.C.).

Practice—Costs as between solicitor and client—Priority of costs—Creditor and devisee.

EXECUTOR AND ADMINISTRATOR.—*Where, in a creditor's suit, the estate is insufficient to pay the debts and the costs of suit, the Crown, as between a creditor plaintiff and defendant devisee, will only give costs as between party and party, and the plaintiff is not entitled to his costs in priority to the defendants, but he is entitled to costs as between solicitor and client against the other creditors.*

This case came on upon further consideration, and the only questions were whether the plaintiffs were entitled to their costs as between solicitor and client, and in priority to the defendants.

The suit was instituted in April, 1853, by summons to administer the personal estate of James Dodds, who was a shareholder in the North of England Banking Company, and died in October, 1837, possessed of shares in the company. By his will, dated in September previous, Dodds left certain real estate to his sister and other persons, and charged the same as therein mentioned. His executors continued to hold his shares, and the bank, having ceased to carry on business in March, 1847, was ordered to be wound up in November, 1848, and the plaintiffs were appointed official managers. Various calls to a large amount were made, and the administration summons being taken out, the whole personal estate was exhausted in payment of such calls; and the winding up being in the Rolls Court, orders were made declaring the real estate liable to such calls, whereupon this bill was filed by the plaintiffs as official managers, for a mortgage or sale of the real estate, and for a receiver, and praying that, so far as might be necessary or proper, this bill might be taken as a bill of the plaintiffs, on behalf of themselves, and all others the creditors of James Dodds who should come in and contribute to the expenses of the suit and of the proceedings under the summons, and the devisees and executors were made defendants. It appeared by the Chief Clerk's certificate that the plaintiffs were the only creditors, and that their debt was about 1,200*l.*, and the total estate about 1,800*l.*

Osborne, Q.C., and *Field*, for the plaintiffs, contended on the authority of *Tipping v. Power* (1 Hare, 408), that they were entitled to their costs in priority to the defendants, the devisees. The suit had been a very expensive one, by reason that the defendants to it had thrown every obstruction in the way: some of the defendants were in Australia, and every possible technical objection had been taken. They also contended that in the case of an estate being deficient to pay a debt the plaintiffs were always entitled to their costs between solicitor and client as a debt, as a sort of make-weight for the loss they sustained: *Thomas v. Jones* (8 W. R. 328; 1 Dr. & Sm. 184).

Toller, Q.C., and *Dickinson*, for the heir of the devisee, submitted that *Tipping v. Power* was a case of a mortgagee, and of course he got his costs in priority: *Grant v. Taylor* (2 Hare, 413). There was no difference between the case of a devisee and that of the heir: *Wetenhall v. Dennis* (12 W. R. 66; 33 Beav. 285).

Rasch, for two devisees, took the same line of argument, insisting that *pro hac vice* they were trustees, and entitled to their costs in priority to the plaintiffs.

Field, in reply, contended that, although there were some words in the judgment in *Tipping v. Power* inconsistent with the marginal note, the decree, which was set out fully, showed that the marginal note was correct. That case was identical with this with reference to the application of the general assets.

KINDERSLEY, V.C.—Looking at the judgment and the decree in *Tipping v. Power* (*suprà*) it appears that that was not merely a mortgagee's suit, but a suit for administration, and, moreover, was by an equitable mortgagee, whose only remedy was to come to the Court and have the estate sold, and the proceeds applied in payment of his principal, interest, and costs, and, if there was any deficiency, out of the general assets. In applying the mortgaged property, supposing it not enough, there must first be payment of the mortgagee's costs of suit and the interest, and then of the principal, so that, if there is an insufficient estate, and the deficiency remains unsatisfied, it would not be costs or interest, but so much of the principal which was unsatisfied, and thus the costs of suit were treated as costs which the mortgagee had a right to be paid as mortgagee. *Wetenhall v. Dennis* was a legatees' suit which resulted in an administration of the estate, not a case for payment of debts, but legacies. The Master of the Rolls seems to have proceeded on the footing which is a reasonable one, that where you are administering an estate, all the persons properly before the Court ought to stand *pari passu*, therefore it appears to me what ought to be done here is, the plaintiffs, as creditors, should have their costs taxed as between party and party, and also as between solicitor and client; the defendant's costs should be taxed as between party and party; the costs of all parties paid out of the fund as between party and party *pari passu*, and if anything is left of the fund that will belong to the plaintiffs, if not more than sufficient to pay this debt, and they will be entitled to payment thereof of the difference of the amounts of their costs as taxed as between party and party and solicitor and client as they would have been as against other creditors there had been any.

KINDERSLEY, V.C., July 3, 1866.

TRAVIS v. TAYLOR.

14 W. R. 909; 12 Jur. N.S. 791.

Will—Construction—Period of division—Statute of Distributions.

WILL.—*E. T. gave all her realty and personalty to trustees, to pay the income to H. for life, and then to sell and pay three annuities, and pay the residue of the income to C. T. for life, and after her decease, in trust for all the children she should leave at her decease equally (subject to the annuities); and in case she should leave only one, to such one. And in case she should die without leaving issue, then the whole of the estate to go to and belong to such*

persons as should then be her (the testatrix's) next-of-kin in a course of administration, according to the Statute of Distributions. C. T. never had a child, though she married:—Held, that the period of distribution was the death of C. T.

The question in this suit turned upon the construction of the will of Elizabeth Taylor, dated 20th March, 1840. The testatrix, after directing payment of her debts, funeral and testamentary expenses, out of her personal estate, and, if insufficient, charging her real estate therewith, gave all her real and personal estate, and all the residue and remainder thereof, to Isaac Faulkner, Isaac Hudson, and Helen Taylor, on trust to place the surplus of her personalty out at interest in Government or real security, and call in and vary the investment at their discretion, and pay the income to Helen Taylor (his sister) for life, and after her decease sell and convert his real and personal estate and invest, with power to vary securities, and out of the income pay 10*l.* a year to each of her three nephews, and during the life of her niece Catharine Taylor pay the residue of the income to her during her life, including such of the annuities as should fall in. And after the decease of her said niece, the will continued, "in trust for and for the benefit of all and every the several children which my said niece Catharine Taylor shall leave at the time of her decease, share and share alike (subject, nevertheless, to the payment of the several annuities hereinbefore by me directed to be paid to my said nephews during their natural lives as aforesaid), and if my said niece shall leave only one such child, *then* to such an only child, his or her heirs, executors, or administrators; and if my said niece shall happen to die without leaving lawful issue, as aforesaid, that *then* the whole of my said estate and effects so directed to be placed out at interest or real or Government security as aforesaid, shall go and belong to such person or persons as shall then be my next-of-kin in a course of administration according to the statute for the distribution of intestates' personal effects." The testatrix then declared that the life interest of Catharine Taylor should be for her sole use, and that her interest and the annuities should be forfeited if anticipated or alienated, and appointed her trustees executors. There was then a codicil postponing the annuities and the gift to Catharine Taylor until six months after the death of Helen Taylor.

The testatrix died 9th of April, 1842, and left Helen Taylor, Catharine Taylor, and the annuitants, surviving; which annuitants died respectively in 1849, 1851, and 1860. Helen Taylor died in May, 1854, devising her trust real estate to Catharine Taylor and George Taylor, and George Kinsey. Catharine Taylor married Benjamin Brooke and died 15th May, 1863, without ever having had a child, and the debts of the testatrix having been paid, questions arose under the last clause in the will as to the period of distribution, and the plaintiff, as one of her next-of-kin, and also of Helen Taylor, filed this bill.

Baily, Q.C., and *F. O. Haynes*, for the plaintiff, contended that the words of the will must receive their natural signification, and that the period of division was the death of Catharine Taylor.

Osborne, Q.C., and *Eddis*, for the trustees, took no part in the argument.

Bazalgette, Q.C., and *Rowcliffe*, for the next-of-kin living at the death of Helen Taylor.

Glasse, Q.C., and *Everitt*, for next-of-kin living at the death of the testatrix.

Authorities cited: *Jarm. on Wills*, 703, last edit.; *Cable v. Cable* (16 Beav. 507); *Wheeler v. Adams* (1 W. R. 473; 17 Beav. 417); *Boys v. Bradley* (1 W. 143; 10 Hare, 389; s. e. 1 W. R. 362; 4 D. M. G. 58); *Pinder v. Pinder* (28 Beav. 44); *Downes v. Bullock* (25 Beav. 54); *Chalmers v. North* (8 W. R. 426; 28 Beav. 175); *Lucas v. Brandreth* (28 Beav. 273-4); *Lees v. Massey* (9 W. R. 425; 3 D. F. J. 113).

KINDERSLEY, V.C. (after referring to the clauses in the will and the different cases cited)—Upon all these authorities, and having regard to the special words of this will, I am of opinion that there is a clear expression of the intention of the testatrix that the next-of-kin should be ascertained and the property divided at the time different from that of her own death, viz., the death of the tenant for life, Catharine Taylor, and therefore that the general rule does not apply. The persons, therefore, who would have been the next-of-kin at the period in question, supposing the testatrix had then died, are intended, and are entitled to take it among them.

STUART, V.C., June 22, 23, 1866.

ATTORNEY-GENERAL v. WILKINSON.

14 W. R. 910; L. R. 2 Eq. 817; 14 L. T. 725; 12 Jur. N.S. 593.

Discussed, *Humphrey v. Humphrey*, 1877, 36 L. T. 91 (V.C.).

Feme covert—Will—Power.

POWERS.—A feme covert having a testamentary power of appointment over personalty, made her will in December, 1822, whereby, without referring to her power or to the property subject to it, she gave "and bequeathed unto her dear husband, James Attfield, all her property and estate whatsoever and wheresoever, and of what nature, kind, or quality soever the same might be":—Held, in the absence of any evidence of there being other property to which the will could apply, that the power was well executed.

By an indenture of settlement dated 2nd May, 1817, Harriet Watson, on her marriage with James Attfield, transferred the sum of 3,100*l.* to trustees, in trust that the interest and dividends thereof should be paid to her during her life for her sole and separate use, and in case of her decease before the death of the said James Attfield, then to the said James Attfield for his life, and with certain trusts in favour of the issue of the marriage. In default of issue, and in the case of the death of the said Harriet Watson in the lifetime of her said husband, the said interests and dividends were settled in trust for such persons and for such purposes as the said Harriet Watson should "by her last will and testament or any codicil or codicils thereto or any writing in the nature of or purporting to be her last will and testament or codicil to be respectively signed, and published by her in the presence of two or more credible witnesses direct or appoint," and in default of appointment upon the usual trust for the next of kin under the Statutes of Distribution.

There was no issue of the marriage, and Harriet Watson died, leaving her husband James Attfield surviving, having previously made her will dated 15th December, 1822, and attested by two witnesses in the following words:—"I give and bequeath unto my dear husband James Attfield, all my property and estate, whatsoever, and wheresoever, and of what nature, kind, quality, soever the same may be. I do hereby give and bequeath the same unto the said James Attfield, his executors, administrators, and assigns to and for his and their own use and benefit absolutely. And I hereby make, ordain, constitute, and appoint my said husband James Attfield, to be executor of this my last will and testament."

The question now raised by the next-of-kin of Harriet Watson was whether the said will was a valid execution of the power contained in the said indenture of settlement or not. There was no allegation in the bill to the effect that the testatrix had not other property other than that settled on her marriage.

Malins, Q.C., and Tripp, for the plaintiff, referred to *Lovell v. Knight*

(3 Sim. 275); *Lempriere v. Valpy* (5 Sim. 108); *Curteis v. Kenrick* (9 Sim. 443); *Davies v. Thorns* (3 De G. & S. 347); *Evans v. Evans* (5 W. R. 170; 23 Beav. 1); *Shelford v. Acland* (5 W. R. 169; 23 Beav. 10).

Greene, Q.C., and *Rasch*, for the representatives of the trustees of the settlement, and

E. F. Smith, Q.C., and *L. Yate Lee*, for an executor of James Attfield, were not called upon.

STUART, V.C.—I think the last authority cited is the only one in point. Wherever there are no means of satisfying the words of a will except by considering it an execution of a power, the Court has in no case decided otherwise. The cases of *Evans v. Evans*, and *Shelford v. Acland*, before the Master of the Rolls, are cases where the Court laid hold of some very small words referring to other property and was induced to hold that the will did not, in these cases, operate as an execution of the power. But I observe that Lord St. Leonards notices these two cases in the last edition of his book on powers, and expresses his opinion that it would be no violation of principle if the Court had decided them just the other way. The case in the note to *Curteis v. Kendrick* is decided on sound and intelligible principles, and this case if of the same kind. If the will does not operate as a power it has no operation. The bill must be dismissed, but without costs.

STUART, V.C., June 27, 1866.

BROWN v. TANNER.

14 W. R. 911; L. R. 2 Eq. 806; 14 L. T. 825: reversed, [1868] E. R. A.; 37 L. J. Ch. 923; L. R. 3 Ch. 597; 18 L. T. 624; 16 W. R. 882 (L. JJ.).

Mortgage of ship and general assignment of freight—Subsequent assignment of particular freight—Notice.

SHIPPING. A. IX.—*The assignee of the freight of a particular voyage, who has given notice of his security to the charterers, has a better equity than a prior registered mortgagee of the ship, who has taken a general assignment of the freight as additional security, but has omitted to give notice thereof*

Semble.—*This is so notwithstanding the mortgage deed contains a recital of the general assignment.*

This bill was filed to ascertain the respective rights of the plaintiff and defendant to certain freight earned by a vessel called the *Pharamond*, under the following circumstances:—

The owner, John Hall, being indebted to the defendant Tanner in a sum of 2,000l., executed a mortgage of the vessel to him, dated the 25th September, 1862, which was duly registered on the following day in the form required by the Mercantile Shipping Acts.

By an indenture of the same date, which indenture was recited in the said statutory mortgage, the said John Hall executed a general assignment to the defendants of all policies effected on the said vessel, and all freight earned or to be earned by her, as a further security for the payment of the said mortgage moneys.

By a charter-party, dated the 27th November, 1863, the *Pharamond* was chartered from Hall by Messrs. Philips, King, & Co., to proceed from Algoa Bay or the Mauritius, in pursuance of which she loaded at one or both of the said

ports, and arrived in London on the 1st of September, 1864. Anterior, however, to her arrival, viz., on the 20th May, 1864, a deed of assignment of that date was executed by Hall, by which he assigned all the freight and earnings of the said vessel for the said voyage to the plaintiff Brown, as security for money owing upon certain overdue bills of exchange.

On the 16th July, 1864, Brown's solicitors gave a written notice of the assignment to Philips, King, & Co., the charterers. The defendant Tanner had not given notice of his separate security, he, as alleged, having, under the circumstances, no possible opportunity of doing so.

On the arrival of the vessel in London, but not until her cargo had been partially discharged, Tanner entered into possession.

The freight in the hands of the charterers being claimed by both parties, the plaintiff filed the present bill, praying that his charge on the said freight might be declared to be in priority over that of the defendant.

Malins, Q.C., and Druce, for the plaintiff.—(1.) The defendant has clearly no lien on the freight unless he takes possession on the completion of the vessel's voyage. This is generally held to be at some time previous to breaking bulk: *Gardner v. Cazenove* (5 W. R. 196; 1 H. & N. 423); *Cato v. Irving* (5 De G. & Sm. 225); *Kerswill v. Bishop* (2 C. & J. 529). (2.) The plaintiff is an assignee of freight without notice of any prior charge, and having given notice of his incumbrance to the charterers, he has a better title than the defendant, a previous assignee who has given no notice. The only security of the defendant, of which the plaintiff had notice, was the registered statutory mortgage. This had reference to the ship only, and not to the freight. The assignment of freight of even date was not registered, and the plaintiff knew nothing of it.

E. K. Karlake for the defendant.—The circumstance of my taking possession or not before breaking bulk is immaterial. I have a separate security over the freight. [STUART, V.C.—You need not trouble yourself about that question. Your difficulty is as to your having omitted to give notice of your separate security.] I am safe as to that upon three grounds—(1.) It was impossible to give notice at the time of taking that security, for there was no one to whom notice could be given. The defendant could not tell when the vessel might be chartered or otherwise, without keeping an agent always on board, which would have been out of the question. But (2) the plaintiff had constructive notice of the defendant's assignment, inasmuch as it was recited in the statutory mortgage of the ship; and one having notice of a deed is held by the rule of this Court to have notice of all to which it refers: *Hall v. Smith* (14 Ves. 426); *Peto v. Hammond* (30 Beav. 495). (3) Notice was not required, for until freight is actually earned, there is only a bare possibility of there being anything upon which notice can operate. Even if it is morally certain that there will be money in the hands of an agent in a few days, there is still, however, nothing upon which notice can operate until the money is actually in the agent's hands: *Holt v. Dewell* (4 Hare, 446); *Buller v. Plunkett* (9 W. R. 190; 1 J. & H. 441); *Webster v. Webster* (10 W. R. 503; 31 Beav. 393); *Somerset v. Cox* (33 Beav. 634).

Cotton, for the charterers, took no part in the argument.

STUART, V.C., without calling for a reply.—I think that the right of the mortgagee as against the right claimed by the plaintiff as assignee of the freight of this particular voyage cannot prevail. That freight to be earned by a particular voyage can be assigned, although there is a mortgage covering the whole of the ship and freight generally, is beyond a doubt. It was so decided in *Lindsay v. Gibbs* (4 W. R. 788; 22 Beav. 522). It is of no force to say that notice of the existing mortgage of the defendant effects the assignee of this particular freight in any degree. The collateral assignment was an assignment to Tanner of all freights to be earned after 1862. It is impossible to say that

such an assignment can prevail against the assignee of the freight of a particular voyage, when notice of that assignment was given before the mortgagee exercised his right to take possession. If a mortgagee does not choose to exercise his rights as mortgagee, or as assignee of all the freight, until after an assignment of the freight of a particular voyage has been made, his right cannot prevail against an assignee who has given notice. The decree must be for the plaintiffs with costs. The charterers will also get their costs from the plaintiff, who will recover them from the defendant. The charterers will pay over the freight after deducting all proper disbursements.

STUART, V.C., June 30, 1866.

HUDSON v. BENNETT.

14 W. R. 911; 14 L. T. 698; 12 Jur. N.S. 519.

Costs—Infringement of trade mark—Offer by defendant before the hearing.

COSTS. TRADE MARK.—*Where the plaintiff, after obtaining an interim injunction, refused an offer of the defendants to accede to an injunction in the terms of the prayer of the bill, and to pay the costs of the suit, requiring to be paid the expenses of apologetic advertisements:—Held that, on prosecuting the suit to a hearing, they were not entitled to their costs.*

The bill in this case was filed by the plaintiffs, carrying on business as bottle beer merchants, under the title of Dawkes & Co., against the defendant, to restrain the infringement of their trade mark, and for an account of the profits, &c., in the usual form. An *interim* injunction, dated 9th November, 1865, had been granted by Vice-Chancellor Wood, and the defendant, without absolutely admitting his trade mark to be an infringement of the plaintiffs, but, as he alleged, to terminate the litigation, offered to consent to a decree granting an injunction in the terms of the plaintiffs' prayer to the bill, and to pay the costs of the suit as between solicitor and client. This offer did not wholly meet the plaintiffs' demands, who required an apologetic advertisement to be inserted in the newspapers at the defendant's expense. To this the defendant would not accede, and the plaintiffs now brought the case on for hearing. Under these circumstances the case virtually came on a question of costs.

Malins, Q.C., and *Mackeson*, for plaintiffs, argued that they were entitled to pursue their case to a hearing, the negotiations for a compromise having gone off. They cited *Burgess v. Hately* (26 Beav. 249).

Bacon, Q.C., and *J. E. Woodroffe*, for defendant, were not called on.

STUART, V.C.—In this case the proposal of the defendant ought, in my judgment, to have been agreed to. There seems to me no excuse for the refusal of the defendant's offer, and therefore each party must bear their own costs.

Wood, V.C., June 22, 1866.

SMITH v. GREENHILL.

14 W. R. 912.

Will—Construction—Trust and trustee—Trusts by reference.

WILL.—A testatrix, having by her will directed her trustees to stand possessed of a fifth of her residuary estate upon trust for a woman for life, and after her death upon trust for her children, directed them to stand possessed of three other fifth parts upon such trusts for three other women respectively as should correspond with the trusts thereinbefore declared concerning the fifth part or share of the first-mentioned woman:—Held, that the three women took only life interests, with remainder to their respective children, in the same manner as the first-mentioned woman and her children took.

This was a common administration suit, and it came on now on further consideration.

The testatrix in the cause, Elizabeth H. Eykyn, by her will dated 13th March, 1863, devised and bequeathed all her real and personal estate to trustees in trust to sell and invest, and to stand possessed of the investments, as to one-fifth part thereof to pay the interest, &c., to Susan Bishop for her separate use for life, and after her death to stand possessed of the said fifth part upon certain trusts in favour of her children. As to another fifth part, the testatrix directed her trustees to stand possessed thereof "upon such trusts for Elizabeth Greenhill as should correspond with the trusts thereinbefore declared concerning the fifth part or share of the said Susan Bishop." Similar trusts were declared concerning two other fifth parts in favour of Charlotte Bennett and Annie Falls.

The question before the Court was as to the extent of the interest of Elizabeth Greenhill, Charlotte Bennett, and Annie Falls, in the fifths in which they were respectively interested; that is to say, whether (1) each of them took a fifth absolutely, or (2) merely a life interest for her separate use, with remainder to her children upon the trusts declared in favour of Susan Bishop's children.

Hinde Palmer, Q.C., and *Lewin*, in support of the latter view, cited the following cases: *Milsom v. Awdry* (5 Ves. 465); *Ross v. Ross* (2 Coll. 269); *Goodman v. Goodman* (1 D. & S. 695).

Rolt, Q.C., *Willcock, Q.C.*, *W. M. James, Q.C.*, *Surrage, Bedwell, Begg*, and *Simmons*, also appeared.

Wood, V.C., said that if authority was necessary in support of the view that these ladies were entitled only to life estates, and that their children would receive the same benefits under the will as were given to Mrs. Bishop's children, the cases cited were amply sufficient. Even without authority, however, he should have taken that view.

The following declaration would be made:—Declare that, according to the true construction of the testatrix's will, the several parts or shares which are given by her upon such trusts for Elizabeth Greenhill, Charlotte Bennett, and Annie Falls respectively as shall correspond with the trusts by the will declared of the fifth part or share of Susan Bishop, are subject to the same limitations for their respective benefit for life, and for that of their children in remainder, as are declared of the said share of the said Susan Bishop.

Wood, V.C., June 28, 29, 1866.

SABLICICH v. RUSSELL.

14 W. R. 913; L. R. 2 Eq. 441.

Interpleader—Proceedings against ship—Captain.

INTERPLEADER.—*Where proceedings have been commenced by different persons against a ship, a court of equity will not interfere at the suit of the captain. Proceedings against the ship affect the owners, and not the captain.*

This was an interpleader suit. The plaintiff was captain of a vessel which had brought over consignments of oil cake in barrels. Some of the distinguishing marks or labels having been lost, 270 of these barrels were claimed by both defendants. Plaintiffs had parted with some of them to each of the defendants, but asserted that they were obtained from him by fraud. The ship had been arrested by order of the Admiralty Court, at the suits of the two present defendants, and had since been released on bail. The bill asked that the defendants might interplead, alleging that the defendants threatened and intended further proceedings against the plaintiff.

C. Hall, for the plaintiff, moved to restrain further proceedings against him.

Rolt, Q.C., and *E. K. Karlake*, for the defendant *Gilbert*.—This is not a case for interpleader. The suit in the Admiralty Court is *in rem* against the ship, not against the captain, who cannot be damned. The plaintiff has caused the embarrassment. He will not be *bis vexatus*.

Dickinson, for defendant *Russell*, also contended that this was not a case for interpleader. The plaintiff had voluntarily parted with a portion of the goods.

C. Hall in reply.—Although the suit in the Admiralty Court is against the ship, still, where is a dispute between third parties, the proper proceeding is to file a bill of interpleader. These proceedings in the Admiralty will not determine the rights between the parties. I am a stakeholder and innocent, and therefore entitled to be protected.

Wood, V.C., said that he had no right to interfere with the proceedings in the Admiralty Court. As far as they have gone at present they were only against the ship, not against the master; the real defendants were the owners. The proceeds, the value, of the ship were liable, therefore the loss would fall on the owners, not on the captain. It would seem that the whole right could be tried in the Admiralty Court, and very advantageously. However, he did not pursue that inquiry further, as the present proceedings were against the ship. *Mr. Hall* asked to be protected against the possibility of an action against the captain himself. The difficulty was whether this was a case for interpleader. It could not be said to be a clear and neat case of accident. The captain had allowed one party to have forty casks, and the other to have nine. This was a sort of acknowledgment of title. *Russell* might say the mistake in the marks was the captain's fault, for the captain ought to have taken more care. He might be liable to damages for non-delivery. His Honour doubted whether at the hearing this might not turn out to be no case of interpleader. The motion must be refused with costs.

[HOUSE OF LORDS.]

June 15, 16, 19, 22, 26, July 3, 4, 1865, May 11, 1866.

RAMSDEN v. DYSON.

14 W. R. 926; L. R. 1 H.L. 129; 12 Jur. N.S. 506.

Distinguished, *Bankart v. Tennant*, [1870] E. R. A.; 39 L. J. Ch. 809; L. R. 10 Eq. 141; 23 L. T. 137; 18 W. R. 639 (V.C.). Adopted, *Plimmer v. Wellington Corporation*, [1884] E. R. A.; 53 L. J. P.C. 105; 9 App. Cas. 699; 51 L. T. 475; 49 J. P. 116 (P.C.). Distinguished, *Weller v. Stone*, [1885] E. R. A.; 54 L. J. Ch. 497; 53 L. T. 361; 33 W. R. 421 (C. A.). Adopted, *McManus v. Cooke*, [1887] E. R. A.; 56 L. J. Ch. 662; 35 Ch. D. 681; 56 L. T. 900; 35 W. R. 754 (Ch. D.). Referred to, *Proctor v. Bennis*, [1888] E. R. A.; 57 L. J. Ch. 11; 36 Ch. D. 740; 57 L. T. 662; 36 W. R. 456 (C. A.); *In re Clarke*, 1889, 60 L. T. 335 (Q.B. D.). Referred to, *Wimbledon & Putney Commons Conservators v. Nicol*, 1894, 10 T. L. R. 247 (K.B. D.); *Lala Beni Ram v. Kundan Lall*, 1899, 26 L. R. Ind. App. 58 (P.C.); *Ahmad Yar Khan v. Secretary of State for India*, 1901, 28 L. R. Ind. App. 211 (P.C.). Referred to, *Cloutte v. Storey*, [1911] E. R. A.; 80 L. J. Ch. 193; [1911] 1 Ch. 18; 103 L. T. 617 (C. A.). Considered, *Ramsden v. Inland Revenue Commissioners*, [1913] E. R. A.; 82 L. J. K.B. 1290; [1913] 3 K.B. 580 n.; 109 L. T. 105 (K.B. D.).

Landlord and tenant—Tenant-right—Estate at will—Building lease—Parol representations of landlord—Expenditure by tenant—Usage of the estate.

WAIVER AND ACQUIESCENCE.—In 1844 J. T. wished to build a house, &c., upon a piece of land then belonging to Sir J. R., the grandfather of the appellant, in fee. The land was allotted to him, and a certain ground-rent was agreed upon, but no lease or agreement for a lease was executed, according to a usage which prevailed in the R. estates, by which persons, without having leases granted to them, but upon an understanding that leases for sixty years, renewable every twenty years, would be granted to such persons whenever they should require such leases, were allowed to build on the said estates. Relying on this usage, and the assurances and promises of the duly authorised agents of the R. estates that he could have such lease whenever he pleased, and that so long as he paid his ground-rent he was as safe without a lease as with one, as he would never be disturbed in his possession, J. T., under the superintendence of these agents, expended large sums of money in erecting buildings on the land allotted to him, and continued to pay the annual ground-rent, as agreed upon:—Held (LORD KINGSDOWN dissentiente), reversing the decision of the Court below, that J. T. was not entitled to such lease, and that the tenancy so created was at most a tenancy from year to year, which might be determined in the usual way.

Per the LORD CHANCELLOR.—If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. But to raise such an equity two things are required—first, that the person expending the money should suppose himself to be building on his own land; and, secondly, that the real owner, at the time of the expenditure, knows that the land belongs to him, and not to the person expending the money in the belief that he is owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land, with the benefit of all the expenditure made on it. It follows, as a corollary from

these principles—or perhaps it would be more accurate to say it forms part of them—that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end.

If any one makes an assurance to another, with or without consideration, that he will do, or will abstain from doing, a particular act, but refuses to bind himself, and says that for the performance of what he has promised the person to whom the promise has been made must rely on the honour of the person who has made it; this excludes the jurisdiction of courts of equity no less than that of courts of law.

This was an appeal from a decree made in a cause of *Thornton v. Ramsden* by his Honour Vice-Chancellor Sir J. Stuart, dated the 2nd March, 1864, upon a question as to the right of Joseph Thornton, the plaintiff in that suit, as against the appellants, the defendants in that suit, to have a lease granted to him of two several properties, part of the Ramsden estates, being a dwelling-house and outbuildings, &c., at Paddock, in the parish of Huddersfield, for a term of sixty years, renewable every twenty years, according to the system of tenure called and known as "tenant-right tenure," or "at will" for many years past established, and known in Huddersfield and the neighbourhood, being a system of erecting buildings upon the Ramsden estates by person without having leases granted to them, but upon the understanding that leases for sixty years, renewable every twenty years, would be granted to such persons when they required such leases. Promises and assurances were made to Joseph Thornton by the agents of the Ramsden estates that he could have such a lease as above described whenever he required it, and on the faith of those statements Thornton erected buildings, &c., under the superintendence of those agents. The learned Vice-Chancellor made a decree declaring that Thornton was entitled to have such a lease granted to him, and against this decree the present appeal was brought.

On the 19th of May, 1864, after the said decree, Thornton was duly adjudged a bankrupt, and the respondents, John Buckley and James Bates were duly appointed assignees of his estate and effects on the 8th of June, 1864. The respondent Lee Dyson was a mortgagee of the two properties under Thornton.

The facts of the case, together with the arguments of counsel, and the authorities cited on both sides, are fully stated in the report of the case of *Thornton v. Ramsden*, in the Court below (12 W. R. 850), and are besides carefully embodied in the judgment of the Lord Chancellor.

Sir R. Palmer, A.G., Bacon, Q.C., and Chapman Barber for the appellants.

Malins, Q.C., Daniell, Q.C., and Malden for the respondents.

May 11.—LORD CRANWORTH, C.—This was an appeal from a decree of Vice-Chancellor Stuart, bearing date the 2nd of March, 1864, whereby it was declared that the plaintiff Joseph Thornton, was entitled to have a lease or leases granted to him of two properties at Paddock, in the pleadings of the cause mentioned at a ground-rent or ground-rents double the amount of the rent then payable for the same respectively, renewable at the times and on the terms therein mentioned, and it was ordered that the appellant Sir John William Ramsden, should grant to the said plaintiff such lease or leases accordingly.

The bill, which was filed by Joseph Thornton and by the respondent Dyson claiming as an incumbrancer under him, stated the circumstances in which Thornton had become possessed of the land in question, and which

they contended entitled them on general principles of equity to claim from the appellant, Sir John William Ramsden, a lease or leases, the particular terms of which I will not at present refer to. The plaintiffs did not allege that there was any contract written or verbal for granting any such lease, nor was relief asked or given on the ground of specific performance of a contract. But His Honour thought that though there was no contract, and so that no case was made for specific performance, yet on general principles of equity the plaintiff's were entitled to the relief which they asked, and he made a decree accordingly.

The property in question consists of a house and out-buildings, forming part of the town of Huddersfield, or its suburbs. The late Sir John Ramsden, the grandfather of the appellant Sir John William Ramsden, was in, and prior to, the year 1780, seised in fee-simple of a large tract of land, which has since that time been built upon, and which now forms a large part of the town of Huddersfield.

John Charles Ramsden, the eldest son of Sir John, died in his father's lifetime, leaving the appellant, Sir John William Ramsden, his only son and heir-at-law, and Sir John himself died in 1839, leaving the said appellant, his grandson, then only eight years of age.

Sir John, by his will dated in 1838, and made after the death of his son, John Charles Ramsden, devised all his estates, except certain estates which had been settled on the marriage of his said son, but which excepted estates do not include any part of the property in question in this cause, to the use (subject to several charges and trust terms) of his grandson the appellant for life, with remainder to his first and other sons in tail male. There were leasing powers in the will to which I need not at present advert. Sir John resided at Byram, about thirty miles from Huddersfield, which latter place he rarely visited. He confided the management of that property to his steward or agent Mr. John Bower, who resided at or near Byram, but who was accustomed to visit Huddersfield twice a-year at audits, for the purpose of receiving the rents and looking over the property.

The mode in which this Huddersfield property was managed was peculiar. A book or roll was kept of the tenants, and as the town became extended, any person desiring to take land for the purpose of building a house used to apply to the agents of Sir John for the land he wanted. This was then marked out for him, he erected his buildings, the ground rent was fixed, and his name was afterwards entered on the roll as a tenant, and he paid his rent at the usual day or days of audit. If he wished to sell his house he and the purchaser used to attend on the agent and surrender, or purport to surrender, his property into the hands of Sir John, and the name of the purchaser was substituted for that of the original tenant. The same course was followed on a mortgage, only that in that case both names, that of the mortgagor and mortgagee, were entered as tenants on the tenants on the tenant roll. In the event of death the name of the legatee or next of kin was substituted for that of the deceased. Persons thus holding land were popularly described as holding by tenant-right. But besides these tenants by tenant-right there were other tenants who obtained regular leases, and the universal, or nearly universal, form of lease was a lease for sixty years, renewable for ever at the end of every twenty or forty years, on payment of a stipulated fine. These tenants holding by lease were entered on the same tenant roll as the tenants by tenant-right, but a memorandum was made against their names, signifying that they held by lease, and the rent at which they held was always at a considerably higher rate than that at which the other tenants held.

The plaintiff Thornton took the two pieces of land, the subject of this suit, on the tenant-right tenure, the one in the year 1837, in the lifetime of Sir John, the other in the year 1845, after his death. The circumstances connected with his taking the land in 1837 are thus stated by him in the bill. He says that in the year 1837, being desirous of erecting a dwelling-house

on a piece of high ground at Paddock, part of the Huddersfield property, devised by the will of Sir John, he applied to Mr. Joseph Brook (whom he describes as one of the duly authorized agents of Sir John, with respect to the management and letting of the Ramsden estates, and as transacting all the business relating thereto in the absence of Mr. Bower), and stated to him his desire to become tenant of the piece of ground in question, as he wished to erect a dwelling-house thereon for himself. Brook, he says, informed Bower of what had thus passed, and Bower, having afterwards come over to Huddersfield to an audit, went with Thornton to Paddock, accompanied by Thomas Brook, a son of Joseph Brook, who was then about nineteen years of age, and who acted for his father. The bill then states that Thornton pointed out to Bower the land he wished to have for his house, and that Bower assented to the application, saying that he would leave to Joseph Brook the staking out of the exact quantity of land to be taken. The precise quantity of land was afterwards agreed on between Thornton and Joseph Brook, and the ground rent was fixed by Brook at an annual sum of 4*l.* Thornton then built his house, and has ever since paid the reserved rent of 4*l.* per annum.

The bill then alleges that while the building of the house was in progress, and when it was nearly completed, Joseph Brook, accompanied by Thornton and his father, came on to the land, and on that occasion Thornton consulted Joseph Brook as to the prudence of his taking a lease of the land and buildings, when Joseph Brook stated it would be folly in him to take a lease, that he was equally safe without one, and that he could get a lease whenever he wanted it, the lease referred to being, as Thornton alleges, a lease for sixty years, renewable every twenty years, on payment of two years' ground-rent as a fine, no other lease then existing or being then known on the Ramsden estates, at Huddersfield. No paper or document was signed by Thornton, and he alleges that he took the land relying on what had been said by Joseph Brook, and on the belief universally entertained at Huddersfield, and encouraged by Sir John and his agents that he could have a lease of it for sixty years, renewable every twenty years, whenever he might think fit, and that he would never be disturbed so long as he paid his 4*l.* ground-rent, and in the knowledge that very many other persons who had taken plots of land and built on them on the same belief and assurance had, on application, had leases granted to them for sixty years, renewable every twenty years.

The book or roll of the tenants of the Huddersfield property was kept at Longley Hall, an old mansion-house, situate on part of the property; and the bill alleges that, after Thornton had taken the piece of land in question, he was entered in that book as the tenant thereof, at a yearly ground-rent of 4*l.*

Mr. Bower died in the month of May, 1844, and on his death the trustees of the will of Sir John appointed Mr. George Loch, now one of Her Majesty's counsel, to succeed him as auditor and manager of the estates, and as he resided at a distance he appointed Mr. Alexander Hathorn to be the resident agent, subject to his control and superintendence. Alexander Hathorn resided at Longley Hall.

In this state of things the bill alleges that Thornton, finding himself, in the year 1845, inconvenienced for want of out-door offices, applied to Hathorn for a further piece of ground, and that the same was accordingly measured out for him by two persons acting under the said Thomas Brook, who had survived his father Joseph Brook, and was then one of the authorized surveyors of the Ramsden estates; that he, Thornton, then erected thereon, under the superintendence of Hathorn, the additional buildings which he wanted, and that after he had done so he received from Hathorn a letter, partly printed and partly written, fixing the ground rent for this additional land at 1*l.* 8*s.* 6*d.* per annum, which additional rent has been ever since regularly paid. The bill alleges that the money expended in building on the two pieces of land amounted to at least 1,850*l.*

On occasion of the first hiring, in 1837, no paper was signed by Thornton,

but on applying at Longley Hall, for the second piece of land, a paper containing a form of application was put before him for his signature as follows:—

“ Huddersfield, 16th June, 1845.

“ Gentlemen,—I beg to make application to you for a plot of ground, situate at Paddock, Huddersfield, on which I am desirous of building a mistal and other outbuildings, and which I am willing to hold under you as tenant-at-will, at such rent as you may think proper to fix.

“ I am, gentlemen, your most obedient servant,

“ To the trustees and guardians of Sir John William Ramsden, Baronet.”

This he signed, but, as he says, without considering its purport or effect, without being furnished with a copy, and without having had it explained to him, in the belief that it was a mere matter of course, and in the firm persuasion that he was to hold this second piece of land on precisely the same terms as to not being disturbed in the possession, and as to a sixty years' lease as those on which he held the other land.

These are the circumstances in which Thornton alleges that he became a tenant, first of Sir John Ramsden and afterwards of his devisees; and there can be no doubt that he thereby became at law a mere tenant from year to year. As to the first piece of land, on which he erected the principal buildings, he took it from Bower, as agent of Sir John Ramsden, at an agreed annual rent of 4*l.*, but without any stipulation as to the term for which he was to hold it. As to the second, he took it on written application that it might be demised to him as tenant at will. He paid for several years the rent of both pieces of land, and so had, at least, a tenancy from year to year. Notices to determine these tenancies were given by the appellant, Sir John William Ramsden, and ejectments were brought to recover possession. There being no legal defence to these actions, the present bill was filed by Thornton and by Dyson, who claimed as mortgagee under him, on the ground that Thornton, though at law a mere tenant at will, had an equitable right to a lease for sixty years, with a covenant for perpetual renewal on payment of certain periodical fines. Whether he has established this right is the question raised in the cause. The Vice-Chancellor was of opinion that he has, and so decreed accordingly.

It will be convenient to consider the case first as to the land taken in 1837, in the lifetime of Sir John. The decree proceeds on the ground that it would have been a fraud in Sir John to have refused to grant the lease demanded, and so that his grandson, the appellant, deriving title only as a volunteer through his will, is bound to do what it would have been a fraud in his grandfather not to have done.

It may be well to consider shortly what the principles of equity on this subject are. If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active, and to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. But it will be observed that to raise such an equity two things are required—first, that the person expending the money should suppose himself to be building on his own land, and, secondly, that the real owner at the time of the expenditure should know that the land belongs to him, and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land, knowing it to be mine, there is no principle of equity which would prevent my claiming the land, with the benefit of all the expenditure made on it. There would be nothing in my conduct active or passive, making it inequitable in me to assert my legal rights. It follows

as a corollary from these, or perhaps it would be more accurate to say it forms part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the lands and buildings when the tenancy has determined. He knew the extent of his interest and it was his folly to expend money upon a title which he knew would, or might, soon come to an end.

The appellants contend that it is within this principle that Thornton is brought. He acquired, they say, possession of the land in question as mere tenant at will, or from year to year, to Sir John, and if on that infirm title he thought fit to expend a large sum in building, there is no principle of equity which prevents Sir John or his devisees from asserting their legal rights by determining the tenancy, and so obtaining the benefit of his expenditure.

The present bill was filed, not controverting this general principle, but contending that there were special circumstances raising an equity in favour of the tenant, arising out of a long uniform course of dealing adopted on the Huddersfield estates, whereby persons taking land, though only as legal tenants at will, or from year to year, were led by Sir John to suppose, and did suppose, that they acquired a right when they had built on the land to hold it for an indefinite time without disturbance, and to become at any time they might think fit lessees for sixty years, with a right to perpetual renewal at the expiration of every twenty or forty years, on certain well-understood terms.

His Honour the Vice-Chancellor thought that such a state of facts was established; that Thornton, when he laid out his money in building his house, did so in the belief created or encouraged by Sir John, that he was at any time entitled to call for such a lease as he claimed, and that Sir John knew that he believed this to be his right, but nevertheless allowed him to proceed. His Honour, I presume, considered this to be in principle the same thing as when the owner of land sees another building on it in the mistaken belief that it is his own. If in that case equity would not allow the owner to lie by and profit by expenditure made by another in the erroneous supposition that the land on which it was made was his own, so neither would it be just to allow a landlord, knowing that his tenant was building, on the notion, however mistaken, that he had rights beyond those of a mere tenant from year to year, to profit by expenditure made in consequence of that mistake. There is great force in this reasoning; and if I had come to the conclusion that Thornton, when he erected his buildings in 1837, did so in the belief that he had against Sir John an absolute right to the lease he claims, and that Sir John knew that he was proceeding on that mistaken notion, and did not interfere to set him right, I should have been much disposed to say that he was entitled to the relief he sought. But a full consideration of the evidence has not led me to any such conclusion. It has failed to satisfy me, first, that Thornton supposed that he had against Sir John any absolute right beyond that of a tenant from year to year; or, secondly, that Sir John knew or believed that Thornton was expending his money in the mistaken belief that he possessed such a right.

The case made by the bill is, that Sir John Ramsden, by his agents, and, since his death, his trustees, in order to induce persons to build on what was called the tenant-right tenure, informed applicants for building plots that they would be equally safe, and that the rents would be less in amount, without a lease than with it; and further, that they could have a lease whenever they required it; and that by means of this course of dealing entire confidence was created in the tenant-right system, as conferring a good title to hold the land so taken for ever, provided only they paid their rent; and further, that they acquired a right to call for a sixty years' renewable lease whenever it might be desired.

The appellant, Sir J. W. Ramsden, by his answer admits the existence of a large class of tenants holding by what is called the tenant-right tenure; but he denies that it was an incident of that tenure that persons holding under

it were more than tenants from year to year, or were entitled to call for a lease. On the contrary, he says that such tenants never had any title, except as tenants at will, or tenants from year to year, and that in consequence of their holding by this precarious tenure, they had their land at a rent very much less than another class of tenants, who took land on sixty years' leases, renewable for ever, at the end of twenty or forty years, on certain terms stipulated in each particular case.

The parties in the cause being thus at issue the question is, what is the fair result of the evidence? Does it establish that which the plaintiffs were bound to establish? Does it shew that when Thornton erected his buildings in 1837 (with which case alone we are now dealing) he did so in the belief that, although he was only at law a tenant at will, yet he had a right to hold his land to him and his personal representatives for ever, so long as he duly paid his rent; and, further, that he had a right to call for a sixty years' lease, renewable for ever, whenever he should be minded so to do? And does it shew further that Sir John knew that he was laying out his money in that belief?

In support of their case the plaintiffs offered, in the first place, the evidence of about 250 persons holding land in Huddersfield by the tenant-right tenure, and they say that the bill correctly represents the tenant-right tenure as established at Huddersfield by Sir John and his representatives, on the faith of which they acquire and hold their properties, and that they never heard it questioned before the proceedings were set on foot by the appellant, which has given rise to this present suit.

None of these witnesses state when it was that they became tenants under what they call the tenant-right tenure. It would have been material that they should have done so, for as the only question on which this evidence bears on this part of the case, is that relating to what was the belief of Thornton, when he built his house in 1837, it would have been important for him to shew that the general belief to which the witnesses refer, existed at that time. It is consistent with the evidence of these witnesses, that they all acquired their interests after the death of Sir John, and that no such general reputation or belief as that to which they refer existed in his lifetime. I am the more led to advert to this distinction, because I observe that they speak of the tenant-right tenure as having been established by Sir John and his representatives, and the question as relates to what was done in the time of his representatives, will I think be found to be open to some observations, not applicable to what was done in his lifetime.

It must further be observed that these numerous deponents were all, or almost all, in stations of life, so far as we collect from their descriptions, making it improbable that they would be able well to scan and consider the precise nature of the reputation to which they depose. About thirty of them appear to have been unable to sign their names, and it is no harsh estimate of the weight due to their testimony to say that they were very likely to have been led by an involuntary bias, to give colour to the general belief and reputation in question, to which a little closer examination by persons in a different sphere of life, might have shewn it was not intitled. With these few remarks I shall leave this part of the evidence, to which it is but fair to say that no great weight was attributed at the bar.

What was mainly relied upon was the evidence offered in support of the allegation that Sir John and his agents, by their words, acts, and deeds, and by every means in their power, encouraged persons to erect buildings on the tenant-right tenure, and stated that there was no occasion for leases, that such persons would be as safe without as with leases, and that they might have leases whenever they might require them, and that they should never be disturbed in their possession.

In support of these allegations evidence was given of statements made by Joseph Brook, whom I will assume to have been the principal local agent

of Sir John living at Huddersfield, and acting there for him under Mr. Bower. William Brook, the surviving brother, and John Brook, a son of Joseph Brook, were both examined as witnesses, and they both say that Joseph Brook was in the constant habit of assuring all persons who, on applying for land, consulted him as to the expediency of taking a lease, that they would be as safe without a lease as with one, that so long as they paid their rent they would never be disturbed, and that they might have a lease whenever they thought fit to apply for it. The language then attributed to Joseph Brook relates to two propositions—First, that persons taking land without a lease would never be disturbed so long as they paid their rent; secondly, that persons taking land without a lease might have a lease whenever they chose to call for it. As to so much of this evidence as relates to the first proposition I give full credit to the accuracy of the witnesses, but I cannot say the same as to the second. I think for reasons to which I will presently advert, their recollection on that point cannot be safely trusted. Assuming, however, that he did make the statements attributed to him by these witnesses, it becomes important to consider what is the fair import of the language used by him, supposing it to be correctly given by the witnesses who speak to having heard it.

And first as to the statement that there would be no advantage in a lease. for that so long as the rent was paid the parties taking the land would never be disturbed. The respondents say it amounted to a statement that persons taking land at a yearly rent, and building on it, would have a right to hold that land to them and their personal representatives for ever, provided the rent was paid. The appellants say it must be interpreted as meaning only that though the right conferred was that of a mere tenant-at-will, or tenant from year to year, yet so long as the ground-rent was duly paid there was no intention to disturb the tenants in their possession, and that they might thus safely allow the matter to rest in the honour of the Ramsden family. If this latter be the true construction it is clear that even if such statements as are attributed to Joseph Brook had been made by Sir John himself, the persons taking the land would have acquired no right legal or equitable beyond that of a mere tenant from year to year.

If any one makes an assurance to another with or without consideration that he will do or will abstain from doing a particular act, but he refuses to bind himself, and says that for the performance of what he has promised, the person to whom the promise has been made must rely on the honour of the person who has made it; this excludes the jurisdiction of Courts of Equity no less than of Courts of Law. The important question, therefore, is which of these two constructions is the correct one? I have no hesitation in saying that in my opinion that of the appellant is the true construction.

In the first place, even taking the language to be exactly that attributed to Joseph Brook by his brother and his son, it is hardly that which he would have used if he had meant to represent to those who consulted him that after they had taken land at a rent and so become tenants, there would be no power in their landlord to disturb them so long as they paid the rent. What he is represented to have said to them is that so long as they paid their ground rents neither they nor their children after them would be molested; not that they could not, but that they would not be molested. The same observation may be made as to the evidence of the witnesses who speak to their conversations with Joseph Brook when they took their land for building. What they represent him to have said when they asked him as to the expediency of taking a lease, is that so long as they paid their ground-rent they would never be disturbed, not that they could never be disturbed, and to one of them, Joe Moore, he added, "Nor will your present rent ever be raised."

This distinction appears to me to be not unimportant when the question is whether it was intended to represent to the persons taking the land that they had a right to retain it for ever, or only that there was no intention on

the part of the landlord to disturb them, and that they might rely on the honour of the family that no such step as evicting them from their holdings ever would be taken so long as they paid their rent. The language is at least as consistent with the latter view of the case as with the former, and must, I think, be interpreted in connection with the evidence of Thornton's solicitor, Frederick Robert Jones, who says that for many years prior to 1858 the investment of money on the tenant-right tenure was made without hesitation, because of the confidence which the people reposed in the honour of the Ramsden family—and many other witnesses speak to the same effect.

Thus interpreted, the language attributed to Joseph Brook would not, either at law or in equity, enlarge the interest which every tenant took as tenant at will becoming afterwards tenant from year to year. But the more important question yet remains to be considered, namely, whether there is evidence to shew that Sir John Ramsden knew, or even suspected, that representations were made which might fairly be supposed to lead his tenants at will, or for years, to expend money in building in the belief that by building they acquired a title which he could never disturb. On this point the evidence of the respondents wholly fails.

There are only two occasions on which Sir John is alleged to have been present when anything passed countenancing the notion that the tenants by what is called tenant-right had any rights beyond that of tenants from year to year. The obvious meaning of Sir John, in both cases, was not that he could not, but that he would not, dispossess the persons holding the land. No such assurance was made to Thornton, and the very foundation of his case is, that it was unnecessary; for that the right to possession for ever was created without any special contract by the mere fact of building on land held on what was called tenant-right tenure.

I have thought it right to consider to what relief, if any, Thornton would be entitled with respect to the first branch of the alleged rights of the holders by tenant-right—viz., the right to hold for ever, so long as they paid their rent. But it is not on this branch of the alleged rights that relief is given by the decree, though perhaps it is its necessary foundation. The relief given proceeds on the other branch of the privileges said to attach to the holders of land held on tenant-right, namely, their right to call at pleasure for a sixty years' lease, renewable every twenty years, and what Thornton was bound to establish was that he built, and that Sir John knew that he built, in the belief that he had such a right.

The first observation I will make here is, that though there is a great deal of evidence that such a right was generally believed to exist, and though William Brook and John Brook say generally that Joseph Brook used constantly to tell persons taking land for building that they could have leases whenever they desired, yet none of the witnesses who actually took leases from Joseph Brook in the lifetime of Sir John say that he ever made any such statement to them. Several such witnesses were examined, and say that Joseph Brook told them that so long as they paid their rent they would never be disturbed; but none of them say that anything like a statement that they could have a lease was ever made. On the contrary, Matthew Riley says that when he asked if he could have a lease, Joseph Brook said, "No, we don't grant leases." I mention this because I think it extremely doubtful whether any such statements as those spoken to by William and John Brook as to the right to a lease ever were made.

Without attributing to those witnesses the intention to say what they knew to be false, I must yet observe that as no such statements were made by the only witnesses examined who actually took land from Joseph Brook in the lifetime of Sir John, it is by no means improbable that after a lapse of many years William Brook and John Brook may have confounded in their minds what they heard Joseph say with what since the present dispute has arisen has become the subject of general discourse. But it is no part of the

appellants' case to contend that leases would not in general be granted by Sir John to persons applying for land, provided only that they were willing to pay a much higher rent; and nothing is more probable than that what Joseph Brook said to persons applying for land had reference, not to leases to be granted at a future time, but to a lease to be made in the first instance when the tenancy commenced.

Assuming, however, that the facts are as deposed to by William and John Brook and that Joseph was in the habit of telling people when they took land that they could have leases when they thought fit to call for them, the question is, how does that affect Sir John? Where any such statement was made to a person taking land, a question might arise between such persons and Sir John, whether what so passed amounted to a contract by Joseph Brook binding on Sir John. No such question is raised or could be raised as to Thornton, for it is not alleged that any such statement was made when he took his land from Bower. As to Thornton the statements said to have been made by Joseph Brook to persons taking land are only material so far as they tend to make it probable that they were known to him, and so had led him to believe when he took his land from Bower, that he had thereby acquired a right to call for a lease whenever he should think fit.

What was the belief of anyone as to his rights on any particular subject is a matter not admitting of direct evidence. The reasonable explanation of the conversation which Thornton had with Joseph Brook, when his house was nearly completed, seems to me to be that he was considering whether it was prudent to trust to what is considered the honour of the Ramsden family, or whether he ought not to bind them by a lease, not that he supposed he could compel them to grant a lease as a matter of right. But even supposing Thornton to have built in the firm belief that he was entitled to a lease, the important question still remains, did Sir John know that he was building in that belief?

On this point the onus of proof is on the respondent, and he has wholly failed to satisfy me.

In the first place, what was the lease on the faith of a right to which it is argued that Sir John knew Thornton was building? Thornton says that it was a lease for sixty years renewable every twenty years on payment of two years' ground-rent as a fine, and that no other lease was at that time known at Huddersfield. This is not the nature of the lease to which the decree has declared him intitled, nor is it consistent with the term of the leases then usually granted on the Ramsden estates, when leases were granted, the fine on renewal being generally one year's improved value, not two years' ground-rent.

But a much more important observation has reference to the rent. What can be the meaning of a person having a right to call for a lease at a rent to be agreed upon between him and his lessor? Suppose they do not agree?

It is endeavoured to meet this by saying that the rent could not exceed double the amount of that at which the person applying had been holding as tenant from year to year. But the evidence of the plaintiff fails to establish any such limit. It is differently given by different witnesses; but I think it is fair to take it from the witness Frederick Jones, who had the best opportunity of knowing the general opinion of the place, as he had formerly been one of the solicitors of Sir John, and at the time of his examination was the solicitor of Thornton. He says, "It was part of the said system, and I have known of many instances that tenant-right holders, or holders at will, as they have been variously termed, might have, and have had, sixty years' leases, renewable every twenty years, for ever, upon such terms with regard to rent as they could bargain for with the agents of the estate, but it was generally understood that such rent would be double the tenant-right unless the agents either had agreed or would agree for a less rent." Now, supposing all this to have been known to Sir John, I do not think it can be treated as amounting

to knowledge on his part that his tenants at will were laying out their money in the belief that they had a right to call for a lease perpetually renewable whenever they might think fit. The mere circumstance that the amount of rent remained to be settled by agreement between the lessor and the lessee excludes the notion of there being a right to compel the grant for a lease.

The statement by Jones that it was generally understood that the rent would be double that which had been paid by the lessee as tenant from year to year unless a lower rate was agreed upon is far too vague to be the foundation of anything like a claim of right. He does not even say that it was generally understood that the landlord could not insist on a higher, but only that he would not; the same distinction to which I have already adverted in dealing with the alleged right to hold for ever so long as the ground-rent was duly paid. If there were nothing else, this absolute uncertainty as to rent seems to me to make it impossible that Sir John could have supposed his tenants-at-will were building in the belief that they had a right to compel their landlord to grant them a lease.

But another important observation on this part of the case is that the supposed right is one in which there was no reciprocity. It is not alleged, indeed it is denied, that there was any right in the landlord to compel his tenant from year to year to accept a lease, and yet it is supposed that the landlord was continually making demises from year to year, with the knowledge that those who thus became his tenants supposed they acquired rights against him, without his acquiring any corresponding rights against them.

The only evidence which could have satisfied me that Sir John knew or even suspected that such a belief was entertained, would have been a uniform practice of granting such leases as represented to have been the right of the tenant-at-will whenever they were called for, but on this point the evidence totally fails. There is no evidence that even a single lease was granted in the lifetime of Sir John to any person holding by tenant-right, though he was in enjoyment of the property for at least fifty-nine years. During that long period of time he granted 296 leases, of which 227 were granted before, and sixty-nine after, the year 1816. Of the 227 five were not renewable leases, but the remaining 222 contained a covenant by Sir John to renew at the end of every twenty years on payment of a stipulated fine, or if no renewal was then made, then, at the end of forty years, on payment of a larger fine. The nature and the amount of the fine varied. In seventeen of the 222 the fine was one year's improved value if the lease was renewed at the end of twenty years, or ten years' value if renewed at the end of forty years. In 174 the fines were two years' rent if renewed at the end of twenty years, or ten years' rent if renewed at the end of forty years. In the remaining thirty-one the fines were fixed sums not depending either on the rent or value of the land. The sixty-nine leases granted after 1816 were all renewable leases like the others. Thirty-one of them were renewals of former leases, and the remaining thirty-eight were all made renewable on payment of one year's value at the end of forty years. It seems to me impossible in the face of this evidence to believe that Sir John knew that persons taking land on the tenant-right tenure had built or were building their houses in the belief that they were entitled, whenever they thought fit, to call for a sixty years' lease, renewable at the end of every twenty years, either according to what Thornton says was his belief, namely, on payment of two years' rent, or according to the relief given by the decree, on payment of one year's improved value.

Sir John could not have understood that any such belief prevailed, knowing, as he must, that though he had many hundred tenant-right tenants he had never granted a lease to any one of them; and further, that in the cases in which he had granted leases to persons taking land on lease instead of by tenant-right, he had from time to time changed the terms of renewal according to his pleasure. It does not seem to me important that, after the death of Sir John, leases were in many cases granted to tenants holding by tenant-right.

The circumstances under which they were granted do not lead to the inference that Sir John knew that buildings were erected in the belief that the persons building could claim a lease as of right, which is the point we are now considering. It is no part of the appellant's case that land was not frequently taken for building on the faith that when the buildings were erected a lease would be granted. In all such cases leases were granted. The conversations spoken to by the plaintiffs' witnesses invariably shew that it was in general optional with those who took land to take it either with or without a lease. The substance of what Joseph Brook is reputed to have said is almost invariably that the applicant might have a lease; but that he would be throwing away his money, that it would cause him expenses and materially increase his rent, and that he would be perfectly safe without a lease. Still it is certain that many persons preferred even at higher rent the ordinary security of a lease, which, however, was never granted till the buildings had been completed or nearly completed.

The mode of dealing with this property being such as I have stated, it was almost certain that at the death of Sir John there would be, as in fact there were, many persons who had taken land on the faith that, according to the usual practice, they might, when the buildings were completed, have a lease in the form then ordinarily adopted. The will, however, was thought by counsel not to contain power sufficiently ample to enable his devisees to grant leases in these cases. To obviate all difficulties on this head an Act of Parliament was passed in the year 1844 giving to the tenant for life, and to the trustees of the will during his minority, leasing powers, which it was thought had not been effectively created by the will.

The Act, after reciting the will of Sir John, and his death, proceeds to state that the system of managing the Huddersfield estates had been that no person desirous of taking land on lease for building purposes obtained any written agreement for a lease, but was permitted, after a piece of land had been appropriated to him, to build upon it upon the understanding that after he had built a lease would be granted to him, perpetually renewable according to the form set forth in the schedule, and that many persons, relying on this system, had in the lifetime of Sir John erected houses on faith of leases being granted to them, but no such leases had been granted; and further, that since the death of Sir John, difficulties had arisen concerning the renewal of leases in pursuance of his covenant for renewal. It is enacted that it should be lawful for the trustees of the will, during the minority of the appellant, Sir J. W. Ramsden, and for him after he should attain his majority, to demise and lease to any person who in the lifetime of Sir John took land, being part of the estate devised by the will of Sir John, on the faith of a lease being granted to him according to the system aforesaid, and who had erected buildings thereon, by a lease of the same according to the form mentioned in the schedule. This form was a lease of sixty years renewable at the end of every twenty years, on payment of one year's improved value, or, at the end of every forty years on payment of ten years' improved value. The Sir John would have been bound by his covenants to grant; and the third second section of the Act authorized the granting of renewed leases, which and subsequent sections enable the trustees during the minority, and Sir John himself after attaining his majority, to grant building leases of any of the devised lands, with covenants for perpetual renewal, on terms to be agreed upon. No leases were granted after the death of Sir John until after the passing of this Act, but Mr. Hathorn, who, on the death of Mr. Bower in 1844, had become the resident local agent of the appellant at Huddersfield, informs us that after the passing of the Act, and during the minority of the appellant, thirty leases were granted to persons who were, at the times of the grant, holding by tenant-right tenure. He adds, however, that in the case of fourteen out of these thirty the parties were entitled to a lease, as they had built on an agreement that they should have a lease when the buildings were

completed. All the other sixteen were granted on rents which were materially raised, and not on any claim of right by the parties who had obtained them.

What was done after the death of Sir John can only be material upon this part of the case, so far as it may throw light backwards on what was the practice in his lifetime, and it seems to me impossible to deduce from what was thus done in and after the year 1845, under the powers of this Act, anything as to what Sir John supposed to be the opinion of those who took land from him without any agreement for a lease. As to many of them it is clear that they were entitled against Sir John to claim a lease. As to the others the lease was granted as a matter of favour or contract, not as a matter of right; and it has not, therefore, any tendency to support the views of the respondents. But there were some other leases granted to tenant-right holders besides the thirty thus referred to, namely, those granted to persons whose tenant-right lands were compulsorily taken by railway companies. The facts as to these persons were as follows:—Some houses in Huddersfield, held by persons on the tenant-right tenure, were, in the year 1845 and 1846, necessary for enabling the Huddersfield and Sheffield Railway Company to make their line. Notices for taking their houses were served on the occupants; but as they were, in the eye of the law, at least, mere tenants-at-will, a difficulty arose as to the mode in which, and the persons to whom, the purchase-money was to be paid. If the company was to treat them as mere tenants from year to year, the purchase-money, except so much of it as would represent the very small interest of such a tenant, would be payable to the devisees of Sir John. But it had always been the practice to recognize these tenants, though at law mere tenants from year to year, yet, as holding under an engagement of honour, that so long as they paid their rents they would never be disturbed. This was felt by the trustees to give the tenants a title in honour to receive such compensation as they would have been entitled to if they had derived from Sir John a legal title and not a title depending merely on the honour of the family. It would not, however, have been just to give to them a legal title enabling them to hold for ever at the rents at which they held as tenants from year to year. For in those cases in which a legal title was granted to persons when they took land for building it had always been done by means of a lease perpetually renewable, at a rent much greater than that at which it would have been granted to them if they had taken it as tenants from year to year. The course, therefore, followed by the trustees was to treat these tenants as persons who had built on the faith of having leases, and to fix the rent at the sum at which, if that had been the case, the leases would have been granted. Leases were accordingly granted on that principle, and so the landlords and the tenants became entitled to the purchase-money between them, according to the value of their respective interests. Sixteen such leases were granted in the year 1846, and Hathorn, who was then the local agent at Huddersfield, states in his evidence that none of them were granted on the application of the tenants or as a matter of right; and, further, that these leases were entirely exceptional, and all the arrangements connected with them were carried out by Mr. Fenton, since deceased, and Frederick R. Jones, then the solicitors of the trustees. Frederick R. Jones afterwards became the solicitor of the plaintiffs, and was examined after, and in reply to Hathorn, but he does not contradict him, and, on the contrary, states that the scheme of granting these leases originated with the trustees. I am aware that two of the lessees, Pass and Tattersfield, stated, when examined in chief, that their leases had been granted to them on a claim of right. No other witness confirms this statement, which is wholly inconsistent with what was afterwards sworn, not only by Hathorn, but also by Frederick R. Jones, the plaintiff's solicitor, and I find it impossible not to believe that the account given by Hathorn is strictly accurate.

Even assuming, therefore, that what was done after the death of Sir John could be relied on as tending to show either what was the belief under which

persons taking land in his lifetime acted, or what Sir John supposed it to be, I do not think that these leases granted on the occasion of the making of the railway throw any light on the subject.

For the same reasons I attach no weight to the fact that on other occasions when damage was done to houses held on tenant-right by working mines or otherwise, the compensation was, with the knowledge and approbation of Sir John and his agents, paid to the tenants. So again, local taxes for drainage and other improvements were charged on and paid by the tenants. All this was the necessary consequence of their being treated by Sir John as persons whom he felt bound in honour to consider as tenants never to be disturbed, and do not, as it appears to me, tend to support the case of the plaintiffs.

So far, therefore, as relates to the piece of land taken by Thornton in the lifetime of Sir John, I do not think it necessary to say more, except only as to a part of the argument at the bar, by which I understood counsel to suggest that it was not necessary to prove actual knowledge in Sir John to shew that he knew that Thornton built on the faith that he was entitled to a lease whenever he should think fit to call for it; but that if that was known to Joseph Brook, Sir John would be bound as if it had been known to himself. I think this is a mistake as to the principles of the law of agency. Even if Joseph Brook was what he is not shown to have been, and what, on the evidence, I do not think he was, a local agent authorised to create tenancies without referring to Bower, still that would not enable him to bind his principal as to matters *de hors* the contract. If he had made it part of the contract with any person whom he had accepted as tenant-at-will that he (the tenant) should be at liberty to call for a lease at his pleasure, then would arise the question whether this part of the contract was within the scope of the agent's authority. But it is not suggested that any such contract was made with Thornton. His case is, that Mr. Bower, being a person authorised by Sir John to let his land to persons taking it as tenants-at-will, had let to him, as tenant-at-will, the land on which he built his house in 1837, and that he had taken it without requiring a lease, fully believing, from what Joseph Brook stated to him, and had stated on numerous other occasions to other persons, and what had thereby and otherwise become the common reputation of the place, that all persons so taking land were entitled to a lease whenever they should call for it. Supposing such statements to have been made, however constantly and openly, they would not be binding on Sir John unless he had authorised Joseph Brook to make them, or else knew that he made them, and that persons taking land acted on the faith of them.

If, indeed, the principal knows that persons dealing with his agents have so dealt in consequence of their believing that all statements made by him had been warranted by the principal, and knowing this, allows the person so dealing to expend money in the belief that the agent had an authority which, in fact, he had not, it may be that, in such a case, a Court of Equity would not allow the principal afterwards to set up want of authority in the agent. But this equity, whenever it exists, depends absolutely on the fact that the knowledge on which it rests can be brought home to the principal. Here the contract was made by Mr. Bower on the part of Sir John, and by him only. I do not think there is any principle of law or equity which can enable the tenant to say that the rights under that contract against Sir John could be affected by statements made by a local agent, without the knowledge of or authority from either Sir John himself or Mr. Bower.

I have gone now through the whole of the case, so far as relates to the land taken for building in the lifetime of Sir John, and I have stated my reasons for thinking that Thornton had no title, legal, or equitable, beyond that of a tenant from year to year, that his claim to continue to hold so long as he paid his rent, as well as his claim to have a lease rested entirely on the pleasure of Sir John, and on what he and those who derive title

through him may think proper to concede. It remains only that I should consider the claim so far as it relates to the tenancy created after the death of Sir John, as to which I need not detain your Lordships long. The observations I have made on the tenancy created in the lifetime of Sir John are all applicable to this second taking, besides which, there are other reasons which, as it appears to me, show that the plaintiffs were not entitled to the relief given by the decree, or to any relief at all. The undisputed facts as to this part of the case are as follows:—In the month of June, 1845, Thornton being desirous of obtaining more ground for the purpose of adding some outbuildings to his house, applied for that purpose to Mr. Hathorn, who on the death of Mr. Bower in 1844, had been appointed a resident agent for managing the property under Mr. Loch, who had succeeded Mr. Bower. Previously to this time a very proper system had been introduced in the management of this property, under which every person applying for land to be held by him not on lease, was required to make his application in writing, stating expressly that he applied for it to be holden by him as tenant-at-will, and printed forms for this purpose were kept at Longley Hall, where the business of the estate was managed. When Thornton applied to Hathorn for the additional land, one of these forms, properly filled up, was put into his hands for his signature, and he signed the same. I have already mentioned its exact form and contents. Hathorn having obtained the consent and approbation of Mr. Loch, sent to Thornton a letter of advice as follows:—

“ Longley Hall, Huddersfield, 24th July, 1845.

“ Sir,—I beg to inform you that the plan of the ground on which you propose to erect a mistal, stable, &c., at Paddock, to be held at will, has been approved of and signed by Mr. Loch. The quantity of ground to be occupied by you will be 165 square yards, which at the rate of 1½d. per yard will make the amount of the annual ground rent payable by you to the trustees of Sir J. Wm. Ramsden, Baronet, 11. 0s. 7d. The first half-year's rent will be payable at November rent-day, 1846. As soon as your building has been completed, I will thank you to come here for the purpose of having your name regularly entered in the rental of this estate.—Your obedient servant,

“ ALEX. HATHORN.”

The ground was properly staked out, Thornton erected his new buildings, and was entered on the rental at Longley Hall, and he afterwards duly paid his rent from time to time as it became due. That he thereby became at law tenant to the trustees from year to year, and for no greater interest is clear. But he insists on the same equity as on his first tenancy, namely, that he was entitled to treat this tenancy-at-will as giving him against Sir John and the trustees an absolute right to call for a sixty years' lease perpetually renewable. The decree of the Vice-Chancellor proceeds on the ground that he was so entitled, but I am quite unable to understand the principle on which this relief was given.

Even if contrary to the opinion I have formed, the facts had warranted the conclusion that Sir John was bound to consider all persons entered as tenants-at-will, or from year to year on his rent-roll, as being entitled to call for such a lease as Thornton required; still I cannot comprehend how any such equity can affect the appellant Sir J. W. Ramsden with respect to the tenancies-at-will created by his guardians after the death of Sir John. Every precaution was taken to show to persons who took land after the death of Sir John that they were tenants-at-will. They were always required to sign an application for land to be held by them as tenants-at-will, and Hathorn says that the words “tenant-at-will” were printed in large conspicuous text-character, so that they could not be overlooked. Thornton indeed says that though he signed the application, he had no opportunity of making a copy of it. He does not suggest that he did not read and perfectly understand it, and Hathorn says he might have had a copy if he wished for it. Add to which that in the answer which he retained, or might have retained, he

was expressly told that he was to hold as tenant-at-will at a rent then fixed by the lessors.

I consider it, therefore, to be established beyond doubt that he knew that his title was merely that of a tenant from year to year, though I also firmly believe that he thought in regard to this second hiring as in regard to the former, that he might safely rely on what was called the honour of the Ramsden family, for the evidence shows that this feeling prevailed after the death of Sir John no less than during his life. I will not repeat what I have already said, namely, that no Court can take cognizance of claims founded only on what is considered an engagement of honour. On these grounds I think that the claim of Thornton to a lease of this second piece of ground is at least as untenable as that relating to the former. I will only add that the conduct of Thornton when, in 1859, he surrendered the property to the appellant, Sir J. W. Ramsden, for the purpose of the mortgage to Dyson, and caused the names of himself and Dyson to be entered as tenants at will, strongly confirms the view I have taken of the case.

The decree of the Vice-Chancellor declares the plaintiff Thornton entitled to a sixty years' lease, renewable every twenty years on payment of the fines mentioned in the schedule to the Act of Parliament, *i.e.*, a fine of one year's improved value. Even if all other difficulties were removed, I cannot understand how the plaintiff could be entitled to a lease on these terms, when his case as made by the bill is, that he was entitled in equity to a sixty years' lease renewable every twenty years on payment by way of fine, not of one year's improved value, but of two years' ground-rent. The mere circumstance of the uncertainty as to what the terms of renewal were to be affords cogent evidence against any claim of right whatever. The plaintiffs, in my opinion, have wholly failed; and I shall here dismiss the case, with one observation, however, as to the claim based on the reliance placed on the honour of the Ramsden family. It is not my intention to step out of the line of my duty by expressing, or even forming, an opinion, as to how far this claim is well founded. Probably the system was originally adopted in the motion that it would give to an humble and not generally wealthy body of dependent tenants an easy and cheap mode of holding and disposing of their houses. It was impressed on them that by means of the register kept in the books at Longley Hall, they could sell, mortgage, or dispose of the property, so far as they had property in their houses by will, at an expense of 2s. 6d. instead of many pounds. Now whatever obligations of honour the mode in which this property was managed may have created on the Ramsden family, I confess that this case has satisfied me that it was absolutely necessary, for the interest of all parties, that some mode should be adopted for putting an end to it. It was an attempt to create a new and cheap mode of conveyancing, which was certain, sooner or later, to involve in difficulties those who had relied on it. The supposed transfers were altogether ineffectual; and it is a subject of wonder to me that litigation was not long ago occasioned by it. The present appellant endeavoured to do what he thought fair and just by obtaining powers to grant leases for ninety-nine years. Whether that was more or less than his tenants-at-will had a right to look for from what they call the honour of the family is a point on which I give no opinion; but that some arrangement should be adopted which should put an end to the system hitherto pursued seems to me absolutely indispensable.

In my opinion the plaintiff did not establish a title to any relief, so that his bill ought to have been dismissed.

In the particular circumstances of this case, and not at all relying upon the fact that I know that the opinions of your Lordships are not unanimous, which I think is no ground for influencing your Lordships' judgment on the question of costs; but in consideration of the circumstances that this system has gone on so long, and that the parties might have been thereby misled as to what they supposed to be their rights, I shall advise your Lordships to

remit the cause to the Court of Chancery, with a declaration that the bill ought to have been dismissed, without saying anything as to costs.

I ought to have said that I have had more than one communication on the subject of this case with Lord Brougham, who was present at the hearing, and is unable to attend here to-day; but he has desired me to say that having communicated with me and my noble and learned friends on the subject, he entirely concurs in the views which I have expressed.

LORD WENSLEYDALE.—The bill in this suit was filed by the respondent against the appellants on the 12th April, 1862, and the case was fully argued before the Vice-Chancellor Stuart. His Honour pronounced the decree in favour of the respondents, not on the ground that this was a case of a claim for specific performance, nor did the bill pray relief on that ground, but that it proceeded upon a recognised equity much higher and more positive than the discretionary and ordinary equitable jurisdiction for specific performance, his Honour thinking that in the case of the permission to build the house given by the acknowledged agent of Sir John Ramsden, in the year 1837, and by the trustees and guardians in the case of building the mistal in 1845, a lease ought in equity to be given to indemnify the tenants. His Honour seems to have thought that it would be a sort of breach of faith and a fraud on the part of the owners if they did not grant leases, and he thought they ought to do so, and that he was warranted in ordering a lease for sixty years, at double the rent then payable. Whether the decree of the respondents can be supported upon the grounds stated by the Vice-Chancellor is the important question in this case.

The case is of some interest with regard to the principle it involves, and of great importance as it affects a very large and valuable property in the district of Huddersfield, with respect to which very similar questions may no doubt arise. It was argued for several days in your Lordships' House, by very able and learned counsel on both sides. The minutest parts of the case have been investigated with great care, and the long lapse of time since the argument has enabled us to consider the whole case very carefully. I have satisfied myself that the opinion of my noble and learned friend on the woolsack which he has just delivered that the bill ought to be dismissed, is perfectly correct. I am of opinion that the plaintiffs cannot support their case, either at law or in equity.

To consider the case without for the present adverting to the ground of the Vice-Chancellor's decision, it is perfectly clear that the respondents could not succeed, on the ground of a manorial custom, affecting the tenure of those lands analogous to a copyhold custom. The alleged practice is comparatively quite modern, nor has that view of the case very properly ever been brought forward on the part of the defendants in error. Nor has any express or implied contract been made out on the part of the landlord by the evidence. Certainly there was no contract in writing by the landlord or an agent, competent to bind him either express or implied, so as to bind the landlord at law. Nor was there I clearly think, any evidence of an express or implied parol contract which being afterwards partly performed, would be binding notwithstanding the provisions of the Statute of Frauds.

On the part of the respondents, it was contended that Thornton took under what is termed the "tenant-right" system in the manor, which existed only or arose in the time of Sir John Ramsden, and is alleged to have been, that the person who took land to build upon, and did build to the satisfaction of the lord or his steward, was entitled to hold at a certain rent, and also whenever he pleased to call for it to have a lease from the lord of the manor for sixty years, at the rent fixed for a lease, at the time of the being allowed to build by the lord or his steward, or if not then fixed, was to be afterwards fixed, and the lease to be renewable at stated periods upon the payment of

a fixed fine. It does not appear that any lease was ever given, as far as I can collect, to any person claiming on the ground of this tenant-right, and as being entitled thereby by Sir John Ramsden in himself or in his time.

To my mind there would be very great difficulty in making out that any such implied contract could be construed to have arisen on the part of the landlord. Sir John Ramsden, the proprietor, in whose time the usage originated, does not appear to have granted any leases under this usage. But even if there had been a practice of granting leases prevailing for a very long period of time by the landlord, who was owner in fee, and might grant any leases of any description that he pleased to any person he pleased, with any terms, it would be very difficult indeed to convert that practice into an obligatory custom or usage, especially in those cases in which the alleged custom itself contemplates a future important matter which was left open to future agreement, namely, the amount of rent to be paid, and other matters to be fixed under the lease to be granted. A thousand instances of the grant of leases, all of which may be referred to kind feeling on the part of the landlord, which will explain every part of this case (and which I sincerely hope will, whatever the result of this suit may be, continue still) will prove nothing.

It appears to me to be perfectly out of the question to hold that there was a contract to grant a lease, the most important terms of which—the amount and time of payment of the rent to be paid—were not stipulated, and which would be naturally the subject of a fresh agreement. If a verbal statement to the like effect had been made by Sir John Ramsden himself to Thornton, before he began to build, the precise terms being clearly in the power of Sir John Ramsden to fix, all that could be said would be, that the rent and precise terms would, in such case, be left to the honourable feelings of Sir John Ramsden, and not create a legal obligation. I cannot see how he could be considered to have made any complete contract at all; still less is there any ground to imply, on the part of the landlord, an agreement that, until the lease was granted, the tenant was to hold as an irremovable tenant for ever at the lower rent at which he held the property as tenant-at-will, which was suggested in the course of the argument.

To me the evidence is quite satisfactory that Thornton took both takes as tenant at will, both in point of law and in equity, and every claim beyond that can only be on the honourable feelings of the appellant. On giving up the first take to the Commercial Club on the 30th September, 1857, he then acknowledged himself to be tenant at will in distinct terms, and at such rent as he, the landlord, would think proper. At the second take of the mistal, on the 26th June, 1848, he takes it expressly as tenant at will from the trustees and guardians. Afterwards, on the 16th October, 1856, Thornton writes to Mr. Hathorn, to know the conditions on which Sir J. W. Ramsden then granted leases, and how much per yard he should be charged for a house, if leased, as he thought of having a lease, which shows distinctly and decidedly that he did not then consider that he was in the condition of a leasehold tenant, or tenant having a right to a lease; and, therefore, there certainly was no mistake in stating himself to be tenant at will of the land in the first take, in transferring it to the Commercial Club in 1857.

These circumstances form a very strong case against the plaintiff which is, in my mind, entirely unanswerable at law. The words "tenant-at-will," were undoubtedly meant by the landlord to be understood in their proper legal sense, and must be taken to have been understood by the tenant to mean what they imported. There cannot be, I think, the slightest doubt upon this part of the case.

Before advertng to the most important question, it remains shortly to notice an argument brought forward on the part of the respondent before proceeding to the most important part of the case. It appeared that in 1845 the trustees of the Ramsden Estate permitted some tenants whose holdings

were required by some railway companies, and who held under the tenant-right system to receive compensation for the buildings from such companies who occupied them, on the footing of being entitled to leases thereof. And the guardians of the appellant granted leases to them under the Act of 1844 for the purpose of enabling them to claim such compensation. This was purely as a matter of favour to the individuals to whom it was granted, and not an acknowledgment of liability on the part of the trustees and guardians. I am quite satisfied that there was no contract, express or implied.

But the most material and more doubtful question remains to be considered, viz., whether the ground on which the learned Vice-Chancellor has proceeded can be supported—whether there is sufficient proof of that species of fraud committed by Sir John Ramsden or the other appellants, on which his Honour relies. This fraud is in the nature of a personal fraud in Sir John Ramsden as to the transaction in 1837, and in the devisees and guardians in that of the year 1845, and a doubt has certainly passed through my mind whether that fraud, if it was a fraud, was not merely personal, and could in any way effect the estate in respect of which it was committed in the hands of one to whom it was afterwards transferred, though a mere volunteer. But this point has not been argued, and I will assume that my doubt is unfounded, and that if Sir John Ramsden was guilty of the personal fraud alleged, the loss occasioned by that fraud might be satisfied out of the estate itself of the person guilty of the fraud against the appellant, who is not a purchaser for a valuable consideration, but a mere volunteer. But I still feel a difficulty how the personal fraud of the trustees and guardians who were not absolute owners can affect the right of the appellant, Sir John W. Ramsden, who does not claim under them.

But it is not necessary to consider this point, for I entirely agree with my noble and learned friend on the woolsack, that personal fraud of this nature on the part of Sir John Ramsden, or his trustees, and guardians on the respondents, cannot be made out in this case.

If a stranger build on my land supposing it to be his own, and I, knowing it to be mine, do not interfere, and leave him to go on, equity considers it to be dishonest in me to remain passive, and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it. If a tenant of mine does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.

In this case the respondent had most clearly, and to his own knowledge nothing but an estate at will in both the first and second take, charged afterwards by the payment of annual rent for tenancies in both takes from year to year. He had been most distinctly and clearly told that he was to be tenant-at-will, and he most clearly understood so. I have already stated that there was no agreement with the landlord for any further estate, or interest, but if it could have been shewn on the part of the respondent that the landlord, Sir John Ramsden, with respect to the first take, and the trustees and guardians in the second take, believing the tenant to be ignorant of his rights, had purposely advised him to go on, the case might fall within the same principle as a case of fraud. But no such case has been made out to my satisfaction. There is no expression, encouragement, or conduct on the part of Sir John Ramsden himself, which ought to raise that suspicion. Those on the part of Mr. Hathorn which have been given in evidence, are all explained by his confidence in the honour and kind feeling of Sir John Ramsden and his family. Mr. Hathorn was only a sub-agent, and declarations made by him could not affect Sir John Ramsden, or the proprietors, as those of an agent who had full power to manage the estate, and sell, or demise it of his own authority, whose acts would be the same as those of Sir John Ramsden himself would be. He was clearly subordinate to Mr. Loch, if

Mr. Loch indeed had any such power, which I much doubt. Those made by Mr. J. Brook are open to the same observation. He was not an agent with full power to manage the estate, to sell and demise it of his own authority, so as to make his statements equal to those of Sir John Ramsden himself, and Brook's observations, made at the time of the first take, were only an expression of the agent of his confidence in the kind and liberal disposition of Sir John and his family. As to the statements and declarations made by Sir John Ramsden himself bearing on this part of the case, they are only two—one was what passed in the presence of a person named Mortimer, and the other spoken to by one Mr. Brier, when Sir John said the tenant should never be disturbed. These related to different transactions than those in question, and were strictly inapplicable to it, as Sir John Ramsden might have reasons for approving of one demise, and not another, and even if they applied to Thornton's take, they amounted to no more than the expression of kind feeling on the part of the landlord, of his own liberal intention, and were not obligatory on him in point of law or equity as a promise. If a man expressly promise upon his honour, his promise does not create an obligation in point of law. If what he says must be so understood by those to whom it is addressed, it cannot amount to more, and creates no obligation in point of law. The assurance of agents in their confidence in the honour of their principals and their family cannot carry the case any further.

I have satisfied myself that this is the true view of the case, and that no liability has been proved on the appellant in any way at law, or in equity, which is all that we in the course of our duty have to decide. What the appellant, Sir John William Ramsden, may choose to do if he succeeds in this suit, is entirely for himself to decide, his obligation (if any) being one binding only in honour.

LORD KINGSDOWN.—I regret that in a case of so much importance as this is there should be any difference of opinion amongst us as to the proper decision of it, and I should have been glad if the practice of your Lordships' House allowed me to withhold the expression of my dissent from the order proposed by the Lord Chancellor. But having submitted in writing very fully to your Lordships the grounds of my opinion without any success, it is unnecessary, and I think it would be useless, that I should do more on the present occasion than state in a very few words what I understand to be the law upon the subject, and the effect generally which the evidence has produced on my mind.

The rule of law applicable to the case appears to me to be this—If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation lays out money upon the land with the knowledge of the landlord and without objection by him, a court of equity will compel the landlord to give effect of such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* (18 Ves. 328) and as I conceive is open to no doubt. If, at the hearing of the cause there appears to be such uncertainty as to the particular terms of the contract as might prevent a court of equity from giving relief, if the contract had been in writing, but there had been no expenditure, a court of equity will, nevertheless, in the case which is above stated interfere in order to prevent fraud, though there has been a difference of opinion amongst great judges as to the nature of the relief to be granted. Lord Thurlow seems to have thought that the Court would ascertain the terms by reference to the Master, and if they could not be ascertained would itself fix reasonable terms. Lord Alvanley and Lord Redesdale, and perhaps Lord Eldon, thought this was going too far; but I do not understand any doubt to have been entertained by any of them that,

either in the form of a specific interest in the land or in the shape of compensation for the expenditure, a Court of Equity would give relief and protect in the meantime the possession of the tenant. If on the other hand, a tenant being in possession of land and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of Law or Equity can enforce. This was the principle of the decision in *Pilling v. Armitage* (12 Ves. 85), and like the decision in *Gregory v. Mighell*, seems founded on plain rules of reason and justice.

The whole question, I think, in this case is within which class does the present claim fall, a point which of course depends entirely on the effect of the evidence. The evidence in my opinion, shews that it falls under the former. The course adopted by Sir John Ramsden on letting his land was this. He lived himself at some distance, about thirty miles from Huddersfield. He had a principal agent or steward, Mr. Bower, who lived near him, and sub-agents or persons in his employ, who resided at Huddersfield. If any person desired to take a plot of land for building, he applied to the steward or one of the sub-agents; and if the application was approved, the piece of ground required was measured and staked out, and the rent fixed. The applicant then took possession, and built his house, on the completion of which, and not before, he was charged with rent, and was entered as a tenant on the rent-books of the landlord.

Thus far there is no controversy between the parties on this record. The question is, what were the terms held out on behalf of the landlord, and on the faith of which the tenants invested their money? The appellant insists that the persons thus taking land and building were of two classes, those who originally contracted for the leases, and those who preferred to hold at lower rents without lease. He admits that the former class were entitled to leases renewable for ever on certain terms; but he insists that those who did not originally contract for leases, were not entitled at any time afterwards to have such leases granted to them—that they were mere tenants-at-will in the ordinary legal acceptation of the term, had no right whatever, legal or equitable, against their landlord, but might, as soon as they had completed their buildings, be turned out of them without any compensation or allowance for their expenditure.

The respondents, on the other hand, maintain that there was no such distinction as is alleged in the original contracts for land—that those who built and entered on their land without leases at lower rents did so on the assurance that they might have leases whenever they required them, and that, in the meantime, they should not be disturbed in their possession, or, at all events, not without full compensation. There is contradictory testimony upon these points, but it appears to me that the preponderance is in favour of the respondents.

I am unable to reconcile with the appellant's hypothesis of distinct contracts for leases, what was done under the Act of 1844—the grant of renewable leases in 1846 to twenty or thirty persons, as to whom there is no evidence that any of them had specially contracted for leases; or the language held by Mr. Loch in 1851, when the tenants were alarmed by the apprehension that they would be required to take leases—unless the tenants-at-will were entitled to leases, there was no power to grant them under the Act. With respect to the letter signed by Thornton, on the application for the two takes on the 16th June, 1845, more reliance was placed upon it in the argument at the bar than I think it was entitled to. The whole force of the observation consists in the use of the words “to hold as tenant-at-will,” which it is said must mean what the words in their legal sense import. The respondents contend that those words were used just as they are used in copyholds—Tenant-at-will of the lord, according to the custom of the manor; that the lands though not copyhold were dealt with very

much in the manner in which copyholds are dealt with; that the tenant's title consisted in an entry of the name of the taker as tenant in the books of the lord, and that the transfer was made by a similar entry in the same books, and that the term "tenant-at-will" was used merely to distinguish those who had no leases from those who had leases. I confess that a reference to the rentals in evidence, appears to me strongly to confirm this view.

It was argued that whatever might have been the original position of the parties, the papers which were signed in 1859, on the occasion of the loan made by the Commercial Inn Money Club, had the effect of clearly making Thornton a tenant-at-will. Having regard to the circumstances under which they were signed, I can attribute no weight to these papers. No notice was given to the respondents that any change whatever was intended to be effected in their position by these papers, and it seems to me that no such change could be effected by the hypothesis. These gentlemen, the one as tenant and the other as mortgagee, were entitled to a substantial interest in the property, and yet, without any consideration whatever of any kind, they are supposed to have voluntarily converted themselves into tenants-at-will, in the strict sense of the term, liable not only to have their rents raised from time to time, as the landlord might think fit, but to be turned out of possession whenever he pleased. It seems to me that the right of the parties in this case must be decided in just the same way as if these two papers had never been signed.

I have thus slightly indicated the reasons which induced me to think that the respondents have made out a case for relief of some kind in a Court of Equity; whether it should be of the kind given by the decree complained of, or in a different form, would, if it were material to consider it, be a very difficult question. But the opinion of the majority of your Lordships makes any consideration of that question unnecessary. Much as I regret that opinion, and the consequences which must flow from it, I am of course quite satisfied that it is much more likely to be right than any that I am able to form.

LORD WESTBURY.—It would hardly be possible for me at this late hour to state in detail to your Lordships the reasons why I feel myself compelled, though reluctantly, to concur in the opinion which has been expressed by my noble and learned friend on the woolsack. But it is unnecessary that I should add anything to the clear, and, to my mind, satisfactory statement of reasons which has been made by the noble and learned Lord. I shall, therefore, dispense with reading the opinion which I had prepared, inasmuch as the arguments which I should have submitted to your Lordships are substantially the same as those of my noble and learned friend, who has already expressed them in the clearest manner. I agree also in the opinion which he has expressed that this bill should be dismissed without costs. Unquestionably, I do not believe that the appellant desires that costs should be given, but whether that is so or not, I think your Lordships will act rightly in reversing the decree appealed from, and dismissing the bill without costs.

Decree reversed. Cause remitted to the Court of Chancery, with a declaration that the bill ought to have been dismissed.

ROMILLY, M.R., July 5, 1866.

BRANCKER v. CARNE.

14 W. R. 947; L. R. 2 Eq. 610; 14 L. T. 786; 12 Jur. N.S. 1015.

Concise statement—Completion of defence—Postponement of hearing—Long Vacation.

DISCOVERY. B.—*The Court will not prevent the postponement of the hearing of a cause till the plaintiff has answered the interrogatories filed with a concise statement by the defendant, merely on the ground that the postponement will prevent the hearing of the cause till after the Long Vacation.*

This was an application to enlarge the time for a suit to come on for hearing on a motion for decree.

The bill was filed on the 19th of November, 1865. On the 15th of March the affidavits in support of the bill were filed, and on the 16th of June the defendant obtained leave to file a concise statement and interrogatories for the examination of the plaintiff. The cause was now set down for hearing, and this application was to have the hearing postponed until the plaintiff had answered the defendant's interrogatories. The motion was that this cause stand out of the paper till the plaintiff has filed a concise statement and interrogatories.

E. E. Kay for the motion.—The defendant has a right to have time allowed him for the completion of his defence.

Baggallay, Q.C., and *Little, contra*.—The Court will not allow a concise statement to be made so short a time before the Long Vacation. It is not required for defence. The object is to prevent a decree being made before the Long Vacation.

Jessel, Q.C., for other parties.—The old practice where a cross bill was filed seeking relief as well as discovery, was to bring up the cross bill to the same stage as the original bill. The original bill was never delayed for the sake of the cross bill.

LORD ROMILLY, M.R.—This case shows completely the satisfactory condition of the business of these courts at the present time. It is stated on behalf of the plaintiff that the defendant has done all he can to delay this suit, and the utmost result is a delay of five months. I cannot go into the merits of this case. It may be that the answers the defendant requires are of great importance to his defence. If I were to decide against him I might be driving him to file another bill. This is much too strong a case to compel a defendant to waive his defence on the ground that it will prevent the case being heard before the Long Vacation. There will be no costs.

KINDERSLEY, V.C., July 5, 1866.

PIFFARD v. BEEBY.

14 W. R. 948.

Practice—Removal of next friend—Stranger—Connection with non-accounting defendant.

INFANT.—*A suit was instituted to carry out articles for a settlement, the father being unable to perform his covenant, and his mother having made an abortive attempt to do so. The bill being by the infant children by their next friend, a near relative of the defendant, a motion was made to remove him and substitute the brother-in-law of the wife, on the ground of the present next friend's near connection with the defendant, that he was a stranger to*

the family, and that the defendant, being one of the trustees of the articles, had, in fact, filed the bill, and had omitted to enforce the articles.

Motion refused with costs.

Semble, the mere fact of a next friend being a stranger and a near connection of a defendant is no reason for his removal, unless such defendant be accountable.

This was a motion by Hamilton Hume, as next friend *pro hac vice*, that William Porter Knightly, the present next friend of the infant plaintiffs, might be discharged from his office, and for a reference to chambers in the usual way, in order that the moving party, or some other fit and proper person, might be appointed next friend in his stead. The bill was filed by the four infant children of Charles Piffard and Emily his wife, formerly Emily Hume, to determine their rights under a voluntary settlement made by their paternal grandmother, Elizabeth Piffard, under these circumstances:—On the marriage of Mr. and Mrs. Piffard articles for a settlement were entered into whereby Mr. Piffard covenanted to settle 5,000*l.* on his wife and children in the usual way. These were dated 29th May, 1858, but inasmuch as the covenant entered into was rather in expectation of property which Mr. Piffard expected from his mother, than from any present ability of his own to settle such a sum, he effected an insurance upon his life and assigned it over to the trustees of the articles on the understanding that it should be re-assigned when the covenant was performed. Mr. and Mrs. Piffard were then resident in India, and his mother in England, and she, by the settlement in question, limited the 5,000*l.* to the children of Charles Piffard generally, without specifying them as the children of that particular marriage, and therefore this was inconsistent with the articles; but at the time this settlement was made the articles were cancelled, and the policy was allowed to drop. Four years elapsed, and, questions arising on the effect of the settlement, this suit was instituted, as it was alleged, by George Beeby, the surviving trustee of the settlement, William Porter Knightly, his near relative, being named next friend of the infants.

The case came on upon a former occasion upon exceptions to the answer, [1866] E. R. A. 283.

Cust, in support of the motion, contended that it was improper that a total stranger to the family, a solicitor, and a near connection of the defendant, who was, in fact, the originator of the suit, should be the next friend of the infants. The expense of the suit had also been very great. The Court had always considered these circumstances objectionable, and had removed a next friend on those grounds; moreover, here the same solicitor acted for Mr. Beeby and the next friend. The party proposed was the brother of the mother of the infants, and it was manifestly for their benefit that he should be next friend in consequence of that relationship, for the Court looked mainly at the interest of the infants. It was now asked that there should be the usual inquiry in chambers: *Towsey v. Groves* (11 W. R. 252); *Sandford v. Sandford* (11 W. R. 336).

Mr. Piffard, the father (a defendant) in person, said that the present motion was not his motion, but he supported it, and contended that the defendant Beeby had been guilty of an omission in his duty as trustee, in not, during the four years, raising the question as to the settlement; and in allowing the policy to drop, for which he might be liable; and that therefore his connection with the present next friend was so objectionable.

Baily, Q.C., and *Renshaw*, in opposition to the motion, were not called upon.

Bagshawe for Mr. Beeby.

KINDERSLEY, V.C.—Mr. Piffard suggested that Mr. Beeby was liable as well as himself, in consequence of his not taking some steps on behalf of the

infants which he ought to have taken. If he failed to do anything for which he became personally responsible—which is a great assumption, and which I assume only for the purposes of this motion—who is first liable? The infants' right is to have the articles carried out, but their prior right is against Mr. Piffard. If Mr. Beeby ought to have compelled Mr. Piffard to perform his part, Mr. Beeby cannot be liable until the liability of Mr. Piffard is exhausted. This is not an attorney's suit, if it was, the Court would promptly interfere on the point whether there ought to be a suit at all, and if so to have a proper next friend. This is the case of an unfortunate miscarriage by reason of the ultimate limitation in the settlement being in favour of the children of any marriage. No doubt Mr. Beeby could have brought an action against Mr. Piffard under his covenant, but it would have been foolish, and in not doing so he acted wisely. He was perfectly justified, however, in getting some proper person as a next friend of the infants, the object being to compel the carrying out of the articles. Then comes this motion, the person proposed as a next friend having the apparent additional advantage that he is the maternal uncle of the infants. It is truly said that the same solicitor acts for the infants and Mr. Beeby, and is that right? Not if there were a question between the infants and Mr. Beeby, or if he were personally liable; but, except upon the suggestion made, I do not see how he is liable. If he be, he clearly should be exonerated by Mr. Piffard; but he has received nothing, and therefore it is not the case of the same solicitor appearing for the infants and an accountable trustee. Moreover the person proposed is the brother-in-law of Mr. Piffard, between whom and the infants there is a question, and therefore, if the present next friend were removed, I should remove a person who has no interest, and substitute one who has an interest, and who, it is not too much to assume, would employ the same solicitor as Mr. Piffard, and pull with him; to whom, therefore there would be the very objection now made to the present next friend. Mr. Piffard may feel sure of this: that, whatever the Court's obligations may be in regarding the infants' rights, it will so exercise them as not unduly to press upon him. Assuming, therefore, to the utmost extent that the present next friend is the nominee of Mr. Beeby, there is no reason to suppose that he will work the suit, (although he is no relative) otherwise than properly. Under these circumstances the fact of the same solicitor being employed is no detriment to the infants; whereas, if I were to do what is asked, their interests might be neglected. I must refuse the application, with costs.

KINDERSLEY, V.C., July 20, 1866.

Re SMITH'S LEASEHOLDS.

14 W. R. 949.

Petition—Affidavit of title, &c.—C. O. xxxiv. r. 3.

COMPULSORY PURCHASE.—*On an application by tenant for life for payment to her of dividends on purchase-money of land taken by railway company, her affidavit as to title, &c., dispensed with.*

Petition by a widow, tenant for life under her husband's will, to have the purchase-money paid into court by a railway company carried over to a separate account, and the dividends paid to her for life.

The executors and remaindermen were co-petitioners.

The affidavit required by C. O. xxxiv. r. 3, had been made only by the

executors, the remaindermen being infants, and the tenant for life very old and infirm.

Rendall, for the petitioners, cited *Re Baroness Braye* (9 Hare, App. 7) in which Turner, V.C., had considered that the order did not apply to applications by tenants for life for payment of the dividends only. He thought it right, however to call the attention of the Court to "*Seton on Decrees*," p. 1077, where the practice was stated to be the contrary.

Streeten, for the company:

KINDERSLEY, V.C. thought that he could dispense with the tenant for life's affidavit.

Wood, V.C., July 3, 1866.

WRAGG v. MORLEY.

14 W. R. 949.

Will—Charge of debts on rents and profits—Costs.

EXECUTOR AND ADMINISTRATOR.—*A charge of debts on rents and profits is a charge on the corpus. The costs of residuary legatees appearing on further consideration, but not parties to the suit, will not be allowed.*

Daubney v. Leake, 14 W. R. 413, and *Hubbard v. Latham*, 14 W. R. 553, followed.

This was the further consideration of a suit for the execution of the trusts of the will of Edward Marriott. By his will the testator, after giving to his wife Elizabeth Marriott (now the plaintiff Elizabeth Wragg) his household goods and furniture, &c., gave all his real estate and all his personal estate not specifically bequeathed to the defendant William Morley and to William Fretwell, since deceased, upon trust to sell and receive his personal estate, and to stand possessed of the moneys to arise by such sales, and to be collected, got in, and received; and the will proceeded as follows:—"Upon trust thereout to pay the costs and expenses attending such sales, and collecting and getting in as aforesaid, and then to pay thereout my debts, funeral and testamentary expenses, if the same shall be sufficient for the purpose; but if not sufficient, I direct that the deficiency be supplied from the rents and profits of my real estate; and, after the payments aforesaid, do and shall invest the residue of the said trust moneys, if any, in the names or name of my said trustees, in or upon Government or real securities, at interest, and do and shall pay to, or permit and suffer my wife to receive the income of the said trust moneys, and the rents and profits arising from my said real estate during her life for her separate use, independently of any husband with whom she may intermarry, and her receipts, whether covert or sole, to be sufficient discharges for the same; and upon the decease of my said wife, upon trust, that they, the said trustees or trustee, do and shall, as soon as conveniently may be, make sale, and absolutely dispose of my said real estate." The testator directed his trustees to stand possessed of the moneys to arise from such sale of his real estate, and of the rents and profits thereof until sold, and of the money so invested as aforesaid, and all the accumulations of interest thereof, upon certain trusts for the benefit of the children of his brother and sisters, and of his wife's brother, the defendant William Morley, and their children. The bill alleged that the defendant Herbert Morley, one of the children of the defendant William Morley,

sufficiently represented the interests of all the children of testator's brother and three sisters, and of the defendant William Morley. A question arose on the construction of the testator's will, whether the debts ought to be paid out of the income, or out of the *corpus* of the real estate. There was also a question whether the costs of the children of one of testator's sisters, who appeared on the further consideration, but had not been made defendants to the bill, were to be allowed out of the trust estate.

Rolt, Q.C., and *T. A. Roberts*, for the plaintiff, contended that the debts were payable out of the *corpus*, referring to the cases collected in *Jarm. on Wills*, ii. 516, *et seq.* 2nd ed. They also urged that those persons interested under the will, who appeared now, but had not been made defendants to the bill, were not entitled to their costs. On this point they cited *Stevenson v. Abington* (11 W. R. 936); *Daubney v. Leake* (14 W. R. 413; 1 L. R. Eq. 496); *Hubbard v. Latham* (14 W. R. 553).

Cracknall for the defendant William Morley, the surviving executor and trustee.

W. M. James, Q.C., and *Chapman Barber*, for the defendant Herbert Morley, contended that the testator intended the debts to be paid out of the annual rents and profits.

C. O. Boys, for the defendant Charles Wragg, the plaintiff's husband.

W. Pearson, for the children of one of the testator's sisters, who were not parties to the suit, also contended that rents and profits meant *annual* rents and profits: *Heneage v. Lord Andover* (3 Y. & J. 360); *Harper v. Munday* (7 D. M. G. 869); *Forbes v. Richardson* (11 Hare, 354), and that he ought to have his costs.

Rolt, Q.C., in reply upon the question of costs.—Where you have the accounting party a defendant, and the party to whom he is to account plaintiff, you need not go any further.

Wood, V.C., said that the rule laid down in *Allan v. Backhouse* (2 Ves. & B. 65), had been acquiesced in in a series of cases since that time. The principle there established was that where there was a sum to be raised at once, or one which the testator had not contemplated being raised by dribblets, and subject to that testator had given his real and personal estate to A. and B., then it was a charge upon the *corpus*. His Honour then referred to the case of *Wilson v. Halliley* (1 R. & My. 590), and said that, applying the principles of that case to the present, where there was a charge of debts which might require immediate payment, every word in that case justified him in saying that a sale or mortgage would be authorised in the present case. All that he found to militate against this view was the direction "after the payments aforesaid" to invest the residue and pay the income to the wife. But the testator had no intention that his wife should be deprived of the rents and profits simply because there was a charge. Why was the sale directed to be postponed to the death of the wife except that she might have the benefit of the rents and profits during her life? The case of *Harper v. Munday* (*loc. cit.*) showed how strong the rule must be. Then, as regarded the question of costs, the rule having been laid down by the Master of the Rolls and Vice-Chancellor Kindersley (in *Daubney v. Leake* and *Hubbard v. Latham*), he would not depart from it. It was a considerable departure from the old rule. The plaintiffs and the defendants to the record must alone have their costs.

Wood, V.C., July 4, 1866.

THE CLECKHEATON INDUSTRIAL SELF-HELP SOCIETY v.
JACKSON.

14 W. R. 950.

The Public Health Act, 1848 (11 & 12 Vict. c. 63), was repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55).

Public Health Act, 1848 (11 & 12 Vict. c. 63)—Reasonable notice—Sewer.

LOCAL GOVERNMENT. D.—*A notice is reasonable, within the meaning of section 45 of the Act, when it specifies the object of an entry on private premises to be the construction of a sewer of certain dimensions, and shows that the entry will be made at a particular point, and that the sewer will go from that point in an oblique direction. It is not necessary that this notice should be accompanied by a map.*

This was a suit to restrain the Local Board of Health of Cleckheaton from entering on the plaintiff's premises, and constructing a certain sewer thereon. The Local Board, after sending a notice that, for the purpose of effectually draining the district by constructing a sewer of certain dimensions, they intended to penetrate at a certain part of the plaintiffs' premises, going in an oblique line, had sent workmen, who commenced digging a trench.

G. M. Giffard, Q.C., and Freeling, for the plaintiffs, contended that this motion was insufficient, as it did not specify how and where the board were going through plaintiffs' land, and was not accompanied by a map, and that it was therefore not a "reasonable notice" within the terms of section 45 of the Public Health Act, 11 & 12 Vict. c. 63. That section only gives them compulsory powers over public property, not over private property: *Reg. v. Local Board of Health of the Borough of Godmanchester* (18 W. R. 155).

Rolt, Q.C., and Robinson, for the defendant, were not called upon.

Wood, V.C., said that the Act was one for the public benefit, and Parliament had assumed that its powers would not be abused. Section 45 imposed the duty of doing a great public work. As to that part of the evidence which said the board were not doing it properly, it was met by a long series of decisions showing that they were the best judges of that. If he held that section 45 gave no compulsory powers over private property, he should find the Act imposing a duty, and at the same time leaving power in any individual to stop the improvements. The Godmanchester case (*loc. cit.*) had nothing to do with section 45. It was never contemplated by the Public Health Act that local boards should be arrested in their improvements by individuals. As to the notice, the Act did not say that a map must be sent. If the Legislature had intended this it would have said so. He could not, therefore, hold that a map was necessary.

His Honour held the notice to be reasonable, and dismissed the bill with costs.

[LORDS JUSTICES.]

July 17, 1866.

Re THE RAILWAY FINANCE COMPANY (LIMITED).

14 W. R. 956.

Joint-stock company—Winding-up—Appointment of official liquidator—Discretion of Court.

COMPANY. M.—*An official liquidator having been appointed by one of the Courts below, the Court of appeal will not vary the appointment unless upon special grounds, the appointment being a matter of discretion.*

An order having been, on the 28th May, 1866, made for the winding up of this company, the Master of the Rolls afterwards appointed Mr. Price the official liquidator. Two motions were now made to discharge the order. The one asked for the appointment of Mr. Chatteris, and the other for the appointment of Mr. Cooper.

Craig, Q.C., and *Cottrell*, for the first motion, on behalf of the directors, and some of the shareholders and creditors.

Daniel, Q.C., and *Roxburgh*, for the second motion, on behalf of a large creditor.

Bardswell for a judgment creditor.

Jessel, Q.C., and *Swanston*, for the official liquidator.

Craig, Q.C., in reply.

Their LORDSHIPS refused both motions with costs, saying that they would not, in a matter of discretion like this, interfere with the way in which the Master of the Rolls had exercised his discretion, unless upon special grounds, which were not shown in the present case.

ROMILLY, M.R., June 27, 1866.

ATWOOD v. ALFORD.

14 W. R. 956; L. R. 2 Eq. 479.

Will—Codicil—Substitutionary gift.

WILL.—*A codicil contained the following words:—"Between my sisters then living, or the lawful issue of any or either of them then dead"—Held, that this was not a substitutionary gift.*

John Lush Alford, by his will, gave to his mother real and personal property, and appointed the plaintiff and James Cobb (who pre-deceased him) executors of his will.

The said testator made a codicil to his will, dated the 2nd of August, 1849, in the following terms:—

"I hereby revoke the devise and bequest made by my said will to my mother, and I hereby devise and bequeath to my executors in my said will named, the real and personal estate by my said will devised to her, upon trust to sell and convert the whole thereof into money, and to invest the produce in Government securities, and by and out of the dividends or interest accruing therefrom, to allow yearly, for the maintenance of my sister Emily,

the sum of 50*l.*, and for that of my mother the like sum of 50*l.* per annum; and upon trust to divide the residue of the dividends and interest, during their joint lives and, after the death of either of them, between my other sisters for their maintenance, and after the death of both, then to divide the principal between my sisters then living, or the lawful issue of any or either of them then dead, the issue taking *per stirpes*, and not *per capita*."

The testator had four sisters, one of whom died in his lifetime, leaving one child, Mary Ellen Hardy. The question was whether such child was entitled to take a share with the other sisters.

The bill was filed by the surviving executor.

Baggallay, Q.C., and *Laurance*, for the plaintiff.

Selwyn, Q.C., and *Speed*, for Eliza Alford, one of the sisters, contended that Mary Ellen Hardy could take no share under the will. Her mother had died, and in the lifetime of the testator. The gifts were substitutionary, and the class to take by substitution were to be ascertained at the death of the testator. They quoted *Christopherson v. Naylor* (1 Mer. 320); *Thornhill v. Thornhill* (4 Mad. 377); *Ive v. King* (16 Beav. 46); *Congreve v. Palmer* (1 W. R. 156; 16 Beav. 435).

Shapter, Q.C., and *Bush*, for the representative of another sister.

Southgate, Q.C., and *Hemming*, for Mary Ellen Hardy.

LORD ROMILLY, M.R.—I think this is not a case of a substitutionary gift at all.

ROMILLY, M.R., June 23, 1866.

In re THE PROPRIETORS OF THE BASINGSTOKE CANAL.

14 W. R. 956.

See *In re Woking Urban Council (Basingstoke Canal) Act*, 1911, [1914] E. R. A.; 83 L. J. Ch. 201 (C. A.).

Winding up—Unregistered company—Company formed under a private Act of Parliament.

COMPANY. M.—*A canal company formed under a private Act of Parliament may be the subject of a winding-up order under the Act of 1862.*

This was a petition for winding-up the Basingstoke Canal.

The canal was opened in 1794, under a private Act of Parliament. The capital was 86,000*l.*, with power to raise 40,000*l.* by mortgage bonds. A subsequent Act was obtained, enlarging the capital. The canal was wholly unsuccessful. The ordinary capital never received any dividend, and the interest on the mortgage bonds was in arrear. The petition stated that the present income was insufficient to keep the canal in repair, and pay the working expenses. The petition was presented in pursuance of a resolution passed at a general meeting of the proprietors.

Wickens and *Davey* appeared on behalf of the petitioners.

The petition was unopposed.

LORD ROMILLY, M.R.—Is this a trading partnership, such as can be made the subject of a winding-up order?

Wickens.—Yes; this is a similar case to the Isle of Wight Trading Company, and the Ventnor Harbour Company, in both of which cases the winding-up order was made.

His LORDSHIP made the order prayed for.

ROMILLY, M.R., June 30, 1866.

Re THE LAND CREDIT COMPANY OF IRELAND; MUNSTER'S CASE.

14 W. R. 957; 14 L. T. 723.

Winding up—Contributory—Misrepresentation—Directors—Lapse of time.

COMPANY.—*A mis-statement of the names of the directors of a company in the prospectus is an important misrepresentation.*

A shareholder complaining of misrepresentation in the prospectus of a company must do so within a reasonable time after becoming aware of the misrepresentation.

This was an application on an adjourned summons from chambers to have Munster's name struck off the list of contributories, on the ground of misrepresentation in the prospectus of the company. The prospectus stated that all the directors of the company were shareholders, and gave the name of James Pim as one of the directors.

It was alleged that Munster was induced to take shares in the company from seeing Pim's name as a director, and that Pim was never qualified to be a director. When the company was formed a negotiation was commenced for the purchase by the company of an estate belonging to Pim, for which he was to be paid partly in cash and partly in shares of the company. This was the only interest Pim ever had in the company, and the negotiation was afterwards broken off. Munster continued to attend the meetings for six months after the negotiation was broken off.

The winding-up order was made on the 1st of July, 1865.

Jessel, Q.C., and E. E. Kay, for the applicant.—The list of directors is a very important part of the prospectus. Persons taking shares rely very strongly on the names they see on the list. Pim never had any qualification at all. He only had a possibility of a qualification, and this possibility subsequently came to nothing: *Re The Life Association of England, Ex parte Blake* (13 W. R. 468; 11 Jur. N.S. 459), *The Brighton Brewery Company* (10 S. J. 807).

LORD ROMILLY, M.R.—I have always held that the names of the directors are most important. But as far as I can see there is no ground for striking out Munster's name. Munster was present during the negotiations in 1864. Pim never attended previous to that time. If the contract had been carried out Pim would have become a director. Munster goes on attending six months after the agreement came to an end, and when, as he must have known, Pim's qualification ceased. In my opinion it is too late for him to raise the question of misrepresentation. He ought to have acted speedily. A misrepresentation does not bind a person who complains directly he finds it out, but he must complain directly. The case of the Marquis of Abercorn, in which the Lords Justices differed from me, was compromised by the plaintiff on payment of 30,000*l*. There is no ground for striking off the name of Munster.

KINDERSLEY, V.C., July 21, 1866.

HORNE *v.* HORNE.

14 W. R. 957.

Administration suit—Legatee—Creditor—Costs.

EXECUTOR AND ADMINISTRATOR.—*In an administration suit by legatees,*

the fact of one of the legatees being a large creditor will not entitle him to costs as between solicitor and client.

Reason for the rule for taxation as between solicitor and client in a creditor's suit.

Earmarking a fund where there is a contingency.

This was an administration suit. W. E. Horne, by his will, charged all his estate with the payment of his debts, and subject thereto and to a specific bequest, devised all his estate to his wife for life, and after her death, on trusts for sale and division of the proceeds among his children. Some years before the testator's death his sister had sent him 250*l.*, with a letter stating that the money was to be for the benefit of his son Fallon Horne, if he should attain twenty-one, and if not, to be divided among the testator's other children. The letter also directed that the interest on the 250*l.* should be accumulated until the fund became payable. The testator mixed the 250*l.* with his own moneys, and on his death his assets were about 935*l.*, and debts about 2,440*l.* The bill was filed by the testator's three children (of whom Fallon Horne was one), all infants, by their next friend, against the testator's widow, praying for an administration of the estate. The usual administration order had been made, and the Chief Clerk had allowed Fallon Horne's claim as a creditor for 250*l.* and interest, amounting to upwards of 300*l.*

F. H. Colt, for the plaintiffs, now asked that, as Fallon Horne was so large a creditor, the suit, *quoad* him, might be treated as a creditor's suit, and his costs taxed as between solicitor and client: *Seton on Decrees*, 165. There was also a question as to how the fund representing the 250*l.* and interest should be dealt with, it being not yet certain who would be ultimately entitled.

O. S. Round for the defendant.

KINDERSLEY, V.C.—The reason for the rule for taxing costs as between solicitor and client in a creditor's suit is that a creditor, as a party suing for the benefit of others, is entitled to something more than an ordinary plaintiff. Fallon Horne sues here as a legatee, and not as a creditor, and therefore the rule does not apply to him. As regards the fund representing the 250*l.*, and interest, it is of importance that it should be earmarked; it had better therefore be carried over to an account entitled "The account of the person or persons entitled to the benefit of the debt or claim of Fallon Horne."

STUART, V.C., June 30, 1886.

DEWAR v. MAITLAND.

14 W. R. 958; L. R. 2 Eq. 834; 14 L. T. 853; 12 Jur. N.S. 699.

Election—Colonial heir.

ELECTION.—Where A. bequeathed and devised certain personal and real estate in England, and devised real estate in the island of St. Kitts, in the West Indies, to trustees in trust for his eldest son for life, with divers remainders over, the will being duly attested to pass the property in England, but not so as to pass real estate in the island of St. Kitts:—Held, that a case of election arose, and that the son had elected to take under the will.

Semble, that irrespective of the question of a voluntary election, the Court would have declared the heir bound to elect.

This was a bill filed on behalf of three infant children of Albemarle Dewar, against the eldest son and heir-at-law of the said Albemarle Dewar, and the trustees of the will of one David Albemarle Bertie Dewar, for the purpose of carrying into execution the trusts of the said testator's will. The question for the Court's decision was one of election, arising under the following circumstances:—

David Albemarle Bertie Dewar, at the time of his death was possessed of valuable freehold and personal property, including certain freehold estates in England, and also in the Island of St. Kitts, in the West Indies, and by his will dated 12th day of January, 1857, after giving a legacy of 3,000*l.*, and certain interests in other personal property, to his son Albemarle Dewar, devised all his real estate in Hampshire to his said son for life, (with certain restraints on alienation), remainder to his first and every other son in tail male, remainder to the first and every other of the said sons in tail general, remainder to the daughters of the said Albemarle Dewar in tail general. After giving the usual powers of jointuring, to create charges in favour of children, to lease, &c., the testator proceeded to give all the rest and residue of his real and personal estate, "including his property in the West Indies," to trustees to sell, and after payment of debts, to invest the produce thereof in the purchase of freehold, copyhold, and leasehold hereditaments in England or Wales, upon the same uses and trusts as his freehold hereditaments in Hampshire had been devised. The will was duly attested according to the law of England, but was not attested so as to pass real estate according to the law of St. Kitts, the law of that island still requiring wills affecting real estate to be witnessed by three witnesses. On the death of the testator, his son Albemarle Dewar duly entered into possession of the Hampshire estates, and received the rents and profits both of them and the West India estates during his life, treating himself, as the balance of evidence was held to shew, as tenant for life only. After the death of Albemarle Dewar in 1862, intestate and practically insolvent, the West India estates were sold by the trustees; but the purchaser declined to complete, insisting that, as the testator's will was not executed so as to pass the real property by the law of St. Kitts, Albemarle Dewar took the estates in that island as heir-at-law, and, on his death intestate, they devolved upon his eldest son, one of the present defendants. The plaintiffs then filed their bill, praying a declaration to the effect that the said Albemarle Dewar was bound to elect either to take the West India property under or against the will of the testator, that he had elected to take it under the will; and that, should the Court be of a different opinion, the estate of Albemarle Dewar, including the West India estates, might be made liable in compensation for the loss sustained by the plaintiffs through the said Albemarle Dewar not giving effect to the said devise of the West India estates.

Bacon, Q.C., and *F. J. Wood*, for the plaintiffs.

Greene, Q.C., and *G. O. Morgan*, for the defendant, cited *Hearle v. Greenbank* (3 Atk. 695), *Boughton v. Boughton* (2 Ves. sen. 12), *Sheddon v. Goodrich* (8 Ves. 481), *Brodie v. Barry* (2 Ves. & B. 127), *Dillon v. Parker* (1 Swans. 405), *Gardiner v. Fell* (1 Jac. & W. 22), *Churchman v. Ireland* (1 R. & My. 251).

F. O. Haynes, for the widow of Albemarle Dewar, who, in the event of his being held to have taken against the will, had a claim against the estate, called the attention of the Court to *Padbury v. Clark* (2 M. & G. 298), *Thelluson v. Woodford* (13 Ves. 209). He referred to the circumstance that in cases where a testator had attempted to dispose of some portion of his own property by an instrument ineffectual for that purpose, the principle of election did not apply to an heir of freehold estates in England. The cases had not gone further than to make a copyhold or customary and Scotch heir elect.

STUART, V.C.—You see an English heir was always a great favourite. I do

not know that this is so with a colonial heir. The exceptional doctrine has not gone beyond an English heir. Can we take it to St. Kitts?

F. O. Haynes.—There is no reason why the doctrine should not extend to a colonial heir.

STUART, V.C.—In this case the heir enjoyed the property according to the terms of the testator's will. It is beyond a doubt that he recognised the devise of this West India estate as a valid devise, and enjoyed all the benefits under the will on that footing. It is said, however, that it must be shewn to the satisfaction of the Court that he knew that the will was an invalid will, and that, if he chose, he could have denied its operation, and enjoyed the estate as heir. There is no doubt that, before an heir can be put to his election, he is entitled to know everything that ascertains the value and situation of the property as to which he is to make his election. But, there is no authority for the doctrine that, where an heir has elected to confirm a devise of land which without such confirmation would be invalid, this Court ought not to hold that those claiming under him are bound. If property be enjoyed according to a certain mode of enjoyment, and with the recognition of certain rights, the Court will be very slow to disturb what has been settled by a long course of enjoyment. In this case the heir-at-law chose to enjoy the property devised by the testator on the footing of his will. The argument has turned on cases where the Court will compel an heir to elect, and in the course of the argument, the extraordinary doctrine of the Court, (too well established to be shaken now), that the heir-at-law is not to be put to his election by an unattested will or codicil, has been discussed. But although that doctrine prevails as to the English heir, it does not apply to copyhold or customary heirs, nor to Scotch heirs. Then on what ground am I to hold that the colonial heir is not to be put to his election where the colonial real estate is not validly devised, and there are benefits given to him on the footing that the property has been validly devised to him? I cannot see any distinction between a case of this kind and that of *Brodie v. Barry*, and that of a customary heir. My opinion, therefore, is that in this case, the Court is bound to declare that Albemarle Dewar must be held to have elected, and that the real estate in the colony must be bound by his act, and that his infant heir is not entitled to elect against the provisions of the will.

WOOD, V.C., June 29, July 2, 3, 1866.

HARRISON v. SYMONS.

14 W. R. 959.

Deed—Construction—"Issue."

DEED AND BOND. POWERS.—*Where, in a deed, a power is given to appoint among "issue," followed by a limitation over in their favour, and then it is declared that the "children" shall take in equal shares, the word "children" does not cut down the strict technical meaning of the word "issue."*

This was a suit for obtaining the decision of the Court on the construction of a power given to Margaret Dyne, by the settlement executed on her marriage with Peter Fry. The settlement was dated the 29th of August, 1826, and, after providing for the husband and wife and the children, declared the following trusts in case there should be no children of the marriage.

"Upon trust for all or any one or more of the brothers and sisters of her the said Margaret Dyne, who shall be then living, and the issue of any one

or more of them as shall be then dead leaving issue, in such shares and proportions, and for such estates and interests, and with such powers, provisions, and limitations over, such limitations over being for the benefit of some or one of them as she, the said Margaret Dyne, by any deed or deeds, instrument or instruments, in writing, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, or any codicil or codicils thereto, to be executed and attested in manner aforesaid, shall, notwithstanding her coverture, and whether covert or sole, direct, limit, or appoint, give or devise the same. And in default of such direction, limitation and appointment, gift and devise, and in case any such shall be made, then subject thereto, and as to so much and such parts thereof, and such estates and interests to which the same shall not extend, upon trust for all the brothers and sisters who shall be then living of her, the said Margaret Dyne, and the issue of any of her brothers and sisters who shall be then dead, equally to be divided amongst them as tenants in common and not as joint tenants, their heirs, executors, administrators, and assigns, the issue of any deceased brother or sister to take only such share as such brother or sister would have taken in case he or she was then living, and the children of each deceased brother and sister, if more than one, to take in equal shares as tenants in common between themselves."

The power thus given was the one in question.

Margaret Fry exercised her power of appointment by her will, in which she appointed in favour of some of her grandnephews and grandnieces as well as in favour of some of her nephews and nieces; and the question now to be decided was whether the appointments to the grandnephews and nieces were or were not good, and whether the limitation over in default of appointment was or was not confined to issue of the first degree. The husband and wife are both dead, and there was never any issue of the marriage.

Prendergast, for the plaintiffs, the Rev. W. M. Harrison and Elizabeth his wife, the latter of whom was a niece of Margaret Fry, and one of the appointees under her will.—The word "children," used in the power, restricts "issue" to those of the first degree.

Daniel, Q.C., and *Haddan*, for two nieces and a nephew, all of whom were appointees, adopted the same view: *Hampson v. Brandwood* (1 Madd. 381).

C. O. Boys for a nephew and appointee.

Osborne, Q.C., and *Surrage*, for other defendants in the same interest, also contended that "issue" was cut down to "children": *Swift v. Swift* (8 Sim. 168).

Freeling, for the trustees of the settlement, and for a niece of Mrs. Fry, to whom she made no appointment, and her husband, cited *Edwards v. Edwards* (12 Beav. 97) (a case of a will).

A. E. Miller, for the widower of a niece who died in the lifetime of Margaret Fry, contended that "issue" was not confined to those of the first degree, and that, notwithstanding her death in Margaret Fry's lifetime, the nieces's issue were entitled.

B. B. Rogers for the child of a grandniece.

W. M. James, Q.C., and *C. Hall*, for grandnieces, who were also appointees, argued that there was nothing to shew that the word "issue" had been used otherwise than in its proper sense. The *onus* was on the other side to shew the contrary. The other side did not shew beyond all possible doubt that "issue" must be confined to "children."

G. M. Giffard, Q.C., and *Willamson*, for another grandniece and appointee.

Wood, V.C., said that the only case for restricting the word "issue" to children in a deed was that of *Swift v. Swift* (*loc. cit.*). There it was almost impossible to construe it otherwise; and the marriage articles were executory, which brought the case nearly to that of a will. This being a deed, he did not feel justified in cutting down the word "issue." The word "such" ran through the whole series of limitations. He thought that, on the whole, he was bound to hold that "issue" was not confined to children.

The decree would be—Declare that, according to the true construction of the appointment, and the limitation over in default of appointment, in respect to the brothers and sisters of Margaret Fry and their issue, the word "issue" comprehends all the descendants of the brothers and sisters of Margaret Fry who were alive at the date of the settlement and pre-deceased Margaret Fry; but that, as between the children of such deceased brothers and sisters and their descendants, their children take as tenants in common; and as to the rest, as joint tenants. Tax the costs of all parties as between solicitor and client; and declare that the appointed and unappointed shares must contribute rateably to such costs.

[DIVORCE AND MATRIMONIAL.]

March 16, 1866.

SANDERSON v. SANDERSON AND GIBSON.

14 W. R. 972.

Suit for dissolution—Examination of the petitioner—Discretion of Court under 20 & 21 Vict. c. 85, s. 43.

DIVORCE AND MATRIMONIAL CAUSES.—*The Court will, under some circumstances, allow a petitioner in a suit for dissolution of marriage to be called to give evidence, under a discretion given by the 43rd section of 20 & 21 Vict. c. 85, notwithstanding the Act which provides that neither of the parties in such a suit is allowed or compellable to give evidence.*

This was a petition for dissolution of the marriage on the ground of the wife's adultery. The respondent and co-respondent traversed the charge, and the case came on for trial before the Court and a special jury.

Sir R. P. Collier, S.G., and Spinks, Dr., for the petitioner, put in letters in the co-respondent's handwriting, and addressed to the respondent, but there was no evidence that they were ever in her possession.

It having been suggested that the petitioner was the only person who could state how they came into his hands,

The JUDGE-ORDINARY said that he thought the 43rd section of 20 & 21 Vict. c. 85, gave the Court power to examine the petitioner, and that he should wish to put him some questions relative to the letters.

Sir R. Phillimore, Q.A. (Woollett with him), objected to the petitioner's being examined unless the respondent was also called as to the same matter.

WILDE, J.O.—It is not in my power to examine the respondent. The 43rd section of the Act 21 & 22 Vict. c. 85, enacts that "the Court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be cross-examined on oath on the hearing of any petition; but no such petitioner shall be bound to answer any question tending to shew that he or she has been guilty of adultery." There is a case

of *Tatham v. Tatham* (8 Sw. & Tr. 511), in which the Court exercised the discretion given by this section of calling the petitioner. In ordinary cases it would be unfair to examine the petitioner when the respondent cannot be examined; but on so narrow a point as to where he got a number of letters, I do not think there would be anything unfair in calling him.

The attorney having intimated that the petitioner was absent in France, the case was allowed to proceed, without insisting on his examination.

WILDE, J.O., in charging the jury, told them that though these letters were evidence against the co-respondent, that in the absence of any evidence as to their coming into the respondent's possession they were no evidence of adultery as against her.

[ADMIRALTY.]

June 9, 1866.

THE "RJUKAN."

14 W. R. 973.

Practice—Right of plaintiff's counsel to a second speech.

In this case, which was a cause of collision, in which the evidence in the cause had been taken before an Examiner of the Court, a discussion arose as to the right of the plaintiff's counsel to a speech in reply.

LUSHINGTON, DR., said that the practice had varied; that in salvage cases, where the evidence had been taken by affidavit, it had not been usual to allow a reply, but that he wished it now to be understood that he would allow a reply in all cases.

[ADMIRALTY.]

July 12, 1866.

THE "SPRING."

14 W. R. 975; L. R. 1 A. & E. 99; 12 Jur. N.S. 788.

SHIPPING.—Collision—Two sailing vessels crossing—Exception to 12th Sailing Rule.

This action was brought by the owner of the late sloop *Constantine* and the cargo on board, and by her master and crew, against the oyster smack *Spring*, for the recovery of damages occasioned by a collision between the two vessels. A cross action was brought by the owner of the *Spring*. The collision took place off the Eddystone on the 15th of March, 1866, at about 9 a.m. The case of the *Constantine* was that the wind was blowing in squalls from S.S.E., and the *Constantine* was steering N.N.E., with the mainsail close reefed, and the boom over her port quarter, and that the *Spring* was seen about a mile distant, bearing four points on her starboard bow, and steering W. by S.: that the *Constantine* kept her course, and when the *Spring* approached waved to the *Spring* to pass under her stern, but that, instead of doing so, the *Spring*,

when within about two lengths of the *Constantine*, put her helm hard-a-port, and soon afterwards struck the *Constantine*. The case of the *Spring* was that the wind was blowing hard from S. to S. by E., that the *Spring* was steering W. by S. on the port tack, with the wind a little free, and was sailing at the rate of about four knots an hour, and that the *Constantine* was descried about three miles off bearing broad on the port bow; that the *Constantine* was steering to the northward, had the wind aft, and was to windward of the *Spring*; that the *Spring* was kept on her course in the expectation that the *Constantine* would get out of her way, but that the *Constantine* approached and caused immediate danger of collision, whereupon the helm of the *Spring* was put hard-a-port, but that a collision happened.

The witnesses on both sides were examined *vivâ voce*.

Milward, Q.C., and Cohen appeared for the *Constantine*, and argued that the case fell within the 12th article of the Sailing Rules, and that the *Spring*, having been on the port tack, ought to have kept clear of the *Constantine*.

Dr. Deane, Q.C., and Clarkson, for the *Spring*, submitted that the case fell within the exceptions to the 12th article of the Sailing Rules, and that the *Constantine* had the wind aft, and was to windward of the *Spring*, and ought to have kept clear of the *Spring*.

LUSHINGTON, DR., after consultation with the Trinity Masters, gave judgment as follows:—We are of opinion that both vessels are to blame. I think it right, however, to state the grounds on which we have formed that opinion. I think the case of the *Constantine* falls under the last clause of article 12 of the Sailing Rules. That article runs as follows:—"When two sailing ships are crossing, so as to involve risk of collision, then if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled, and the other ship free, in which case the latter ship shall keep out of the way; but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward."

I am of opinion, and the gentlemen of the Trinity House agree with me, that the case of the *Constantine* falls under that head, and that that vessel was to blame. With respect to the *Spring*, I think it falls under the 18th article. The text of that article is as follows:—"When, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications (afterwards mentioned) of avoiding immediate danger." Now it is perfectly clear, that the *Spring* did not keep her course, but ported her helm. In the answer it is pleaded, that there was "immediate danger," when she ported, but looking at the whole of the evidence, I cannot come to the conclusion that it was done in order to avoid "immediate danger," and therefore we are of opinion that both vessels are to blame.

Decree accordingly.

KINDERSLEY, V.C., July 21, 1866.

Re THE ST. KATHERINE'S DOCK COMPANY.

14 W. R. 978.

Practice—Dock company—Costs.

COMPULSORY PURCHASE.—Lands were taken and the purchase-money paid into the Bank, under the St. Katherine's Dock Act, and subsequently the

company was amalgamated with another, and the Amalgamation Act repealed the former Act, and incorporated with it the Lands Clauses Act; but there was a saving clause, providing that everything done, suffered, or confirmed before the passing of the Amalgamation Act, should be valid as if the repeal had not happened, and the amalgamated companies should be treated as one.

On a petition for re-investment in land of the money so paid in under the former Act:—Held, that the costs were payable by the company under such former Act.

This was a petition for the re-investment in land of 52,000*l.*, which had been paid into court under the provisions of the St. Katherine's Dock Act. 6 Geo. 4, c. 105, as representing the proceeds of certain charity lands belonging to the St. Katherine's Hospital, and taken by the St. Katherine's Dock Company under the above Act, and the only question was as to the costs. By the 57th section it was enacted, that where by reason of a disability or incapacity of any party or parties entitled to any houses, lands, tenements, or hereditaments to be purchased or taken under the authority of that Act, the purchase-money for the same should be required to be paid into the Bank of England, and to be applied in the purchase of other messuages, houses, buildings, lands, tenements, or hereditaments, to be settled to the like uses in pursuance of that Act; it should be lawful for the said Court (of Exchequer, now of Chancery) to order the expenses of such last mentioned purchase, or so much of such expenses as the said Court should deem reasonable, together with the charges of obtaining such order, to be paid by the said company; and the said company should, from time to time, out of any moneys applicable to the purposes of that Act, pay such sum of money, for the purposes aforesaid, as the said Court should direct. By the 27 & 28 Vict. c. 178, the St. Katherine's Dock Company and London Dock Company were amalgamated, and, amongst other Acts, the 6 Geo. 4, c. 105 was thereby repealed, and the Land Clauses Act incorporated; but by the 12th section it was enacted that, notwithstanding the repeal of the said recited Acts, and, except only as was by that Act otherwise expressly provided, everything before the commencement of that Act done, suffered, or confirmed respectively and under or by those Acts, or any of them, should be valid as if the repeal of them had not happened, and the repeal thereof and the operation of that Act respectively should, accordingly be subject and without prejudice to anything and everything so done, suffered or confirmed respectively; and to all rights, liabilities, claims and demands both present and future, which, if the repeal had not happened, might be incident to, or consequent on any and everything so done, suffered, and confirmed respectively, with respect to all such things so done, suffered, or confirmed respectively; and all such rights, liabilities, claims and demands; and the amalgamated company should to all intents represent the London Dock Company and St. Katherine's Dock Company respectively, provided that the generality of expressions should not be restricted by any of the provisions of that Act. By the 16th section it was provided that, notwithstanding the repeal of those Acts, in every case in which, under any of those Acts, any money was, before the commencement of that Act, paid into the Bank of England, or to any trustee or trustees, as purchase or compensation money, or on any account, the money, or the stocks, funds, or securities in or upon which the same was from time to time, by order of the Court of Chancery or otherwise, invested, and the interest, dividends, and annual produce thereof should, after the commencement of that Act, be applied and disposed of pursuant to the repealed Acts. The petition was entitled in the 6 Geo. 4, c. 105, and an order was made upon it for re-investment, and the costs ordered to be paid by the company in the terms of the repealed Act in which the petition was entitled. In settling the minutes of the order the Registrar considered that the matter should be mentioned again to the Court,

as he doubted whether the costs should be paid according to the terms of the 6 Geo. 4, c. 105, or the Lands Clauses Act, 8 & 9 Vict. c. 18.

Baily, Q.C., in support of the petition, contended that the Act to regulate the payment of costs was the Lands Clauses Act.

Speed, for the company, insisted that the question of costs in this case, where the money was paid in before the Amalgamation Act, was governed by the 6 Geo. 4, c. 105: *Re Cherry's Settled Estates* (10 W. R. 305).

KINDERSLEY, V.C., stated the facts. If the question stood merely on the incorporation of the Lands Clauses Act and the repeal of the former Act, the costs would either have not been payable at all, or, if payable, it would have been under the Lands Clauses Act; but in this Act the 12th and 16th sections appear to me to govern the matter. [His Honour read the sections.] There is no question about the meaning of that, that notwithstanding the Act incorporating the two companies, and notwithstanding the total repeal of the former special Act, where any money has been actually brought into court (the case here) under the prior Act, it shall be dealt with, notwithstanding the repeal, as if the Act had never been repealed, and under the provisions of that prior Act. Now, taking the last section (the 16th) in connection with the 12th, in which there is a repeal of the prior Act, the operation of the new Act is to be subject to everything previously done, which is thereby confirmed, but subject to and including the right to costs in accordance with the Act. It appears to me that sections 12 and 16 entirely prevent what is contended for by the petitioners, which is, that the Lands Clauses Act is to govern the costs; because the last Act prevents that by saying that whatever took place before its commencement shall be carried out under the old Act, and all rights and liabilities contained in it shall be dealt with under the old Act. It appears to me that the costs which the company are liable to pay are costs under the old Act. The case of *Ex parte Cherry* was cited as similar to this, and no doubt if it was I should follow it, and come to the same conclusion, but the grounds were very different. [His Honour referred to that case.] In that case the subsequent Act did not repeal the former one, but gave power to raise further moneys, which were to be dealt with as under the former Act, the companies having no power to deal with the money under the last Act in any other way than specially provided by the prior Act, and they would not therefore pay any costs, otherwise than under such prior Act. On that ground the Lords Justices thought that the preceding Act governed the question of costs. There the application was to have the money out of court and invest it, and they thought the Act did not apply to that—not so here, for it is for re-investment. It appears to me in the present case the effect of the two sections I have referred to is to throw back the matter, where the money was brought into court before the passing of the second Act, and direct that everything shall be done, and the rights and liabilities dealt with under the former Act.

KINDERSLEY, V.C., July 17, 24, 1866.

SURRIDGE v. CLARKSON.

14 W. R. 979.

Will—Construction—Issue—Survivor.

WILL.—A testator gave the interest of 3,000*l.* stock to his wife for life, and after her decease, the interest of 1,000*l.*, part of the 3,000*l.*, to his daughter E. for life, and then to her issue; and as to another 1,000*l.*, to his daughter M.,

and all her issue at twenty-one, with trusts for maintenance; and if she should not leave issue at her decease, or they should not attain twenty-one, to the issue of his daughters E. and S. equally, in the same terms as the former gift; and as to the remaining 1,000*l.*, to his daughter S., and her issue after her decease. He then directed a valuation of his farm stock, and gave the amount, thereof and all his personalty and estate whatsoever, to his sons J. and T. equally, and appointed his sons R., J., and T. residuary legatees, subject to payment of 10*l.* a-year to his wife out of the valuation.

By a codicil the testator gave to his daughter M. 1,000*l.* Consols for life, and after her decease to her issue; and in default of issue, to her two surviving sisters' issue at twenty-one. M. survived her two sisters, and was not married, and the testator left grandchildren and great-grandchildren:—Held, that M. took for life only, that the three sons of the testator, R., J., and T., all took the residue, and their issue, at M.'s death, took as purchasers as joint tenants; that is, such issue as were either alive at the testator's death, or came into esse before the death of M.

The questions in this case arose on the will of North Surridge, dated 3rd April, 1811, whereby he gave the interest and dividends of 3,000*l.* Irish 5*l.* per Cents. to his wife Martha for life, and after her decease he gave the interest and dividends of 1,000*l.*, part of the 3,000*l.* to his daughter, Elizabeth Fitch, for life, and then to her issue; and after the decease of his wife he gave the interest and dividends of 1,000*l.* Irish 5*l.* per Cents. to his daughter Martha Surridge for life, and then for all and every her issue, equally to be paid and transferred as and when they attained twenty-one, and the interest and dividends to be applied for their maintenance; but in case she should not leave issue at her decease, or such issue should not attain twenty-one, then unto all and every the issue of his daughters Elizabeth Fitch and Sarah Surridge equally, in the same way as in the prior gift: and upon and after the decease of his wife he gave and bequeathed the interest and dividends of the remaining 1,000*l.* of the 3,000*l.* to his daughter Sarah for life, and to her issue after her decease. And after directing a valuation of his corn and live stock, &c., which should be upon his farms at his decease, he gave and bequeathed the amount thereof, together with all his personal property and estate whatsoever and wheresoever, and of what nature, kind, or quality soever (except household furniture, plate, linen, &c., which he gave to his wife for her life) to his sons John and Thomas Surridge equally, and he thereby made and appointed his sons, Robert, John, and Thomas, residuary legatees, subject, nevertheless, to the payment by each, out of the produce of such valuation and the residue as aforesaid, of the sum of 10*l.* a piece, clear of all taxes and deductions whatsoever, which he gave and bequeathed to his said wife for life; and he appointed his sons Robert and North Surridge executors. The testator made a codicil dated 23rd January, 1812, whereby he gave to his daughter Martha 1,000*l.* Consols for life, and after her decease to her issue, and in default of issue to her two surviving sisters' issue as they should arrive at the age of twenty-one years.

The testator died on the 19th February, 1812, the widow in March, 1827, having received the dividends and enjoyed the other bequests during her life. Robert died in 1849, leaving North Surridge surviving, and he died in January, 1860, and appointed the plaintiffs executors, who also, therefore, now represented the original testator. Martha, the daughter, lived till 31st July, 1861, and was never married, and survived both her sisters, Sarah and Elizabeth. Sarah married John Smith and had five children, and died in June, 1861. Three of these children attained twenty-one, and one of the daughters survived her mother and died under twenty-one, as did the remaining child, and both these two died unmarried. Elizabeth Fitch survived her husband and died in 1838, leaving five children, who all attained twenty-one. Of these one was in America, another died in 1836 intestate, two (daughters) were unmarried, and

the other was married and had two children, both now infants. At the death of the testator the issue of Elizabeth Fitch living were four, at the death of Martha Surreidge, the daughter, fifteen. On the death of Martha Surreidge, the daughter, questions arose as to the construction of the will in the events that had happened, and chiefly what was the effect of her having survived both her sisters, with respect to the 1,000*l.* Consols given by the codicil, and whether Robert was included in the residuary bequest? Thomas Surreidge died in 1817 and John in 1828, both leaving issue. This bill was filed in February, 1863, praying the construction of the will.

Charles Browne, for the plaintiffs, the trustees who had filed the bill, stated the points for argument.

W. W. Mackeson, for the issue of Elizabeth Fitch and Sarah Surreidge.—As to the legacy in the will, the word issue must mean children and remoter issue living at the death of the testator, and who were born subsequently up to the death of Martha; and as to the legacy in the codicil the word issue in the gift (to the issue of Martha), and in the gift over, must mean the same class, and default of issue therefore must mean default of issue to take under the previous limitation, so that it was immaterial whether the word issue in the limitation meant issue living at the death of Martha, or any issue who might have been born between the death of the testator and the death of Martha, in either view the gift over would be good. He also argued that the word surviving might be construed "other," or, at all events, that as the gift was to the issue of the surviving children, the testator could not have intended a contingent gift, and that he must substantially have meant the issue of the two sisters to take at all events; and that the issue took as tenants in common, because of the words "as they should arrive at the age of twenty-one years": *Towns v. Wentworth* (6 W. R. 395; 11 Moo. P. C. 526); *Ginger v. White*, (Willes, 348); *Kirkpatrick v. Kilpatrick* (13 Ves. 476); *Sheppard v. Lessingham* (Ambl. 122); *Re Wyndham's Trust* (1 L. R. Eq. 290); *Westwood v. Southec* (2 Sim. N.S. 192); *Re Wynch's Trust* (3 W. R. 750; 6 D. M. G. 188); *Knight v. Ellis* (2 Bro. C. C. 570; 2 Jarm. on Wills, 234); *Hand v. North* (12 W. R. 229).

C. Ward, for Samuel Fitch the younger, and William Claydon and Jane his wife, took the same view.

Warner, for Hester Martin, the representative of Thomas Surreidge, argued that the gift over of the 1,000*l.* Consols mentioned in the codicil to the issue of Elizabeth Fitch and Sarah Surreidge never took effect, for (1) the word "surviving" could not be construed "other," there being only three sisters in all, nor could the word be struck out of the codicil altogether; and (2) the gift over on the death of Martha without issue was void for remoteness: *Tudor's Lead. Cas. Conv. (Forth v. Chapman)*; *Jee v. Audley* (1 Cox, 324); *Darley v. Martin* (13 C. B. 683).

Crossley, for Robert and North Surreidge, the representatives of Robert Surreidge, supported the same view as Warner with regard to the construction of the codicil.

Robert's claim to share as one of the residuary legatees being conceded, this point was not argued.

July 24.—*KINDERSLEY, V.C.* (after stating the facts and referring to the will).—With respect to the gift to the sons it is clear that not mentioning Robert was a mere slip, and that appears clear by what follows as to the valuation of the 10*l.*, and therefore the testator must be taken to have committed a clerical inaccuracy in omitting the name of Robert, who is therefore entitled equally with his brothers. The codicil presents much more difficulty than the will, the testator evidently having been unwise enough to pen it himself, drawing inspiration from the will, but not knowing how to handle the subject. If I looked at this matter not judicially, no doubt the testator intended to do the same with the 1,000*l.* Consols as with the 5*l.* per Cents., but I must put a proper legal construction upon it. He intended to

give Martha a life estate only, followed by a gift to her issue after her decease, and if we were to stop there, it appears to me, after the decision in *Wynch's Trusts* (*suprà*), founded on *Knight v. Ellis* (*suprà*), it is impossible to maintain that she took an absolute interest. If the gift had been to her and her issue, it would have been absolute; but the life estate being given, I feel myself constrained to hold that her issue took by purchase (whatever is meant by the word "issue") expectant on her decease. But she had none, and the question is, what is the effect of the following words—"and in default of issue to her two surviving sisters," &c. No doubt they import a general failure; and, according to the general effect of the words, if at any time she had no issue, the intention was to give the estate over; and that would be void as to personalty, because in personalty you cannot have an estate tail. But it appears to me that those words, following immediately, as they do, upon the gift to her issue, must be construed as meaning the same thing as issue did in the gift; that is, "in default of her having issue to whom I intend at her death to give it over, to her sisters," &c. This is a curious question, arising from the singular way in which the testator has used his vernacular tongue. There were only three sisters, and having provided for Martha and her issue, in the event of her not having issue, then to the issue of her sisters. It is said it is only to go to such of her sisters as shall survive her, and that if one had pre-deceased her and the other had survived, then it would have gone to the issue of the surviving sister, excluding the issue of the deceased one; but as both have left issue, it is suggested that it is undisposed of, because there was, in fact, no sister of Martha who survived her and therefore it cannot go to the issue of either. Then it is argued that "survivor" means "other"; but that seems to be precluded by this:—He gives it to her two surviving sisters, and therefore, if you substitute the word "other" for "surviving," it would refer to more than two; but the fact is, the testator assumed that the two sisters would survive her, and then gave it to the issue of them, who, in such a case, must necessarily survive Martha. The mode of expression does not make it contingent, and therefore the gift to the issue of the sisters is effective, although both of them died before Martha.

Then comes the question, What issue is meant? They take as purchasers, but limited to a particular class. In neither of the cases referred to was there the same difficulty. In *Wynch's Trust* it was wisely agreed not to raise that question; and in *Knight v. Ellis* Lord Thurlow had not the same difficulty, and therefore he expressed no opinion as to what issue took. I am bound to hold here that Martha took only a life estate, and that the issue of her sisters, on her death, took as purchasers, and I must let in as many as I can. There is a suggestion on the will that the word should be interpreted children. I cannot so limit it. All I can do is to give it to all the issue of the two daughters, either alive at the testator's death, or coming into *esse* before the death of Martha, the tenant for life, and, there being no words of severance, they must take as joint tenants. The Court is always reluctant to give to a class in which there are members of different generations who would take together, but I do not see how to escape from this result; for it may be that among the issue of the sisters, parents and children, and even grandchildren, may take together.

KINDERSLEY, V.C., July 23, 24, 1886.

HOLLIS v. ALLAN.

14 W. R. 980; 12 Jur. N.S. 638.

Referred to, *In re Bouch*, [1886] E. R. A.; 54 L. J. Ch. 665; 29 Ch. D. 658; 52 L. T. 366; 33 W. R. 421 (C. A.): reversed, [1899] E. R. A.; 56 L. J. Ch. 1037; 12 App. Cas. 385; 57 L. T. 345; 36 W. R. 193 (H.L.).

Special case — Settlement — Construction — Bonus — Dividends — Yearly proceeds.

SETTLEMENT.—*On the marriage of H. and D., sixteen shares in the P. and O. Company were vested in trustees in trust to pay the interest, dividends, and yearly proceeds to D. (the wife) for her life, or such persons as she should direct, to her separate use; and there was a proviso that if any bonus should be declared in respect of the shares, that should be invested in augmentation of the settlement. The company being their own insurers, carried over 5l. per cent. on their floating stock to the insurance fund, and declared a dividend out of the surplus (if any) year by year among the shareholders, and carried forward small sums left out of such surplus to the following year, and so on de anno in annum:—Held, that these additional payments were not bonuses, and that the wife was entitled to them for her life.*

This was a special case under Sir George Turner's Act to determine the question whether two sums of 12l. and 16l. respectively were bonuses in respect of sixteen 50l. shares in the Peninsular and Oriental Steam Navigation Company, within the meaning of the settlement made on the marriage of the Rev. Benjamin Samuel Hollis and Jane Duplex.

The instrument in question was dated 24th August, 1841, and made between George Duplex of the first part, Mr. Hollis of the second part, Jane Duplex of the third part, and Richard Bourne and James Hartly of the fourth part. It recited that George Duplex was entitled to sixteen shares upon which the full sum of 50l. had been paid, making 800l., and that he proposed to settle the same on Jane Duplex and her children in the names of the trustees, and had assigned the same to them. It was witnessed that the trustees should stand possessed of the shares, upon trust, during the joint lives of the said Jane Duplex and the said Benjamin Samuel Hollis, her then intended husband, to pay the interest, dividends, and yearly proceeds of all and singular the said shares, as the same should come in and be received into the proper hands of the said Jane Duplex, or unto such person or persons as the said Jane Duplex, notwithstanding her intended coverture, should from time to time, after the same should have actually become due, and not by way of anticipation, direct and appoint; and after the decease of either of them to the survivor during his or her life, and after the decease of the survivor upon certain trusts, in favour of the children, with limitations over upon which no question turned. Then followed this proviso—"Provided always, and it is hereby agreed and declared by and between the said parties hereto, that in case at any time or times any bonus shall be declared and paid in respect of the said shares hereby settled, or any of them, in addition to the ordinary interest or dividend paid or payable in respect thereof for the current year, every such bonus shall be laid out and invested by the trustees or trustee for the time being of the settlement hereby made in their or his names or name, in some or one of the public stocks or funds of Great Britain, or upon Government or real securities, at interest, in augmentation of the settlement hereby made." And there was a covenant by Mr. Hollis to settle after-acquired property, and there was a power to appoint new trustees, which was exercised in 1856. James Allan was now sole trustee.

The Peninsular and Oriental Steam Navigation Company was established in 1840, by Royal charter, and by the deed of the company it was declared that there should be half-yearly meetings; and by the 128th clause, that in every year, commencing from the 1st of September, 1840, the board of directors should set apart out of the net profits made by the company during that year such a sum of money as should be considered necessary for forming a repair fund for machinery, vessels, &c., and other stock; and further, that the directors should set apart, out of the dividends and profits, such a sum of money, or security of any description, not exceeding one-fourth of such net profits after deducting any moneys so set apart for repairs, as in the discretion of the board of directors should for the time being be thought desirable, and invest it in the name of the company as a reserve fund for the general benefit of the company; and that from time to time it should be lawful for the board of directors to provide a guarantee fund; and to make a dividend, as in the discretion of the said board should be thought advisable (under the clause next in order), out of the net profits to be declared at the end of the half-year. Previously to, and up to the date of, the settlement aforesaid the company had paid 7l. per cent. on their shares, which was paid half-yearly until 1846. In that year, and in 1847 and 1848, the dividend was 8l. per cent.: 3½l. per cent. in one half-year, and 4½l. in the other half-year.

From 1848 to the present time the company had divided its net annual profits among the shareholders in sums composed of various items; one being called a dividend, another an additional payment, and another a payment out of the proprietors' underwriting account. The dividends varied in amount, and were sometimes called "the usual dividend," whereas the additional payments were called in the reports "bonus," "dividend," and "additional payment." It appeared that up to December, 1848, the company was in the habit of insuring at Lloyd's in the usual way, but that thenceforward they determined to insure their vessels themselves. For this purpose they, by resolution, charged the annual revenues with 5l. per cent. on the floating stock, before striking a balance of profit and loss, and that sum was carried to what was called "the proprietors' underwriting account."

The unused surplus of this account was annually divided among the shareholders under the name of the payment out of the proprietors' underwriting account, and the residue (if any) too small to be included in such payment was carried forward to the next year, and formed part of the fund available for "additional payments" in the next account. Up to 1864 the moneys paid to the trustees as "additional payments" and on the "underwriting account," were treated by all parties as income, and paid to Mrs. Hollis; but in that year the question was raised whether they were not within the proviso, and so capital. Therefore, in December, 1864, Mr. James Allan, having received 56l.; that is 28l. for dividend, 16l. additional payment, and 12l. on the underwriting account; only paid 28l. to Mrs. Hollis, retaining the other sums until the question was decided, and this special case was filed for that purpose. The questions were, first, whether the 16l. ought to be treated as income and paid to Jane Hollis for her separate use, or as capital, and invested under the trusts of the settlement; secondly, the same question as to the 12l.

Toller, Q.C. and *Lindley*, appeared for the plaintiff (the husband), and contended that the sums in question were capital or bonus, and ought to be invested: *Ward v. Coombe* (7 Sim. 634); *Plumbe v. Nield* (8 W. R. 337).¹

Baily, Q.C., and *Bovill*, for the defendant Mrs. Hollis, insisted that the 16l. and 12l. were in fact part of the annual proceeds of the shares, and had been and were paid *de anno in annum*, and were therefore income.

Rasch for the trustees.

(1) See also *Price v. Anderson* (15 Sim. 73); *Preston v. Melville* (16 Sim. 163); *Baily v. Wainwright* (14 Ves. 160); *Maclaren v. Stainton* (3 D. F. J. 202); *Witts v. Steere* (13 Ves. 363); *Paris v. Paris* (10 Ves. 185); *Brander v. Brander* (4 Ves. 800); *Lock v. Venables* (8 W. R. 121, 27 Beav. 596)

Toller, Q.C., in reply.

KINDERSLEY, V.C., stated the facts and questions.—Some observation has been made on the language of the settlement, but it appears to me that the proviso was clearly intended for regulating the way in which the clause giving the life interest was to be carried out. Now it is to be observed that, although the discussion had reference to the general law with respect to bonuses, the real question is what is the construction of the settlement. That instrument uses the word "bonus," and I have to determine in what sense it is used. In order to determine any question, either generally or on this particular settlement, with respect to these payments, which were not made simply as dividends, it is necessary to look into the machinery of the company regulating their practice with respect to the mode of dealing with profits arising from the concern from year to year, in order to see what properly is bonus, that is, as the term is used in this deed. I need not say that the word "bonus" may be and often is used incorrectly and inappropriately; but I may consider that it does not depend on the mere term applied, but the nature of the matter under the general law as to what is a bonus. [His Honour referred to the company's regulations and practice.] The repairing fund, no doubt, was to provide for the wear and tear constantly going on of the stock, and the reserve fund was applicable for purchasing vessels and machinery, and for general purposes. It appears to me the effect of these clauses is that, after paying the expenses of repairs, and setting apart a reserve fund to be applied in any way for the benefit of the company, subject to this the profits are divided among the proprietors to such an amount as the board of directors shall from time to time think fit. [His Honour then referred to the insurance practice of the company.] It appeared that after dealing with the surplus of this fund as divisible among the shareholders, they could not get rid of the whole, but there was always a small amount left, and that was thrown into the aggregate of profits for the next current year, and all treated as profits; because, of course, such a sum could not be accurately or mathematically divided, but from year to year this surplus was brought in as part of the profits of the next half-year, and so *toties quoties*. Now the question is, having regard to the deed of settlement, whether sums so dealt with are to be considered dividend or bonus? Mr. Bailly justly said that all the income of the shares belonged to the tenant for life, and if there were no proviso the matter would be left to the general law with respect to the mode in which the things called bonuses are dealt with. I think I may say that in ordinary cases the general rule is that what is properly called bonus, which is so called in contra-distinction from what is called dividend or income, may be described as, without pretending to define it, whatever comes from a fund accumulated during several preceding years for any purpose, and ultimately found unnecessary for the ordinary payments, or grown so large as not to be capable of being dealt with in the usual way; if that be paid to the shareholders in addition to a dividend, I should say that was a bonus. On the other hand, if what is often called bonus, or which a company choose to call bonus, is nothing more than dividends of a current half-year, it is not bonus; and that view I acted upon in *Plumber v. Nield* (*suprà*); but that does not affect the decision of this case. Here it depends on the construction of a particular clause, a proviso in the settlement, which I must treat as as important as that which creates the tenancy for life. The purpose of the parties appears to be that, notwithstanding that Mrs. Hollis was to have the dividends for life, she was to take them subject to the proviso. What, then, on the fair interpretation of the words, is bonus, and what interest or dividend? for under one or other term these sums must come. When the settlement was made there was no experience of the proceedings of the company, so as to determine what was the ordinary interest or dividends of the current year, whether 3l., 4l., or 7l. per cent., therefore that cannot govern the interpretation. I think they meant this: "We do not know at present anything about dividends, but we do know that under the deed, after setting apart certain funds out of annual net profits, there is to be division among the

shareholders"; therefore, as I conceive, they considered bonus to mean that which comes, not out of the current year, but from some fund which, being appropriated, has become so large that the directors could part with some portion of it irrespective of the income of the current year. And when the settlement speaks of interest and dividends, it contemplated the clause in the deed of the company by which, after providing for different funds, there was to be a division of the profits; and I cannot go upon anything except what they knew at the time, not upon any resolution or practice of the company since.

No doubt the company have power to carry the surplus over to the other funds; but unless they do so, it never became part of such funds, or of any funds which could supply a bonus, which is not from current profits, but from profits of one or more previous years. The word bonus means something good, though why it is in the masculine instead of the neuter I do not know; but a God-send, something unexpectedly good.

With respect therefore to the 12l. from the underwriting account, that never was, nor was intended to be, a permanent fund; it was a surplus which was thrown back to the profits as dividends. Calling this or the additional payments bonuses will not prevent their being mere profits of the current year; the 12l., therefore, is not bonus, not coming from any preceding year or years, but is part of the profits, separated by a process of machinery of account, and Mrs. Hollis is entitled to it as tenant for life.

As to the 16l., additional payment, that could be got at only by dissecting the aggregate mass treated as profits, and the fund consisting of what was not divided in the previous year, and was treated as part of the profits of the year. This surplus was always small in comparison with the millions dealt with in each year. It appears to me that I ought not to dissect that fund in order to say how much (if any) is bonus in distinction from interest. There is nothing illegal in throwing it in as part of the profits of the next year. It is a very convenient and reasonable practice, and not contrary to any resolution of the company. Mrs. Hollis is therefore entitled to this other sum of 16l.

Costs of all parties out of the fund.

KINDERSLEY, V.C., July 25, 1866.

RUSSELL v. HARFORD.

14 W. R. 982; L. R. 2 Eq. 507; 15 L. T. 171.

Specific performance—Conditions of sale.

WATER. VENDOR AND PURCHASER.—*Where the owner in fee of two adjoining houses, let to A. and B. as yearly tenants, allowed A.'s house to have a water-pipe running into the well of B.'s house, and at a subsequent sale of the houses by auction each tenant purchased his own house, such privilege of water supply was:—Held, not to pass as against B. under an ordinary reservation in the conditions of sale of "rights of way and water and other easements."*

Harford, the defendant, was seised in fee of certain houses at Clifton two of which, adjoining each other, he let for some years to Russell, the plaintiff, and one Mackrell, respectively, as yearly tenants. During Mackrell's tenancy the defendant, as landlord of both houses, allowed the house occupied by Mackrell to be supplied with water by means of a pipe communicating with a well in the yard of that occupied by the plaintiff. In October, 1865, both premises, together with others belonging to the defendant, were sold by auction in lots, the premises occupied by Mackrell being numbered as lot 5, and those

occupied by the plaintiff as lots 4 and 6. The 10th clause of the conditions of sale was as follows:—

“ 10th. Each lot is believed and shall be taken to be correctly described as to quantity and otherwise, and is sold subject to the payments mentioned in the particular, and to all chief rents and other rents, rights of way, and water and other easements (if any), charged or subsisting thereon, none of which matters, nor any matter discoverable by mere inspection of the premises, shall annul any sale, or give rise to any right to compensation.”

Mackrell and the plaintiff both, by their respective solicitors, attended the sale. Lots 4 and 6 were put up together, before lot 5, and were knocked down to the plaintiff's solicitor. Mackrell's solicitor then, in the presence of the plaintiff's solicitor, stated to the auctioneer that lot 5 was supplied by a pipe with water from a well on lot 6, and inquired whether that supply would be continued. The auctioneer replied, in the words of the 10th condition of sale, that each lot was sold subject to all rights of way and water and other easements then existing. Lot 5 was then put up and knocked down to Mackrell's solicitor. Afterwards a memorandum of agreement printed on the back of the conditions of sale was signed by each solicitor for his principal. No objection to or requisition upon the title of the defendant to lots 4 and 6 was taken by the plaintiff, and a conveyance was tendered by his solicitor to the defendant's solicitor. The draft was subsequently returned to the plaintiff's solicitor with the addition of a clause covenanting a reservation to Mackrell, as owner of lot 5, of a right of water supply by a pipe communicating with the well on lot 6, and a right of entry for purposes of repair. This addition was resisted by the plaintiff; a correspondence took place; and the defendant threatened to proceed under the 12th condition of sale, which provided for forfeiture of the deposit and re-sale by the vendor, in case of non-completion by the purchaser. The plaintiff then filed his bill, praying specific performance of the agreement and restraint of any re-sale by the defendant.

Baily, Q.C. and *Millar*, for the plaintiff. *Daniel v. Anderson* (10 W. R. 366), shows your Honour's opinion that such a condition of sale does not apply to a case like the present: *Suffield v. Brown* (12 W. R. 356). The auctioneer merely referred to the conditions of sale, and the 10th condition relied on does not apply to a requirement like the present, but to “ easements,” which might prevent the vendor from giving a conveyance: *Fewster v. Turner* (6 Jur. 144).

Glasse, Q.C., and *C. J. F. Cooke*, for the defendant.—*Daniel v. Anderson* (*ubi sup.*) was a case between two purchasers. In *Suffield v. Brown*, the Lord Chancellor's judgment at p. 360, (citing *Nichols v. Chamberlain*, Cro. Jac. 121), supports our case. *Fewster v. Turner*, is disapproved of by Lord St. Leonards (*Vend. & Pur.* 13th ed. p. 20). Then the silence of the plaintiff's solicitor, when the defendant's solicitor questioned the auctioneer, entitled the latter to infer an acquiescence in the right: *Freeman v. Cooke* (2 Ex. 654); *Cornish v. Abington* (7 W. R. 504).

Baily, Q.C., in reply.—Any inference from “ silence ” is against the defendant, who never mentioned the “ easement.”

KINDERSLEY, V.C., said that the defendant, while landlord, had imposed an obligation on lot 6, and granted a privilege to lot 5; but this was simply a license, and not an easement or right of water; at any rate, any right there might be to this privilege determined with Mackrell's tenancy.

Then had anything occurred at the auction to bind the plaintiff to a continuance? The auctioneer, in reply to the question put to him by the defendant's solicitor, had quoted the tenth condition of sale, so that, assuming that the plaintiff's solicitor heard what passed, the matter came to this, that the agreement for the purchase of lots 4 and 6 was signed on the footing of the conditions of sale.

Then, what was the effect of the conditions of sale? The tenth condition, about which the main contention was, might apply to a part of the property as

well as to the whole, but it was evident that that condition was never intended to apply to rights as between different lots. Now, independently of authority, what did the language of the condition import? Its import was—protection to the vendor against a discovery by the purchaser of any easement of which the vendor had been ignorant. If it was intended to mean that, as between different lots, one lot should be servient to another, that ought to have been stated. It was clear, therefore, that there was no easement which could be binding as between vendor and purchaser, and that the plaintiff had made his purchase without notice, or intention of notice, of any continuance of the previous privilege.

Then it had been said that, sale and purchase having taken place, the matter had turned out differently to what each party had anticipated, and that, if the plaintiff was not to be bound, neither should the defendant, the vendor. But this had not been the defendant's contention. He had been proposing to proceed under the twelfth condition.

A decree must be made in favour of the plaintiff, with costs, declaring that the defendant was not entitled to the benefit of such a covenant as he claimed.

KINDERSLEY, V.C., July 19, 28, 1866.

COOPER v. THE LONDON CHATHAM AND DOVER RAILWAY
COMPANY.

14 W. R. 985.

Practice—Specific performance—Motion, before answer, for payment of purchase-money or delivery of possession.

VENDOR AND PURCHASER.—*Messrs. C. contracted with a railway company to sell land, with a stipulation that they should have possession and pay the purchase-money in two years, with interest. They took possession, but only paid one-third of the purchase-money, and a bill was filed for specific performance and payment of the purchase-money unpaid and interest. Before answer the plaintiffs moved for payment of the balance of the purchase-money into court, or delivery up of the land.*

Order made for payment or delivery up within a month, and if the land should be delivered up, payment into court by the vendors of the one-third received by them in a fortnight after delivery up of possession.

This was a motion that the London Chatham and Dover Railway Company might either pay into court 21,000*l.*, or deliver up possession of certain land at Battersea-park, now forming part of a station used for engines, plant, &c., the subject of the suit, which sought specific performance of the contract to purchase the land. This contract was dated in 1862, the purchase-money (31,000*l.*) to be paid in two years, with interest, the company being allowed to take possession. The two years expired, and the company paid 10,000*l.*; and the 21,000*l.* and interest remaining due, this bill was filed, and this motion made before answer. The contract, by the 15th clause, provided that the lien of the plaintiffs on the said land, buildings, and hereditaments, for and in respect of the moneys under and by virtue of those presents contracted to be paid, and all interest thereof, and all rights and remedies incident to such lien should be in full force and effect, anything thereinbefore contained notwithstanding. The plaintiffs were trustees for sale, and had sold the land in question, being part of Long Hedge Farm estate, Battersea, to the defendants.

Glasse, Q.C., and Nalder appeared for the plaintiffs.

Baily, Q.C., and Kekewich for the company.

Cases referred to: *Cosens v. The Bognor Railway Company* (10 Sol. Jour. 884); *Tindal v. Cobham* (2 M. & K. 385); *Younge v. Duncombe* (1 Yonge, 275).

July 28.—KINDERSLEY, V.C.—Under ordinary circumstances the motion is almost a matter of course, but it was said that there are grounds in this case upon which the Court cannot make the order, namely, that the purchasers are in possession, and were let into possession for the purpose of using the land for their railway works, and that therefore it is unreasonable that they should be called upon to deliver up possession. No doubt the object of the contract was that the company should take possession and build, but it is expressly provided by the 15th clause of the contract that the vendor should retain the benefit of his lien for the purchase-money unpaid. Under these circumstances, the effect of the purchasers being let into possession to use the land does not prevent the vendors from coming here to make such a motion as this. There is another difficulty. It appears that, in another branch of the court, in a suit against the same company, a receiver and manager has been appointed, and the point was discussed whether an order on this motion might not clash with that order; but, on consideration, I think it does not. Here the purchasers (the company) have the option of paying the money or delivery of possession, and if the receiver prevents the delivery of possession, it is no fault of the vendors, and they are not to be affected by the circumstance that by reason of some general dealings the purchasers have made themselves liable to have a receiver put upon this property. The purchasers having paid 10,000*l.*, and 21,000*l.* remaining unpaid, the vendors have no more right to retain the land and possession of the money than the purchasers, and therefore the vendors, if the purchasers deliver up possession, must bring into court the amount they have received. Therefore the order must be that within one month after service of the notice, the company do either pay into court the 21,000*l.* or deliver up possession of the premises to the vendors; and in case the purchasers deliver up possession then there must be an order that within a fortnight after that time the vendors do bring into court the 10,000*l.* received. I can say nothing about interest.

It was then arranged that on payment within a fortnight of all interest and arrears of interest, the principal might be paid on or before the second seal in Michaelmas Term, 1866.

Wood, V.C., July 9, 1866.

In re ROLLING STOCK COMPANY OF IRELAND (LIMITED)
(COMPANIES ACT, 1862).

CLACK'S CASE.

14 W. R. 987.

COMPANY.—Where a holder of shares in a company transfers his shares to the nominee of another company, as part of a scheme for the amalgamation of the two companies, the second company having no power to buy shares, and the transfer is not registered, but the transferor's name remains on the register:—Held, that he must be placed on the list of contributories of the first company.

This was an application by the official liquidator of the above company,

which is now in course of being wound-up to have the name of a Mr. Clack placed upon the list of contributories.

In June, 1863, the company made an attempt to amalgamate with the General Rolling Stock Company. The attempt was continued in that and the following years, but it was eventually found impossible to carry out the amalgamation scheme.

Part of the scheme was that the General Company should offer the members of the Irish company shares in the General Company or give them the value of their shares in money. Mr. Clack elected to receive the value of his shares in money, and executed a transfer of his fifty shares in the Irish company to Morris, the secretary of the General Company. This happened in August, 1864. In consequence of the desire to amalgamate no meeting of the directors of the Irish company had been held since June, 1863, and its business had been virtually in the hands of the General Company. The 16th section of the Irish company's Articles of Association provided that deeds of transfer should be left at the office of the company with the acceptance by the transferee, and such evidence of title as the directors might require, and that, thereupon, the directors should register the transfer. In the present case the transfer deed was taken to the office with the acceptance, but it was never registered in the official register, and Mr. Clack's name was never removed from the register of shareholders. A notice of the transfer was pasted into a book by the General Company. This book was stamped with the name of the Irish Company, although labelled in another part with that of the General Company.

Giffard, Q.C., and *Lindley*, for the official liquidator.—This transfer cannot stand. Morris was a mere nominee, or common vouchee of the General Company, and the purchase of shares was *ultra vires* the General Company. Mr. Clack, being on the official register, must be a contributory, unless he can show that the register ought to be rectified. If he attempts to show that, we must look at the whole transaction.

Wilcock, Q.C., and *Graham Hastings*, for Mr. Clack.—The sale to Morris was *bonâ fide*, and there was a complete transfer. We took the deed to the office with Morris's acceptance. The company required no evidence of title, because they knew all about it. Notice of the transfer was put into a book at their office; whether that is a proper book or not is immaterial. Mr. Clack and the transferee have done all that is necessary, and the directors are bound to register the transfer: *Whittet's case* (1 De G. & J. 577); *Ward's case* (2 L. R. Eq. 226); *Emmerson's case* (14 W. R. 785; 2 L. R. Eq. 231); *Mayhew's case* (2 W. R. 486; 5 D. M. G. 837); *Scully's case* (6 Ir. Chan. Rep. 524); *Walton's case* (26 L. J. Ch. 545).

Wood, V.C., said the whole question was whether this was a *bonâ fide* purchase and sale. It was not a purchase and sale at all. The company had attempted to amalgamate and then found they could not do so. Thereupon the General Company offered the choice of receiving shares in their company or having the money back. The deed of the General Company gave power to amalgamate or to purchase another company, not to purchase their shares. Mr. Clack says: "I prefer having back my money." There was clearly no idea of a sale, but it was this: "We want to retire, and the General Company has offered to return our money so as to get rid of unwilling shareholders." Morris was a mere nominee, and on a bill for specific performance the case of *Mortlock v. Buller* (10 Ves. 292), would arise immediately. This was a mere inchoate transaction, and illegal on the face of it. Mr. Clack's name must be on the list of contributories. He must pay no costs but would receive none.

[IN THE COURT OF EXCHEQUER.]

June 5, 26, 1866.

ATTORNEY-GENERAL OF THE PRINCE OF WALES *v.* CROSSMAN.

14 W. R. 996; 14 L. T. 856.

Practice—Venue—Information at the suit of the Attorney-General of Prince of Wales—Balance of convenience—Prerogative as to venue.

CROWN. PRACTICE.—*An information was filed by the Attorney-General of the Prince of Wales to recover, in respect of the duchy of Cornwall, certain port dues, payable on goods imported into the outport of Torquay. The venue was laid in Middlesex.*

The defendant moved to change the venue to Devon, on the grounds that the cause of action arose and the principal witnesses resided there, and that to try in Middlesex would increase the cost of the proceedings.

It was held, however, that, as of necessity the documents relating to the matters in issue could more easily be produced in Middlesex, from the office of the duchy, and as the Crown had the power to interfere and demand a trial at bar at Westminster, the balance of convenience was on the side of the trial in Middlesex, and a rule, obtained to change the venue to Devon, was accordingly discharged.

Semble, that in a suit in the nature of a transitory action, the Attorney-General for the Crown has a prerogative right to lay and retain the venue in any county he pleases.

Semble, that the Attorney-General of the Prince of Wales has the same prerogative in respect of the duchy of Cornwall.

This was an information at suit of the Attorney-General of the Prince of Wales. It contained the common money counts for money due in respect of certain customs and dues chargeable upon goods imported by the defendant into the outport of Torquay within the water of Dartmouth, parcel of the duchy of Cornwall, and for dues payable by the defendant for breaking bulk from certain ships arriving in the first outport.

The venue was laid in Middlesex.

Mr. White obtained a rule to change the venue from Middlesex to Devon upon an affidavit sworn by the defendant stating (1) that the cause of action, if any, arose in the county of Devon, and not in the county of Middlesex nor elsewhere out of the county of Devon.

2. That the defendant and all the witnesses as to facts resided at Torquay in the county of Devon, or within the immediate neighbourhood, and that it would add considerably to the expense if the action were tried out of the county of Devon.

No affidavit in answer to this was filed by the Attorney-General of the Prince of Wales, but there was an affidavit filed, sworn by the Attorney and Solicitor for the Duchy of Cornwall, which stated—

1. That the suit had been commenced by information at suit of the Attorney-General of the Prince of Wales and Duke of Cornwall, for the recovery of certain dues and customs, part of the ancient revenues of the duchy, and that he believed the defendants were about to contest the same on the ground that these were not payable to his Royal Highness in right of his said duchy.

2. That he had instituted inquiries in the office of the Queen's Remembrancer, in order to ascertain if there were any precedents in the office for a change of venue at the instance of the defendant in a personal suit, commenced by information on the part of the Attorney-General for the time being of the Crown, or the Attorney-General for the time being of the Prince of Wales and

Duke of Cornwall, suing in right of the duchy, but that he could not find any, and that it had always been the practice in these cases to lay the venue in personal suits by information in any county which the Attorney-General for the time being might select.

Karslake, Q.C., and Garth, showed cause.—In the first instance the question involved in this motion is whether the ordinary rules of the Court, with respect to changing the venue, apply to an information filed by the Attorney-General for the Prince of Wales. There are no direct authorities upon the point. In a purely personal information the Crown can lay the venue at pleasure in any county and keep it there: *Attorney-General v. Smith* (2 Price, 113). And the balance of convenience is in favour of extending this privilege to the Prince of Wales suing in right of his possessions as Duke of Cornwall. The immediate reversion of the duchy is vested in the Crown, which is therefore directly interested in all suits relating to it: *Attorney-General v. Mayor of Plymouth* (Wightwick, 134), *Attorney-General v. Sir J. St. Aubyn* (Wightwick, 167). And accordingly the Attorney-General for the Crown might intervene in this case and demand a trial at the bar of the Exchequer: *Rowe v. Brenton* (3 Man. & R. 133). [CHANNELL, B., referred to *Attorney-General v. Hallett* (15 M. & W. 97).] If pending this suit the duchy reverted to the Crown these prerogative proceedings could be continued without abatement: *Attorney-General v. St. Aubyn* (1 Wightwick, 247). It is therefore advisable, the interest of the Crown and Duke being thus identical, that the practice here should be assimilated to that of the Crown, and that one mode of practice should not prevail when the Prince of Wales is seised of the duchy, and another when the Crown is so seised. Besides, there is no precedent for this; the records have been searched, and no instance of a change of venue upon the motion of the defendant in a case like this can be found. There is, however, very little precedent to guide us for the periods during which Princes of Wales have been actually seised of the duchy are very short. That the Prince of Wales is not bound by the ordinary rules of procedure when suing in respect of his duchy, is shown by the fact that when he is intended to be bound by a statute, he is expressly named. [MARTIN, B.—The power of changing the venue is not given by statute, but depends on the equitable power of the Court.] *Attorney-General v. Churchill* (8 M. & W. 171) will be relied on, but there the information was quasi local. *Tidd's Prac.* vol. I. p. 650, was also referred to.

White and Channel in support of the rule.—When this duchy was granted to the Princes of Wales no special rules were laid down. Parliament simply ratified the charter of the King: *Prince's case* (8 Rep. 1). The origin and history of venue are well explained in *Churchill's case* (*sup.*), and it lies on the other side to establish a prerogative so as to exempt the Prince of Wales from the operation of the ordinary rules as to venue. The only argument brought forward is the argument *ab inconvenientiâ*; and there is no precedent. Analogous cases of privileged persons suing in Middlesex show that the question of change of venue is entirely in the discretion of the Court: *Bisse v. Harcourt* (Carth. 126), *Earl of Shaftesbury v. Cradock* (Ventr. 363), which was a case of *scandalum magnatum*. And if the Court have the power they will exercise it in favour of defendant, as no affidavit has been filed in answer to his; and the cause of action is one which is local in its nature, and ought to be tried in the county where the witnesses live. *Standford v. Nedham* (1 Lev. 56) was also referred to.

Cur. adv. vult.

June 26.—BRAMWELL, B.—In this case I wish to say one word as to my own opinion. It seems to me that the counsel for the Attorney-General to the Prince of Wales have made out that the rights of the Duchy are to be treated on the same footing as those of the Crown, but I doubt very much, when we come to see what the nature of the application is, and the answer to it here, whether any question of prerogative arises, because it seems to me that the

application is made to us, and resisted on the ground of convenience, that is to say, the defendant says it would be more convenient to try at Exeter, and the Crown officers, although they assert their right simply and irrespective of convenience, also say it would be more convenient to try in London. As far as I can judge, the balance of convenience is not such as that if this were a case between subject and subject we should interfere with the right of plaintiff to lay his venue where he likes, and I do not think we ought to do so here. But for my own part I should be very sorry to lay down, without much consideration, that in any case at the pleasure of those who advise the Crown they may lay the venue in an inconvenient county, I am not at all prepared to assent to any such proposition. I do not at all dissent from anything that may be said by my brother Channell.

CHANNELL, B.—The Court is very anxious to deliver judgment in this case at these sittings, in order that the party who might wish to go to trial might have an opportunity of doing so either in Devonshire or Middlesex, and a judgment has been prepared, which I am about to read as the judgment of my Lord Chief Baron, my brother Martin, and myself. There has not been time to submit it to my brother Bramwell, to enable him to give all the considerations and reasons he would wish to give, but he has just stated that he does not differ from us in the result, and I think that when what he has just said comes to be considered it will not demonstrate any difference between the reasons on which he relies and those which will be found in the judgment of the rest of the Court.

It will be understood that the judgment which I am about to read is the judgment of the Lord Chief Baron, my brother Martin and myself. This was an information filed by the Attorney-General for his Royal Highness the Prince of Wales, Duke of Cornwall, to recover certain port dues alleged to be due from the defendant, claimed by the duchy in respect of goods brought into, and landed at Torquay, which is alleged by the Attorney-General for the Prince to be a member of the port of Dartmouth (referred to in Hale's *Treatise De Portibus Maris*, p. 48, Hargrave edition). The venue in this information is laid in Middlesex. Application was made by the defendant to a judge at chambers to change the venue to the county of Devon. This application was supported by an affidavit which, if made in an ordinary action, between subject and subject, and not answered, would have been sufficient to entitle the defendant to have the venue changed, on the ground that the cause of action arose within the county of Devon, and that the question could be more conveniently tried there. It would still, however, have been open to the judge in such an action to have retained the venue in, or restored it to Middlesex, notwithstanding the cause of action arose in the county of Devon, upon being satisfied upon affidavit, that on the score of saving expense, or some manifest convenience, it was improper that the trial should take place in Middlesex. In the present case the judge at chambers, on certain objections having been made on behalf of the Attorney-General for the Prince, referred the application to the Court. Accordingly, in last term, Mr. Meadows White, on the part of the defendant, obtained a rule to change the venue to Devon; against this rule cause was shown in the first instance by Mr. Karslake and Mr. Garth on behalf of the Attorney-General. It was contended on the part of the Attorney-General that the Court had no power to change the venue in this case: that the Attorney-General of the Prince of Wales, Duke of Cornwall, is, in cases affecting the right of the duchy, in the same position as the Attorney-General for the Crown, and that they both have the right, not only to lay the venue where they please, but to keep it there. It was further contended that the application of a defendant by the motion to change the venue arose upon the equity of the statutes of Richard II. and Henry V., and that these statutes did not bind the Crown, the Crown not being named therein. See the judgment of the Court delivered by Parke, B., in the case of the *Attorney-General v. Lord Churchill (sup.)*, where, at p. 193, the origin of the practice of changing the venue in actions is explained by that

learned judge. See also Tidd's Practice (9th ed.), p. 601, *et seq.* It was further contended that the statutes applied to actions only, and not to informations.

We are agreed that it is for the officers of the Crown to make out clearly their prerogative in any case where they claim to be on a different footing from the subject as regards procedure in any litigation. This was, in effect, laid down in the case before referred to, namely, *The Attorney-General v. Lord Churchill* (8 M. & W. 171).

We think that, although the Attorney-General for the Crown may not have a right in all cases, not only to lay but also to retain the venue when he pleases, in an information such as the present, which is a suit in the nature of a transitory action, he would have the right. It would not necessarily follow that the Attorney-General for the Prince of Wales would have the same right. The authorities cited to us, to show that he would, were *The Attorney-General to the Prince of Wales v. the Mayor of Plymouth* (1 Wightwick Exch. Rep. 134), *The Attorney-General to the Prince of Wales v. Sir J. St. Aubyn* (1 Wightwick Exch. Rep. 167); Rules on the Revenue Side of the Exchequer, June, 1860, rule 190, November, 1861, and November, 1863; the Crown Suits Act, 1865 (28 & 29 Vict. c. 104). *Rowe v. Brenton* (3 Man. & R. 133) was also referred to. We think that in this case the Attorney-General to the Prince of Wales must be taken to be in the same situation as the Attorney-General to the Crown; but it does not seem to us absolutely necessary in the present case to decide whether, in the case of an information such as the present, if filed by the Crown, the Crown would have a right to lay and keep the venue where it pleased, nor whether, if as against the Crown, the venue could not be changed on motion, the Crown not being bound by the statutes and practice referred to, the same rule would apply to the Attorney-General to the Prince, for the case was argued before us on the ground of convenience as well as on the points we have noticed. The facts on which the argument as to convenience or inconvenience proceeded were not indeed stated on affidavit—at least, no affidavit has been filed, but were referred to by counsel on each side with the sanction of the other. For the defendant were urged upon us the inconvenience and expense of bringing up witnesses from Torquay to London to attend the trial. On the other hand, it is clear from the facts stated to us by the counsel for the Attorney-General, and not disputed by the defendant's counsel, that the question to be tried must depend to a considerable degree upon documents and records which would be produced by the officers of the duchy, no doubt more conveniently in Middlesex.

Nor was it disputed by the defendant's counsel that the Attorney-General might allege such an interest in the Crown as to entitle him to appear and claim a trial at bar. The inconvenience of bringing a Devonshire jury to Middlesex for trial at bar at Westminster would be great, and would go a long way to counterbalance the inconvenience of many of the witnesses residing at Torquay.

We think, then, that the Court ought not to interfere to change the venue, and that the rule should be discharged, and discharged without costs.

Rule discharged.

CHELMSFORD, L.C., July 21, 25, 1866.

HAYWARD v. KERSEY.

14 W. R. 999; 14 L. T. 879.

Equitable mortgage—Implied agreement to release equity of redemption—Lapse of time against an insolvent—Costs where fraud is charged.

MORTGAGE. WAIVER.—*An equitable mortgagee, who has bought in the*

legal estate, is fifteen years in undisturbed possession of the rents and profits:—Held, that the lapse of time and presumed acquiescence are immaterial as against an insolvent, and that he has a right to redeem.

A general charge of fraud does not affect the rule as to payment of costs by a resisting mortgagee.

This was an appeal from Vice-Chancellor Stuart. The facts of the case are as follows:—

On the 20th of June, 1829, Lord Cottenham demised certain premises to Balls for ninety-nine years at 31*l.* per annum. Balls becoming embarrassed in circumstances, deposited the lease with Kersey, the defendant, for money advanced, but no assignment took place until the 5th of December, 1846. Balls then became bankrupt, and Kersey entered on the premises. On the 2nd October, 1835, Kersey agreed to assign the premises to Hayward, the plaintiff, for ninety-nine years, provided Hayward rendered them fit for habitation within three months; he did not do so, but the forfeiture was waived. In 1844 Hayward, the plaintiff, borrowed 60*l.* from one Goddard, and in July, by a memorandum, authorised Kersey to satisfy himself and Goddard out of the premises. On the 25th March, 1845, the plaintiff Hayward, with permission of the defendant, made an underlease of a portion of the premises to Hardy for 30*l.* per annum, and an underlease of the residue to Coles for 61*l.* per annum, making altogether 91*l.* per annum. On the 5th of December, 1846, the defendant Kersey purchased the legal estate from the assignees of Balls. Hayward subsequently fell into difficulties, and went to Whitecross Street Prison, and petitioned for a discharge, and Goddard was appointed trade assignee. In 1849 the defendant brought an ejectment against Hayward and Goddard to which Hayward alone pleaded. Atkinson, the solicitor for both Hayward and Goddard, came from Kersey's solicitors with a proposal that Goddard should accept 60*l.* and that the plea should be withdrawn, which was done, and judgment went by default. For fifteen years, from the 6th December, 1849, the defendant Kersey enjoyed undisturbed possession of the rents and profits of the premises. On the 14th of April, 1864, the plaintiff's debts were all paid, and a re-vesting order issued, and he was restored to his rights. On the 29th of June, 1864, the plaintiff filed a bill against Kersey to redeem; and Vice-Chancellor Stuart held that no release of the equity of redemption had been executed by either Hayward or Goddard, and his Honour relied on the 13th paragraph of the plaintiff's answer to show that the defendant was still equitable mortgagee, and against this decision the present appeal was brought.

Malins, Q.C., and Bristowe, for the appeal.—The plaintiff is barred by lapse of time and acquiescence: *Burton v. Slattery* (5 Bro. P. C. 233), *Trulock v. Robey* (12 Sim. 402), *Heathcote v. Paignon* (2 Bro. C. C. 175), *Chalmers v. Bradley* (1 Jac. & W. 63), *Pickering v. Lord Stamford* (2 Ves. jun. 280), *Roberts v. Tunstall* (4 Hare, 257), *Harcourt v. White* (8 W. R. 715; 28 Beav. 203). The plaintiff has charged fraud, and has not proved it. He therefore ought to pay the costs: *New Brunswick and Canada Land Company v. Conybeare* (10 W. R. 305; 9 H. L. Cas. 750).

Bacon, Q.C., and Angelo Lewis, contra.

Malins, Q.C., in reply.

LORD CHELMSFORD, C.—This is clearly a case between mortgagor and mortgagee. There are, therefore, two questions—First, is the mortgagor entitled to redeem; and, secondly, is he precluded from so doing by any agreement with the mortgagee. The plaintiff's interest in the premises arose in the following manner. [His Lordship stated the facts as above.] His Honour therefore admitted the right of the plaintiff to redeem, unless the circumstances connected with the ejectment were equivalent to an agreement to execute a release of the equity of redemption. Now where is the agreement with the

defendant? The legal estate was in Kersey, and Goddard assisted Kersey in obtaining possession. Goddard appeared to have looked more closely to his own interest than to that of the creditors. The premises were worth 800*l.*, and there was a negotiation on foot for their sale at 1,200*l.*, while Goddard's debt was but 60*l.* What was the duty of Goddard? To dispose of the equity of redemption most advantageously for the creditors. It is quite clear that Goddard might have bound the plaintiff by releasing the equity of redemption, and if he had executed a release the plaintiff would have been bound, but as Goddard executed no release the insolvent is not bound. And what is the evidence of any agreement to execute a release? Mr. Hartland's affidavit declares that the circumstances relating to the ejectment were a perfectly *bond fide* arrangement that the premises would be delivered free of any charge on the part of Hayward or Goddard, and that it was his belief that there was no release nor agreement to release. Under these circumstances it appears that there was no release of the equity of redemption to bind the plaintiff, and if so, the lapse of time and the alleged acquiescence on the part of Hayward signify nothing. True, Goddard did not do his duty as assignee, but what was the acquiescence on the part of Hayward? Hayward had no power to enforce his rights; he was not a free agent; he was completely in the hands of his assignee. Hayward's mere forbearance is quite immaterial. Hayward's right, therefore, is not taken away. There was no release and no agreement to release, and consequently the plaintiff has a right to redeem. As to the costs, the general rule doubtless is they are to be paid by the mortgagor if his right to redeem be admitted, and by a mortgagee who unsuccessfully resists the claims of the mortgagor, unless there be fraud charged on the part of the mortgagor and not established. In the present case, however, the charge of fraud appears to me but a sort of general summing-up; there are no specific charges of fraud, and no difference ought to be made in this case on that account.

Vary so much of the Vice-Chancellor's decree as relates to costs, and declare Hayward entitled to redeem, and let the defendant pay the costs.

[LORDS JUSTICES.]

June 29, July 2, 1866.

CAUSTON v. THE CITY OFFICES COMPANY (LIMITED).

14 W. R. 999.

Demurrer—Bill to restrain action on lessee's covenant to repair.

C. was tenant of some premises under a lease which contained a covenant by the lessee to repair, and leave in repair. The reversion was vested in A. Before the expiration of the lease A. contracted to sell the reversion to O., the owner of some adjoining premises. O., before the expiration of C.'s lease, began rebuilding the adjoining premises, and in so doing, according to the allegations in the bill, seriously injured C.'s premises. After the lease expired, O. commenced an action in A.'s name against C. upon the covenant to repair. C. filed his bill against O. and A., alleging that the want of repair in the premises was caused by the works carried on by O. on the adjoining premises, but that he (C.) had no defence to the action, because it was commenced in A.'s name, and praying that O. might be restrained from prosecuting the action.

A demurrer for want of equity to this bill was overruled.

The plaintiff in this case was lessee of some premises in Nag's Head Court,

Gracechurch Street, under a lease which expired 25th March, 1866. The reversion in fee was vested in two persons named Appleton. The lease contained a covenant to repair, and leave in repair, the premises. In the year 1865, the defendants, the company, entered into an agreement with the Appletons for the purchase of the reversion. They also purchased some adjoining property, and intended to erect large buildings on both properties. In November, 1865, they commenced their works on the adjoining property, and, according to the allegations in the bill, they, in the course of their works, seriously injured the plaintiff's premises, and also his stock-in-trade. The plaintiff demanded compensation, which was refused by the company, and ultimately the plaintiff commenced an action against the company for damages. subsequently, on the 28th March, 1866, the company commenced an action against the plaintiff, in the name of Appletons, for alleged breaches of the covenant to repair, and leave in repair. The bill alleged that the dilapidations in the premises were occasioned by the works carried on by the company upon the adjoining premises, and that the names of the Appletons being used in the action, because the legal estate in the premises was still vested in them, the plaintiff in this suit had no defence to the action at law.

The bill prayed an injunction to restrain the company from proceeding with the action, and to restrain the Appletons from allowing their names to be used, the plaintiff offering to pay such compensation as the Court might think fit in respect of any want of repair of the premises not caused by the company. To this bill the defendants demurred for want of equity. The demurrer was allowed by Vice-Chancellor Stuart, and from this decision the plaintiff now appealed.

Malins, Q.C., and Dickinson, for the plaintiff.

Bacon, Q.C., and G. Druce, for the defendants, contended that this was a case of cross-actions, and that all the questions at issue between the parties could be settled at law.

Malins, Q.C., in reply.—The actions cannot be cross-actions as the parties to them are different.

KNIGHT BRUCE, L.J., said that the bill alleged a wrong done by the defendants, and a title such that the merits of the case could not be raised in a court of law. There might be some circuitous mode of redress there, but if this Court saw a substantial ground for its interference it would interfere. Such a case was in truth admitted here, and with deference to the Vice-Chancellor, he thought that the demurrer must be overruled.

TURNER, L.J., said that he had some doubt, but he submitted his opinion to that of his learned brother. The Court would be able to do complete justice upon the merits of the case when they came before it.

[LORDS JUSTICES.]

July 24, 25, 1866.

THE CREWER AND WHEAL ABRAHAM UNITED MINING COMPANY
(LIMITED) v. WILLYAMS.

14 W. R. 1003.

See, *National Bank of Australasia v. United Hand-in-hand & Band of Hope Co.*, [1879] E. R. A.; 48 L. J. P.C. 50; 4 App. Cas. 391; 40 L. T. 697; 27 W. R. 889 (P.C.).

Mortgage by directors of a joint-stock company—Articles of association—Ultra vires.

COMPANY.—Where the articles of association of a company empowered the

directors to raise any sum or sums of money by mortgage or charge upon all or any of the company's estate or effects, a mortgage made by the directors to secure past and future advances by a banker to the contractor of the company, was set aside at the instance of the company as ultra vires.

This was an appeal from a decision of the Master of the Rolls (reported 14 W. R. 444 [35 Beav. 353; 55 E. R. 932]) dismissing a bill filed by the company for the purpose of setting aside a mortgage made by the directors, in the name of the company, of all the property of the company, to secure to the defendants, who were bankers, moneys advanced, and to be advanced, by them to the contractor of the company, to enable him to carry out his contract with the company.

The facts of the case are sufficiently stated in the former report.

Jessel, Q.C., and *Prendergast*, for the appellants, the company.

Baggallay, Q.C., and *Rowcliffe*, for the defendants.

Jessel, Q.C., in reply.

KNIGHT BRUCE, L.J., said that the bill seemed to have been dismissed under a misapprehension, and the dismissal could not stand.

TURNER, L.J., said that there must be a declaration that the mortgage was invalid so far as it made the property of the company a security for debts due by the contractor to the defendants. So far as it secured moneys due by the company, and so far as it was a mortgage by the contractor himself, it would not be interfered with by this declaration.

[LORDS JUSTICES.]

July 25, 1866.

DOWLING v. DOWLING.

14 W. R. 1003; L. R. 1 Ch. 612; 15 L. T. 152; 12 Jur. N.S. 720: reversing,
14 W. R. 47; L. R. 1 Eq. 442; 13 L. T. 553; 11 Jur. N.S. 1033 (V.C.).

Distinguished, *Cross v. Maltby*, 1875, L. R. 20 Eq. 378; 33 L. T. 300; 23 W. R. 868 (V.C.). Applied, *In re Smaling*, 1877, 37 L. T. 392; 26 W. R. 231 (V.C.).

Will—Construction—Gift to children by implication.

WILL.—*A testator gave the residue of his estate to trustees, "the interest therefrom to be divided half-yearly between my four sons above named, and at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children":—Held, (reversing STUART, V.C.), that the sons took absolute interests, subject to be divested in the event of their dying without issue.*

This was an appeal from a decision of Vice-Chancellor Stuart (reported 14 W. R. 47) that the sons of the testator in the cause took only life interests in the residue of the estate, with remainder by implication to their respective children. The facts of the case sufficiently appear from the report of the hearing before his Honour.

Malins, Q.C., and *Cracknall*, for the appeal.

Bacon, Q.C., and *Aitkin*, *contra*.

KNIGHT BRUCE, L.J.—We have both made up our minds as to the true construction of this will. The four sons take absolute interests, subject to their being divested in the event of their dying without leaving issue. It is unnecessary, at the present stage, to go beyond that.

TURNER, L.J.—I am of the same opinion. The gift to the sons is a limited gift, but not expressly a gift for life. The expression is, “the interest to be divided between my four sons, and at the decease of either without lawful issue, such share to revert the remainder,” which seems to assume that the share of each was considered by the testator to be vested in the original person to whom he had given it. There is, therefore, in my opinion, an absolute gift to the sons; but this absolute gift is subject to this: that upon the death of either of them without issue, the share is to revert to the remainder then living, or their child or children. I do not know whether I am right as to this, but it appears to me, upon the true construction of the will, that the children are not to take any interest as against their parents. If the parents are out of the way, then the children are to take in the place of the parents; but so long as there are parents, their children are to take nothing. This agrees with the view that the sons take absolutely; but this absolute gift is not cut down in favour of the children, because they take nothing as against their parents. I do not know that we differ from the learned Vice-Chancellor as to the rule of construction applicable to this case, but he has drawn an inference in favour of the children from the fact of the gift over being to the surviving sons or their children; but as the gift over to the children of the other sons was not such as to interfere with the gift of the parents, except in the event of the parents being out of the way, no inference can be drawn in favour of the children of a son dying, leaving children, as against their parent. The case of *Ex parte Rogers* (2 Mad. 449), which has been so often commented upon, does not govern the present case. The mere fact of giving over property, in case of dying without issue, does not show an intention to give to children as against the parent. The testator might well suppose that the children would be sufficiently provided for from other sources, or that the parent would himself be able by means of the gift to provide for the children. The result is, that, in our opinion, each of the four sons take absolute interests, subject to their being divested in the event of any of them dying without issue, leaving it undetermined how the shares will devolve in that event.

[LORDS JUSTICES.]

July 26, 1866.

JENNER v. MORRIS.

14 W. R. 1003; L. R. 1 Ch. 603.

Discussed, *Leathes v. Leathes*, [1877] E. R. A.; 46 L. J. Ch. 562; 5 Ch. D. 221; 36 L. T. 646; 25 W. R. 492 (M.R.).

Title deeds—Delivery out of court to legal tenant for life.

DEED AND BOND.—*Circumstances may be such as to disentitle a legal tenant for life (subject to terms) from having the title deeds of the property, of which he is so tenant, delivered out of court to him.*

This suit was instituted by one of the persons entitled to a portion charged upon certain real estates, of which Sir J. A. Morris, one of the defendants, was legal tenant for life, for the purpose of having his portion and the other portions

raised by mortgage. Sir J. A. Morris's life estate was subject to a term vested in trustees to raise the portions in question, there being also a prior term for other purposes. The title deeds were brought into court for the purposes of the suit, and the money having been raised by mortgage, Sir J. A. Morris applied before Vice-Chancellor Kindersley to have the deeds delivered out to him, on the ground that the suit was now at an end. The mortgagees resisted this application, and the Vice-Chancellor refused it. It appeared that on one occasion, before the deeds had been deposited, Sir J. A. Morris had taken a large number of them with him to Paris, and this was urged as a reason why they could not be safely handed over to him. Sir J. A. Morris now appealed from the Vice-Chancellor's order.

Baily, Q.C., and *A. Smith*, for the appeal.—Mortgagees of a term, even from an owner in fee, have no right to the deeds in the absence of special stipulation, and the case is still stronger when the mortgage is only made by trustees of a term. The legal tenant for life has a strict right to the deeds, the purposes of the suit, which in no way affected the inheritance, being at an end. They cited *Harper v. Faulder* (4 Mad. 129); *Wiseman v. Westland* (1 Y. & J. 117); *Plunkett v. Lewis* (6 Ha. 65).

W. W. Karslake, for the mortgagees, relied upon the conduct of Sir J. A. Morris as disentitling him to have the deeds placed in his custody, and also stated that the original contract with the mortgagees, which was settled by the Vice-Chancellor personally in chambers, provided that the mortgagee should have the deeds, although this arrangement was opposed by the solicitors of Sir J. A. Morris. He also contended that it is the practice of the Court to retain deeds in court when a stranger is interested in them, and cited *Webb v. Webb* (1 Dick. 298); *Hicks v. Hicks* (2 Dick. 650); *Brigstocke v. Mansel* (3 Mad. 47); *Hotham v. Somerville* (5 Beav. 360).

Baily, Q.C., in reply, contended that the mortgage deed contained no provision as to the title deeds.

KNIGHT BRUCE, L.J., said that he could not, without the consent of the mortgagees, agree in ordering the deeds to be delivered to Sir J. A. Morris, after the way in which he had formerly dealt with them. He concurred in the view of the Vice-Chancellor.

TURNER, L.J., said that he should have thought that an order might have been made for delivery of the deeds to Sir J. A. Morris upon his giving security, to be approved by the judge in chambers, for their safe custody, and for their production to the mortgagees, and for their being brought back if, and when, required by the Court.

W. W. Karslake then, on behalf of the mortgagees, consented to an order in the terms suggested by Turner, L.J., and the order was accordingly so made.

ROMILLY, M.R., July 30, 1866.

Re THE BISHOPS WALTHAM RAILWAY COMPANY.

14 W. R. 1008: on appeal, [1867] E. R. A.; 15 W. R. 96; L. R. 2 Ch.

382 (L. JJ.).

Railway company and execution creditor—Order for sale—27 & 28 Vict. c. 112, s. 4.

EXECUTION.—An order will be made for the sale of lands of a railway company under an *elegit* as a debtor within the meaning of section 4 of 27 & 28 Vict. c. 112.

This was an application to have the property of the Bishops Waltham Railway Company sold to pay a judgment debt.

An action had been brought against the company to recover a debt of 2,389*l.* Judgment was obtained, and a writ of *elegit* issued, and was returned *nulla bona*.

The judgment debtor now applied for an order under 27 & 28 Vict. c. 112, s. 4, to have the property of the railway company sold for a payment of the debt.

Selwyn, Q.C., and *Chapman Barber*, for the petitioner. This case is similar to *The Hull and Hornsea Railway Company* (2 L. R. Eq. 262). A writ of *elegit* is now required to make a judgment effectual.

Fitzhugh for the railway company.

LORD ROMILLY, M.R.—The petitioner is entitled to the same order as in the case of *The Hull and Hornsea Railway Company*. Even if the effect of the order is to put an end to a railway company which cannot pay its expenses, it will not be much to be regretted.

STUART, V.C., July 11, 1866.

BOYD v. PAWLE.

14 W. R. 1009; 14 L. T. 753.

Copyholds—Disentailing deed—Enrolment—3 & 4 Will. 4, c. 74.

COPYHOLD.—*An indorsement by the steward of the manor on a disentailing deed, that the same was produced before him at his residence, is not a sufficient enrolment within the statute.*

On the 9th February, 1861, P. H. Clutterbuck, being legal tenant in tail of certain freehold hereditaments in Hertfordshire, and equitable tenant in tail of certain copyholds held of the manor of Croxley, in the same county, executed a disentailing deed of the property of both tenures. The deed was allowed to remain unenrolled until the last day of the six months within which the 3 & 4 Will. 4, c. 74 requires such a deed to be enrolled in chancery, and on the court rolls of the manor.

On that day the steward of the manor was waited on at his private residence in London, and the parties, being unable to leave the deed with him, on account of losing the opportunity of enrolling it in chancery, procured his indorsement as follows:—"This deed was produced before me, at my residence, on the 9th of August, 1861, and was then withdrawn to be, as I was told, enrolled in chancery."

No actual entry was made on the court rolls.

The question now raised was whether the deed operated to bar the entail as to the copyholds therein comprised.

Bacon, Q.C., and *Roberts*, argued that the indorsement was sufficient.

Greene, Q.C., and *Bristowe*, for the tenant in tail, were not called upon.

Horton Smith for trustees.

STUART, V.C.—It is decided by authority that under the statute, unless the deed be enrolled within six months, it is void. This is the case here, and the distinction attempted to be made here is unavailing.

Declare that the copyhold property is not affected by the disentailing deed, but that it goes to customary heir. Costs must be costs in the cause.

Wood, V.C., June 30, 1866.

In re WEST SURREY TANNING COMPANY (LIMITED).

14 W. R. 1009; L. R. 2 Eq. 737.

Distinguished, *In re Suburban Hotel Company*, [1867] E. R. A.; 36 L. J. Ch. 710; L. R. 2 Ch. 737; 17 L. T. 22; 15 W. R. 1096 (L. J.). Discussed, *In re Gold Company*, [1879] E. R. A.; 48 L. J. Ch. 281; 11 Ch. D. 701; 40 L. T. 5; 27 W. R. 341 (C. A.). Distinguished, *In re Brinsmead & Sons*, [1897] E. R. A.; 66 L. J. Ch. 85; [1897] 1 Ch. 45 (Ch. D.): affirmed, [1897] E. R. A.; 66 L. J. Ch. 290; [1897] 1 Ch. 406; 76 L. T. 100 (C. A.). Discussed, *In re National Company for Distribution of Electricity by Secondary Generators*, [1902] E. R. A.; 71 L. J. Ch. 702; [1902] 2 Ch. 34; 87 L. T. 6 (C. A.).

Limited company—Overwhelming influence—Compulsory winding-up.

COMPANY. M.—*Where investigation of the affairs of the company about to be voluntarily wound up seems proper, and there is an overwhelming influence on the part of a single shareholder, the Court will, on the petition of a shareholder having a substantial interest in the company, order a compulsory winding-up.*

This was a shareholder's petition for the winding-up of the above company. The facts were substantially as follows:—

The company was incorporated in April, 1863, for the purpose of acquiring a certain tannery, and the stock-in-trade and goodwill thereof, extending the tannery if necessary, and carrying on the trade of tanning in all its branches. The ostensible vendor of the tannery was one W. A. Page; and the prospectus dwelt much on the favourable terms on which Page had consented to sell it, viz., the allotment to him of shares in the company to the extent of 6,000*l.*, and on the fact that he had consented to become the manager of the works.

Amongst the names of the first directors of the company was that of a Mr. Van Zeller. The petitioner, one Colonel Todd, knowing something of Van Zeller, and induced also by the terms of the prospectus, applied for and obtained 100 shares. Afterwards he obtained 1,200 more, and ultimately became one of the directors of the company.

The petition stated that the petitioner had recently discovered that Van Zeller, who now held 10,475 shares out of the total number subscribed for of 12,805, was, at the date of the incorporation of the company, and for two years before that date had been, the real owner of the tannery; that Page was his manager at a fixed salary; and that the shares nominally allotted to Page were in fact, and always had been, the property of Van Zeller. The petition also contained, amongst other charges against Van Zeller, a charge of having persuaded the board, while the petitioner was ignorant of the true state of affairs, to cancel a large number of the shares allotted to Page, on the ground that Van Zeller had accepted them as a security for a debt owing to him from Page, and that it was a very hard case that his security should turn out a risk and nothing more. The petitioner further stated that at a meeting of the company, held on 7th May, 1866, it was resolved that the company should be wound up voluntarily, and that one Derbyshire (stated to have been a joint-promoter with Van Zeller of the company) should be appointed sole liquidator. The petitioner objected to this resolution, which had not been confirmed by any subsequent meeting, and, under the circumstances, asked that the Court would order a compulsory winding-up.

Van Zeller, in his affidavit, denied that, at the date of the incorporation of the company, and for two years previously, he was owner of the tannery; he stated that Page was in fact the owner as lessee of the tannery, and the absolute owner of the goodwill; and that the shares allotted to Page were

bona fide so allotted. On the other hand he stated that for two years previously to the incorporation of the company the business of the tannery was, in fact, carried on by Page at a yearly salary for his (Van Zeller's) benefit, and at his expense. He also said that his statement of Page's having handed him the shares as a security was true. His affidavit, after setting forth a list of shareholders whereby it appeared that out of 12,805 shares subscribed for, after deducting his own, the petitioner's, and 500 other shares held jointly by himself and the petitioner in trust for the company, only 480 shares remained, concluded with the statement that he and all the other shareholders except the petitioner objected to a compulsory winding-up.

Cottrell for the petitioner.

Dickinson (*Rolt, Q.C.*, with him) for Van Zeller and others.

Wood, V.C., said that it could not be contended that the matters stated in the petition, and attempted to be explained by Van Zeller's affidavit required no investigation, or that Mr. Van Zeller had not an overwhelming influence in the company. The petitioner had a very substantial interest in the company; but even if all the other shareholders except Mr. Van Zeller were with him he could not stand against Mr. Van Zeller's wishes. He thought it right therefore that the usual order for a compulsory winding-up should be made.

Wood, V.C., July 2, 1866.

In re PENINSULAR, WEST INDIES, AND SOUTHERN BANK
(LIMITED).

AUSTIN'S CASE.

14 W. R. 1010; L. R. 2 Eq. 435; 15 L. T. 140.

Distinguished, *In re Great Oceanic Telegraph Company; Harward's case*, [1872] E. R. A.; 41 L. J. Ch. 288; L. R. 13 Eq. 30; 25 L. T. 690 (V.C.). Discussed, *In re Freehold and General Investment Company; Green's case*, [1874] E. R. A.; 43 L. J. Ch. 629; L. R. 18 Eq. 428; 30 L. T. 672; 22 W. R. 791 (V.C.). See *In re Columbia Chemical Factory, Manure and Phosphate Works*, [1884] E. R. A.; 53 L. J. Ch. 343; 25 Ch. D. 283; 49 L. T. 479; 32 W. R. 234 (C. A.).

Winding-up—Alleged director—Contributory in respect of qualification shares—Costs.

COMPANY. M.—A. was invited to become a director of a company by a letter informing him what the qualification was. He said that he must first be satisfied on certain points, and went to the company's office to make inquiries. While there he attended a meeting of the board, and joined with a director in signing a cheque. He did not, however, sign the attendance-book, nor was his name entered in the minute-book. His inquiries proving unsatisfactory, he determined not to join the company. Shortly after his attendance at the meeting he received a letter of allotment of the qualification shares from the secretary, and his name was registered as a shareholder. Immediately on his receipt of the letter of allotment he returned it to the secretary, at the same time stating that he could not become a director. The secretary in reply said that his "resignation" had been accepted by the directors. He was never told that his name was on the register. Subsequently

his name appeared, without protest, in the printed prospectus as that of a director.

On his application, during the winding up of the company, his name was struck off the register, but no costs were allowed to him.

This was an adjourned summons. The summons had been taken out by a Mr. Austin for the removal of his name from the list of contributories of the above-named company. The company was now in course of being wound-up, and the application was opposed by the official liquidator.

The necessary facts were as follows:—

On the 23rd July, 1864, soon after the establishment of the company, Sir Edwin Pearson, one of the first directors, wrote a letter to Mr. Austin, of which the following is the material part:—

“I have been very anxious to see you about the new Southern Bank, of which I spoke to you some time back, being desirous to obtain a seat for you on the board. I have done so if you would like to accept it. The qualification is nominal—ten shares only, on which it is proposed to call up only 10 per cent., which I have arranged shall be paid for you. If I hear nothing to the contrary from you by return of post I shall take it as an acceptance of the seat which I have much pleasure in offering to you.”

No written answer was returned to this letter, but shortly after its receipt Mr. Austin met Sir Edwin Pearson at Eastbourne, and had a conversation with him, in which he asked him whether a certain portion of the capital had been subscribed for by responsible persons. Pearson said that he was not sure whether such portion had been so subscribed for or not; and thereupon Austin said that before joining the company he must be satisfied on this point.

On the 12th September, 1864, Austin went to the offices of the company for the purpose, as he said, of examining into the point on which he required satisfaction. The result of his inquiries was unsatisfactory; but, notwithstanding this, while at the office, he attended a meeting of the board, and joined with a director in signing a cheque for 500*l.* He did not, however, enter his name in “the attendance book,” nor was his name inserted in “the minute book.” Nor did he then, or at any time afterwards, do any other act as an officer or member of the company. His name, however, subsequently appeared, without protest, among the names of the directors in the printed prospectus.

On the 16th September, 1864, Austin received from the company's secretary a letter of allotment of the directors' qualification of ten shares. He at once returned the letter of allotment in a letter in which he stated that he was unable to become a director, as he was not satisfied with the result of the inquiries he had made. The secretary wrote a reply to the last-mentioned letter, in which he merely said that the directors had received his “resignation” with regret, but did not say anything about the qualification.

In the register of the company, under the date of 16th August, 1864, Austin's name appeared as a shareholder; but he was never informed that his name had been so registered.

Giffard, Q.C., and *Dickinson*, for the applicant, relied on *Re National Assurance, &c., Association, Marquis of Abercorn's case* (10 W. R. 451, 548). That case had decided that a man could not be made a director on merely equitable grounds. Here the allotment was perfectly gratuitous, and rejected as soon as made. Suppose the shares were now valuable, could the applicant insist on having them on the mere ground of his having once signed a cheque as a director? Clearly not.

Cottrell, for the official liquidator.—The applicant knew the qualification for a director, and must have known that he was on the register. He should therefore have seen that it was rectified.

WOOD, V.C., said that this was a difficult case, but, on the whole, he was of opinion that the applicant's name should be struck out of the register. Of course a man could not be bound by receiving a letter telling him that if he did not refuse an offer of a seat at the board by return of post he would be assumed to have accepted it, and would be registered for the qualification shares. Certainly the applicant had taken a strong step in signing the cheque; but, on the other hand, the moment he received the letter of allotment he returned it, and declined in effect to have anything to do with the company. The applicant treated the matter as perfectly open up to that time, and no doubt he had a right so to treat it. The secretary's letter did not, indeed, acknowledge the return of the shares, but only what he called "the resignation" of the directorship. The applicant, however, would naturally look upon the thing as a whole, and consider that the acceptance of his refusal to become a director involved the acceptance of his refusal to take the qualification. His name, therefore, would be struck off the register, but regard being had to the signing of the cheque, no costs would be allowed to him. The official liquidator's costs would come out of the estate.

Wood, V.C., July 4, 6, 1866.

PORCHER v. WILSON.

14 W. R. 1011.

Referred to, *Buckley v. Buckley*, 1887, 19 L. R. Ir. 544 (M.R.); *In re Smith*, [1899] E. R. A.; 68 L. J. Ch. 333; [1899] 1 Ch. 365; 80 L. T. 113; 47 W. R. 223 (Ch. D.).

Mortgaged estate devised—Pecuniary legatees and annuitants—Marshalling since Locke King's Act.

EXECUTOR AND ADMINISTRATOR.—Where the mortgage debts of a testator are primarily payable out of his personal estate, the devisees of a mortgaged estate are not entitled to have the mortgage debt satisfied out of the personal estate until the pecuniary and specific legatees and annuitants are satisfied; the pecuniary legatees and annuitants being entitled to have the assets marshalled, so that any payment in respect of the mortgage debt out of the personal estate would have to be recouped by the mortgaged estate.

This cause, which was an ordinary administration suit, came on now by way of further consideration.

Charles Porcher, the testator in the cause, by his will, dated October 12th, 1860, devised all his freeholds to the use of the plaintiff, his wife, for life, with remainder to such uses as she should appoint, and in default of appointment to the uses therein declared. He then devised his copyholds and leaseholds to uses corresponding as nearly as might be with the uses of the freeholds. He then bequeathed certain pecuniary legacies and a specific legacy of 14,930*l.* 16*s.* 10*d.* Reduced 3 per Cent. Annuities. He then gave and bequeathed all money, securities for money, arrears of rent, goods, chattels, credits, and personal estate, of or to which he should at his death be possessed or entitled, or of which he should at his death have power to dispose by will, except chattels real included in the devise thereinbefore contained of real estate, and except what else he otherwise disposed of by that his will, or any codicil thereto, unto trustees upon trust to call in, sell, and convert into money such part thereof as should not consist

of money, and by and out of the money to arise thereby, and by and out of the arrears of rent and ready money of which he should be possessed at his death, to pay his funeral and testamentary expenses, legacies, and debts, including a certain annuity therein mentioned, and the several bond debts in the said will mentioned, and a premium due annually to an insurance office; and he directed that, subject to the trusts aforesaid, they should stand possessed of the moneys to arise from the getting in, &c., of his residuary personalty, upon trust to invest and pay the income to the plaintiff for life, and after her decease to hold the principal and income upon such trusts as the plaintiff should by will or codicil appoint, and in default of appointment, upon the trusts in the said will mentioned.

The testator died on the 4th April, 1863, possessed of considerable real and personal estate. On the realty there was a mortgage of 19,339*l.* 15*s.*, created by a deed dated November 5th, 1856. He was also indebted to other persons in various sums, and some of his debts other than the said mortgage were secured by bonds and covenants.

The bill submitted that the will contained a direction to pay as well all simple contract debts and the said debts secured by bonds and covenants, as also the said mortgage debt, out of the personal estate of the said testator; and that as to such mortgage debt the testator had declared his intention of exonerating his real estate from the payment thereof. The bill further alleged that the testator's personalty not specifically bequeathed was insufficient for the payment of those debts, and there was no fund left for the payment of the general legacies or the annuities bequeathed by the will.

By the decree in the cause, which was dated July 6th, 1864, it was declared that the mortgage debts of the testator were primarily payable out of his personal estate; but that declaration was to be without prejudice to any question as to marshalling assets as between the devisees of the real estate of the said testator and pecuniary and specific legatees respectively.

The question of marshalling now came before the Court.

Rolt, Q.C., and *Kekewick*, for the plaintiff.

Bristowe for the legatees of the stock.

Giffard, Q.C., and *Martin Ware*, for the trustees.

Druce for parties entitled in remainder.

WOOD, V.C., made the following declaration:—Declare that the devisees of the mortgaged estate are not entitled to have the mortgage satisfied out of the personal estate until the pecuniary and specific legatees and annuitants are satisfied; the pecuniary legatees and annuitants being entitled to have the assets marshalled, so that any payment in respect of the mortgage debt out of the personal estate would have to be recouped by the mortgage estate.

Wood, V.C., July 11, 1866.

ATWOOL v. FERRIER.

14 W. R. 1014; 14 L. T. 728.

Practice—Exceptions to bill for scandal.

PRACTICE.—*In a suit for the winding up of a partnership long ago terminated, the ground for relief being the possession of the assets by the defendant and his unwillingness to account, the bill contained statements of fraudulent*

misrepresentations alleged to have been made by the defendant for the purpose of inducing the plaintiff to join the business.

Such statements were ordered to be expunged as scandalous.

These were exceptions to the bill for scandal.

The bill was filed April 9th, 1866, for the winding-up of a partnership between the plaintiff and defendant, and it grounded the title to relief solely on the possession by the defendant of some of the assets of the business, and on his refusal to account with the plaintiff. The prayer was in the ordinary form.

The partnership in question was stated by the bill to have existed from September, 1856, to December, 1857. The bill began by setting forth the circumstances under which the plaintiff was induced to join the defendant in a business, which the latter carried on under the style of "Ferrier & Morgan." The defendant was stated to have continually urged upon the plaintiff the advantage which would accrue to him from joining the defendant in his business, and to have represented that one branch of his business alone, at a moderate estimate, produced 2,000*l.* a-year profit, and that his partner Morgan might be willing to withdraw in the plaintiff's favour. Induced, according to the bill, by these representations, the plaintiff, in September, 1856, joined the defendant in his business, which then began to be carried on under the style of "Ferrier & Atwool." The bill further stated that in the autumn of 1857 the partnership concern became seriously embarrassed, and then proceeded with the following statement, which was the portion of the bill now excepted to:—"The plaintiff then discovered that the representations made to him by the defendant as to the value and profits of the business were not correct, and that the defendant, instead of making the large profits alleged, had only shortly before commenced business with a capital of 25*l.*, and that he was, at the commencement of the said partnership, without means and in pecuniary difficulties. He also discovered that the Mr. Morgan, referred to as a partner, was only a clerk of the defendant's at a small weekly salary."

The defendant had answered the bill, but had refused to answer the interrogatories founded on the above passage.

Rolt, Q.C., and Bird, for the defendant, supported the exceptions. The bill does not ask to be relieved from the partnership. If it had, there might have been some relevancy in the charges contained in the passage excepted to. But the plaintiff insists on the partnership, and claims the benefit of it. No relief is asked on other grounds. The passage excepted to is a slur on the defendant's character, in no way relevant to the issue or to the costs of the suit. They cited *Ex parte Simpson* (15 Ves. 476).

Willcock, Q.C., and Higgins, for the plaintiff.

Wood, V.C., said that he could have no doubt that there was what amounted to a serious charge of fraud in the passage excepted to. That charge was a little disguised by the way in which it was expressed, but there was ground enough to hold that the plaintiff, "willing to wound, but yet afraid to strike," had on this occasion struck sufficiently for the Court to interpose. The whole passage was utterly irrelevant to the issue, and to the costs of the suit. For the plaintiff had not been obliged to file his bill in order to get rid of an odious partnership. He had got rid of the partnership more than eight years before the bill was filed. The only reason for the suit was the alleged unwillingness of the defendant to account. That being so the exceptions would be allowed, and the obnoxious passages would be ordered to be expunged. The usual order as to the costs of the exceptions.

[BANKRUPTCY.]

July 8, 1866.

Re COLLINS.

14 W. R. 1014.

Application for release—Adjournment of examination sitting sine die—Practice.

The Court will not order the release of a bankrupt who is arrested after an adjournment sine die, although the creditors may have proved the debt in respect to which he afterwards obtains judgment.

The bankrupt, who was a boot and shoe manufacturer, filed a petition for adjudication against himself on the 14th day of November last, and he was on the same day adjudicated a bankrupt. On the 20th of February, 1866, a meeting for examination and discharge was held under the bankruptcy, but in consequence of the bankrupt's non-attendance either in person or by counsel he was adjourned *sine die*, and protection disallowed. At this sitting Mr. Collins proved his debt. After the adjournment *sine die* Collins proceeded at law for the recovery of the amount of his claim, and, having obtained judgment, arrested the bankrupt on the 2nd June for debt, 88*l.* 6*s.*, and costs, 8*l.* 6*s.* This was an application for the bankrupt's release from custody at the suit of Mr. Collins.

Denney, in support of the application, explained the cause of the bankrupt's absence upon the day fixed for him to pass his examination, and contended that the detaining creditor had adopted a very irregular course by first proving his debts in the bankruptcy, and afterwards causing a writ of *ca. sa.* to be issued upon a fresh judgment for the same debt.

R. Griffiths for the detaining creditor, contended that the 112th section of the Bankrupt Law Consolidation Act gave the Court power to order the release in those cases only where the bankrupt was in custody at the period of the adjudication, and that the section was not intended to apply to a case where the arrest took place after the date of the bankruptcy. He referred to *Re Kimberley* (13 W. R. 565, 641).

HOLROYD, COMR.—If this had been the simple case of an arrest at the suit of a creditor who had proved his debt against the estate of the bankrupt I might have interfered, but the creditor seems here to have obtained judgment after an adjournment of the bankrupt *sine die*. The bankrupt having allowed the creditor to obtain judgment, notwithstanding the bankruptcy, I do not see how I can interpose. The application will be refused, but the bankrupt may have leave to apply to re-open the question of last examination.

ROMILLY, M.R.

July 12, 24, 1866.

SKILBECK v. HILTON.

14 W. R. 1017; L. R. 2 Eq. 587.

Dissolution of Partnership—Rights between partners—Concealment of dealings with assets—Laches.

DEED AND BOND.—*A. and B., partners in trade, executed a deed to wind*

up the partnership, containing a mutual release. B. had, unknown to A., previously withdrawn a sum of money from the concern:—Held, that A.'s equity was not to have the money repaid, but to have the transaction set aside.

A. continued to act upon the deed for a year after he knew that B. had withdrawn the money:—Held, that he could not then have the transaction set aside.

This was a suit instituted to recover three sums of money with interest, drawn out on application by the defendant from the joint accounts of a partnership. Two of the sums, amounting to 575*l.*, were applied by the defendant to his own use, and the remaining sum of 180*l.* was paid to the defendant's nephew.

The plaintiff and defendant carried on business as cotton spinners at Manchester. The defendant undertook the management, and the plaintiff resided at Hull and supplied the money.

In October, 1864, the defendant wrote to the plaintiff to inform him that the concern was failing, and that the business could not be carried on any longer without great loss. The plaintiff thereupon instructed his solicitor with an accountant to go over and see the works and examine the accounts. The examination of the accounts turned out much more unfavourable than they had expected, and showed a balance due from the defendant.

The defendant offered to retire from the partnership on payment of 500*l.* This was refused by the plaintiff.

On the 28th of October, 1864, the solicitor of the plaintiff wrote to the defendant suggesting the alternative of the execution of a deed of dissolution of the partnership or a suit in equity, and ultimately, after some more discussion, on the 22nd of November, 1864, the plaintiff forwarded to the solicitors of the defendant the draft and engrossment of the deed of dissolution of the partnership. The effect of the deed was that Skilbeck should take upon himself the debts and obligations of the concern, and that the partners should mutually dissolve the partnership. It contained a release of actions, suits, claims, &c., and an assignment of the property.

In the beginning of December the mills, with the books and the like, were handed over to the plaintiff, when it appeared, from the entries therein contained, that the defendant, on the 28th of October, 1864, had drawn out for his own use 300*l.*; that on the 15th of November, 1864, he had drawn out for his own use the further sum of 275*l.*; and on the 21st of November, 1864, he had drawn out and paid to his nephew, F. C. Milton, a sum of 180*l.* These entries were made after the books had been examined by the plaintiff's solicitor and accountant, and it appeared by the evidence and the whole transaction that the plaintiff was wholly ignorant of the fact at the time when he sent the deed for execution.

Jessell, Q.C., and *Smart*, for the plaintiff, contended that it was not owing to any negligence on the part of plaintiff that the defendant had been able to abstract money from the partnership assets. By the partnership deed it was the duty of the defendant to see that the assets were properly applied.

Baggallay, Q.C., and *Little*, for the defendant, contended that the defendant had adopted the arrangement and could not, as the Scotch law expresses it, both approbate and reprobate the deed. He had acted under the deed after he had gained full knowledge of all the circumstances.

Jessell in reply.—This is a case of fraud, and the doctrine of *laches* and *caveat emptor* does not apply.

July 24.—LORD ROMILLY, M.R., after stating the facts above set out, continued.—On going through the evidence I do not find the slightest justification for the abstraction of these sums of money. It is simply 575*l.* taken out of the concern by the defendant and put in his own pocket to which he was not

entitled, and 180*l.* paid to his nephew, who was as little entitled to it as he was to the 575*l.* The question is what were the rights of the plaintiff on the discovery of this fact in 1864? I think that the only equity he had was to annul the whole transaction. The agreement he entered into by mistake, in the belief that the books remained as they were when shewn to the accountant previously. There was not any communication of this fact made to the plaintiff, and though he might have inspected the books he never did so. But, at the same time, though the defendant knew of this when he accepted the proposal to execute the deed, he also knew what the state of the books was; he had taken the money openly, no concealment about it, only no proclamation of it, and he most probably acted on such knowledge, because, by the literal terms of the deed, he was secured in the possession of 575*l.* to himself, and 180*l.* to his nephew—i.e., 755*l.* in the whole. I am clearly of opinion that this would not bind the plaintiff, and that the plaintiff might immediately have recovered the whole amount notwithstanding the execution of the deed. But I do not think that he could compel the defendant to accept the conveyance (two of the terms of which in effect gave him, the defendant, 575*l.*, and his nephew 180*l.*) so altered as to make his conveyance stand without those two terms being in it; as if, in fact, the arrangement had been other than it was. The defendant abstracted the money openly. It appeared in the books. Any one might have inspected them on the plaintiff's behalf, and the defendant says he acted on the faith of the books being accepted, and the mutual release being executed in the state of the books as they stood. If the moneys had been in existence as part of the partnership assets,—as, for instance, in the shape of stock or bills—it is possible that the Court might have reached them in that character, as to which I abstain from giving any opinion: but in the way or form of an order to refund, it appears to me impossible. I could not direct that to be done without cancelling the whole arrangement, and causing an account to be taken on the footing of an ordinary dissolution of a partnership; that is, this Court cannot set aside the arrangement between the parties as to a portion of it, and uphold it as to the rest.

The next question then is, can I now upset the whole transaction? I would certainly have done so in December, 1864, and the plaintiff could not have been compelled to abide by an arrangement entered into by him in such a state of circumstances. But the plaintiff has by his acts precluded himself from obtaining that relief now. The taking of the money is admitted by the defendant, and no excuse offered, on the 8th December, 1864; and the bill of the plaintiff is filed in December, 1865, and it comes to be heard in July, 1866; but in the meantime the concern has been wound up. The plaintiff took possession of the mill in May, 1865, has sold the machinery, and all the matters connected with it—has put an end finally to the concern. If he had insisted on his not being bound by the transaction of November, 1864, he was bound to leave the matter exactly as it was, and then the concern would have been wound up by the Court with the concurrence of the defendant. It might have been sold as a going concern, the defendant would have had a voice in the sale of the machinery, and might have made it more profitable; but he neither did nor could interfere, for the plaintiff proceeded to act on the arrangement as if he were entitled under it to deal with the partnership property as he pleased, and yet, besides this, to make the defendant account for and repay the sums he had withdrawn, and to do so in strict violation of the clause for mutual release contained in the deed which constituted the arrangement.

The bill will be dismissed, but without costs.

STUART, V.C., July 16, 1866.

IMPERIAL GAS-LIGHT AND COKE COMPANY v. WEST LONDON
JUNCTION GAS COMPANY (LIMITED) AND GREAT WESTERN
RAILWAY COMPANY.14 W. R. 1019; 15 L. T. 66: affirmed, [1887] E. R. A.; 56 L. J. Ch. 862 n.;
58 L. T. 900 (n). (L. JJ.).*Metropolitan Gas Act, 1860—Construction.*

GAS AND GASWORKS.—*The effect of this Act is not to prevent companies who were not enumerated in it, and who were supplying gas to others than the public at the time of the passing of the Act, from continuing to do so.*

Semble, railway companies, and hotels in connection with them, are not "the public" within the meaning of the 54th section.

The plaintiffs in this case were one of the gas companies enumerated in the Metropolitan Gas Act of 1860, to whom certain privileges were given by the Act, with reference to the supply of gas to the public within the metropolitan districts. The bill was filed to restrain the defendants, the West London Junction Gas Company, from supplying gas for sale to the Great Western Railway Company, or to any other company or person (more particularly the Great Western Hotel Company and the Bishop's Road station of the Metropolitan Railway Company), within the districts or limits in which the plaintiffs had an exclusive right to supply the public by the terms of the said Act. The circumstances of the case, and the provisions of the Act, under which the plaintiffs sought to restrain the defendants, were as follows:—In the year 1858 the Great Western Railway Company, who had previously been supplied with gas by the plaintiffs, entered into an agreement with a person of the name of Vaughan for the erection and management by him of private gas works, to be constructed on land belonging to the railway company, and to be used for supplying them with such gas as they might require at the Paddington station, including that which might be required for the Great Western Hotel, the site of which was leased to a company mainly composed of the railway company's directors and shareholders. Owing to Vaughan not having funds to carry out the agreement some further arrangements were made between the parties and a Mr. Vavas seur, and an indenture dated 7th February, 1860, was executed, by which the railway company agreed to advance money to enable Vaughan and Vavas seur to carry out the agreement of 1858. Meanwhile, and some months prior to the deed of 7th February, 1860, Vavas seur and other persons had agreed to form a joint-stock company for the purpose of purchasing Vaughan's and Vavas seur's interest in the contract with the Great Western Railway Company. This was done, and the West London Junction Gas Company so formed was duly registered on the 15th September, 1859, under the Joint-Stock Companies Acts of 1856 and 1857. That company, with the exception of a short interval when the Great Western Railway Company entered into possession of their premises for non-performance of the contract with Vaughan & Vavas seur, continued to supply the railway company and the hotel company, to a larger or less extent, up to the date of the present proceedings.

From the opening of the Metropolitan Railway in 1863, the Great Western Railway Company supplied the Bishop's Road station and some of the carriages of that railway with gas made by the West London Junction Gas Company; the said station belonging to the Great Western Railway Company, subject only to certain rights and privileges of user thereof by the two companies in common.

In the year 1860, the Metropolitan Gas Act was passed, securing to the plaintiffs' and several other companies (amongst which the defendants, the West London Junction Gas Company, was not enumerated, certain privileges

in reference to supplying the metropolis with gas, and regulating, as therein mentioned, the operations of the various companies referred to in it.

By section 6 it was enacted that the limits of each of the said companies should be the respective districts supplied with gas by such companies, as the same had been defined upon certain maps, approved by the authorities therein designated; provided that, at the expiration of every three years, certain alterations might be made in the boundaries of the said districts, upon the application and with the consent of the persons therein stated; and "that such last-mentioned map or maps should be binding upon all parties, and the provisions of this Act shall be held to apply to the several districts when so altered, and to the several companies affected thereby, as fully and effectually as if no alteration in such districts had been made. And no other company or person than the company to whom such limits are for the time being assigned, or shall hereafter be assigned, shall supply gas for sale within the said limits, unless authorized by Parliament so to do."

By the 54th section it was enacted that "nothing in this Act contained shall avoid prejudice or impair any of the powers now exercised by or vested in the Metropolitan Board of Works, or in the Commissioners of Sewers of the city of London, and the liberties thereof; or any powers now vested in any local authority within the metropolis, or any powers now exercised or possessed in respect of the manufacture or supply of gas within the metropolis by any railway company, or by any other persons or person making or supplying gas for his or their own use, and not making or supplying gas to the public as a trade or business."

The plaintiffs now sought to restrain the defendants, as above stated, under the 6th section; and the defendants claimed to fall within the exceptions contained in the 54th section.

Bacon, Q.C., and Bagshawe, for the plaintiffs.

Malins, Q.C., and W. P. Dickens, for the defendants the West London Gas Company, and,

Osborne, Q.C., and Stevens, for the defendants the Great Western Railway Company, were not called upon.

STUART, V.C.—The case for the plaintiff totally fails. The question turns on the construction of an Act of Parliament, the purpose of which, as expressed in its recital, was to prevent any one of the companies who are named in the recital from encroaching on the districts allotted to another, and to prevent the too frequent opening of the public streets. But there is nothing in the recital as to the intention of the Legislature to interfere with the rights of the public to have gas from anybody who can supply it in the best and cheapest way. In the body of the Act the enactment goes greatly beyond the recital. The 6th section goes to restrain any person whatever from manufacturing or selling gas except the particular favoured companies whose names are recited in the Act. But the 54th section describes what the exceptions are and the language here is extremely plain. [The Vice-Chancellor referred to the section.] Its purpose is not to interfere with any person who was engaged in manufacturing gas either for his own use or for the public, at the time when the Act was passed. Was the defendant so engaged at that time? The West London Gas Company did not supply the public, but the Great Western Railway Company and the Metropolitan Railway, which was so far a branch of it, and the Great Western Hotel Company, of which the Great Western Railway Company are landlords. Do these constitute the public? Certainly not. It is impossible to say that they do, and the case seems to me to come very clearly within the exceptions so properly described. The bill must be dismissed with costs.

ROMILLY, M.R., July 6, 7, 1865.

BRANDON v. BARLOW.

13 L. T. 6.

Marriage-settlement—Destruction of by husband—Bill to re-establish—Evidence.

EVIDENCE.—*In 1860 a husband, through the intervention of his wife, obtained possession of their marriage-settlement from their trustee. The husband then, in order to raise money upon the property comprised in it, destroyed the settlement, mortgaged part of the settled property, and was proceeding to sell other parts of it. In April, 1864, the trustee filed a bill to restrain the intended sale, and prayed a declaration that the cancelled settlement should be established, and the trusts of it carried into effect. The husband did not deny the fact of his having destroyed the settlement; but the plaintiff and the wife denied many of his allegations, especially those with respect both to the circumstances under which the settlement was obtained by her from the trustee, and the precise contents of it. No draft or other copy of the settlement was produced to the court; but there was the evidence of the trustee and the wife on the one side, and that of the husband and other persons who were not parties to the settlement, but who had subsequently read it, on the other. There was also the evidence of the solicitor who had prepared the settlement, and who had acted as solicitor to the husband in the mortgage transaction, and in the proposed sale of part of the settled property:—Held, that, upon a full consideration of all the evidence in the case, the plaintiff was now entitled to the relief he sought.*

The object of this suit was, principally, to revive a marriage-settlement, which it was admitted on all sides had been executed as alleged in the bill, but which had been destroyed some years since. The case rested upon the evidence adduced in it, and the consideration whether it was sufficiently clear to entitle the plaintiff who was a trustee of the original settlement, to the relief which he sought.

The facts of the case were shortly these:

The bill stated that the defendants Mr. and Mrs. Barlow were married on the 25th Dec., 1856, and that previous to and in contemplation of that marriage, but on the same day, an indenture of settlement was executed by Mr. Barlow. That settlement was made between Mr. Barlow of the first part, Mrs. Barlow (the daughter of the plaintiff) of the second part, and the plaintiff of the third part, and Mr. Barlow thereby conveyed to the plaintiff and his heirs seven freehold messuages and a considerable piece of land adjoining thereto, in Market Street and Cannon Street, in Fenton, in Staffordshire, to hold the said premises unto the plaintiff and his heirs upon certain trusts for the benefit of the defendants Mr. and Mrs. Barlow successively, for their respective lives, and from and after the decease of the survivor of them, upon trust for the benefit of such issue, upon trust for the benefit of the children of Mr. Barlow by a previous marriage.

Soon after the marriage, differences arose between Mr. and Mrs. Barlow, and she returned to her father's house. While there, it appeared that he gave into her hands the settlement, till then in his custody. After she had received it, Mr. Barlow, wishing to borrow money upon the property comprised in it, obtained possession of it and destroyed it. He then mortgaged part of the settled property, and was proceeding to sell other parts of it. This suit was instituted to restrain the projected sale, and to re-establish the lost settlement and carry out the trusts of it.

The settlement was prepared by a Mr. George Lockett Robinson, a solicitor, and one of the defendants to this suit; but no draft or other copy of it was produced to the court.

Mr. Barlow, by his answer, denied that the settlement comprised the piece of land adjoining the seven houses; and stated that it contained, in addition to the trusts mentioned or referred to in the bill, a power for him to sell or mortgage the settled property with the consent of his wife. At the date of the settlement the property comprised therein was subject to a mortgage to the Longton and Fenton Benefit Building Society, No. 4; and notice of the settlement was given to the society by Mr. Robinson.

The differences between Mr. and Mrs. Barlow arose some time before 1860, and in that year she returned to the house of the plaintiff. Mr. Barlow, by his answer, also stated that in the summer of that year he and his wife, who then had no prospects of a family, were desirous of building additional houses on the lands comprised in the settlement, and accordingly, and with a view to raise thereout the necessary funds, "Mrs. Barlow obtained from her father the said indenture of settlement, her father being, as Mr. Barlow believed, acquainted with the reason why it was required from him, and Mrs. Barlow took it to the said George Lockett Robinson, who then requested to have a private interview with Mrs. Barlow. Mr. Robinson had that interview with her, and on her return from it she told Mr. Barlow that she was willing to give up her interest under the settlement and to consent to Mr. Barlow's selling or mortgaging the property, and he subsequently, with the knowledge of his wife, saw Mr. Robinson in the matter. Mr. Barlow then again showed him the settlement, and he, after looking at its contents, said it could be given up with the consent of Mrs. Barlow and destroyed. Mr. Barlow said he understood by the expression 'given up' that the settlement could be cancelled. He accordingly burnt the settlement, and thereupon, through the intervention of Mr. Robinson, borrowed, on the 29th June, 1860, from the Methodist New Connection Beneficent Society, a further sum of 500*l.* on mortgage of the property comprised in the settlement. Mrs. Barlow was not a party to that mortgage. Mr. Barlow also stated that when he told his wife of the fact of his having burnt, as he did burn, the settlement in a furnace belonging to the works of some gentleman, named Glover, she expressed no displeasure thereat, but just the contrary."

The plaintiff, by an affidavit filed in support of the bill, stated (*inter alia*) that after a great deal of persuasion on the part of his daughter, and in the hope of her obtaining better treatment from her husband, he delivered the settlement to her in order that Mr. Barlow might have it in his possession; but without any suspicion on the part of the plaintiff that the settlement would be destroyed, suppressed, or improperly disposed of. Mrs. Barlow, in an affidavit filed by her in support of the bill, confirmed the evidence of the plaintiff, adding that she never supposed her husband meant to destroy or suppress the deed, and that she said nothing to the plaintiff that could lead him to any suspicion of that kind. Mrs. Barlow further stated that she believed the settlement contained no such power of sale or mortgage as was alleged by her husband; that he never explained to her that if the settlement was given up—meaning thereby, in effect, cancelled—that he would be able to raise money on the property comprised in it; that she never expressed her willingness to give up, and never wished to give up, the settlement to him; that it was taken out of her box which was locked up, and the key kept by her in her own possession; that she never assented to the destruction of the settlement; and that she knew nothing afterwards of the mode adopted by her husband to raise the money.

Mr. Barlow, in an affidavit filed by him in support of his case, stated that, prior to the marriage, there was a meeting of the parties at the house of the plaintiff; that at that meeting a draft of the then intended settlement was read; that the power to sell or mortgage the property was after some discussion directed to be inserted by Mr. Robinson in the settlement, and the draft was left with the plaintiff. He also stated that the power was in the parchment copy of the settlement; and he admitted that he did take the settlement out of a box belonging to his wife, but that the box was unlocked at the time he

did so. There was also the evidence of other parties, not parties to the settlement, who had read it, and spoke to the fact of its containing the power of sale or mortgage.

The defendant George Lockett Robinson, by his answer in the suit, relied mainly on the privilege of his position as solicitor to the parties to exonerate him from much of the information required from him; but in an affidavit filed by him he stated "that the settlement contained in default of children of Mr. Barlow's marriage with Miss Brandon a general power for Mr. Barlow to appoint the settled property as he pleased. The whole of that property belonged to Mr. Barlow; and the deponent's practice had always been in such cases (and he had no doubt he did so in this case) to leave the property, in default of issue of the marriage, at the sole disposal of the husband. Immediately before the date and execution of the mortgage to the Methodist New Connection Beneficent Society mentioned in the bill, the hereditaments and premises comprised in the said settlement were in mortgage to the Longton Fourth Benefit Building Society; and to James Glover, of Longton, common brewer, for sums together amounting to the sum of 252*l*. The whole of the 500*l*. advanced by the said Beneficent society was applied partly in payment to the said James Glover of the amount due to him on mortgage as aforesaid; and the remainder of such 500*l*. was used by the said George Barlow, as the deponent had been informed by him and believed to be true, in or towards erecting on vacant ground at Fenton six cottages. The said vacant ground was comprised in the said mortgage to the said Beneficent Society, and also comprised in or adjoined to the premises comprised in the said settlement. In or about the month of May, 1860, when the said George Barlow first applied to the deponent to obtain for him the first 500*l*., he proposed to give a mortgage of (with other hereditaments and premises) the premises included in the said settlement. The deponent thereupon reminded him of their being so included; whereupon he replied that the settlement was as nothing, as all parties had agreed to set it aside, and that the plaintiff had given up the said indenture to him. The defendant George Barlow and his said wife were then living together, she assisting in the receipt of his rents and the management of his property, and so far as the deponent knew, they lived together in mutual affection. The deponent then informed the said George Barlow that he could not consent to treat the said settlement as null or void, unless the deponent was perfectly satisfied of the willingness of his said wife to its being so treated. He then said that he was sure his said wife was willing, and that he would send her up to the deponent, that from a personal interview with her he might be satisfied. In a day or two afterwards he brought up to deponent's office the said settlement, and made an appointment with him for the said interview with his said wife. She accordingly alone, without the said George Barlow, attended at deponent's office, and he well remembered when at the corner of his own table in his own office she stood while he conversed with her on the subject. The said settlement then lay on his said table, but was not opened before her, and he showed it to her. He told her of her husband's application to him, and that he had informed deponent that all parties had agreed to disregard the settlement; but deponent said that he could not agree to go on with the business unless she assured him that she was willing. Being a perpetual commissioner deponent considered it due to the said Mary Barlow to examine her privately and apart from her husband, and by some of the questions usually put to married women by perpetual commissioners to test her freeness and willingness. From her answers, her intelligence, she being a woman of mature age and strong mind, and all the circumstances of the case, deponent believed, and had since believed, and now believed, that she knowingly, freely, voluntarily, and without compulsion on the part of the said George Barlow, consented to the said settlement being treated as null and void. She never afterwards inquired for or mentioned the settlement to him until after she had for the last time left her said husband and he had refused, as deponent was informed, to allow her a separate maintenance; although

deponent had often seen her in the meantime. Shortly after the said private interview with the said Mary Barlow the said George Barlow called upon deponent, and took from his said office the said settlement. He afterwards told deponent that he had destroyed it as being useless. Believing, as deponent did, that he had power with his wife's concurrence to put an end to it, and believing, as deponent did, that she did concur in putting an end thereto, he treated it as practically revoked. The only reason, and object, and purpose as mentioned by the said George Barlow to deponent for the destruction of the said settlement was, that all parties had consented to its destruction.

Mr. Robinson also denied many of the allegations made by Mr. Barlow, his co-defendant, as to the circumstances connected with the mortgage transaction and the intended sale; but the nature and effect of that part of the evidence will, for the purpose of this report, sufficiently appear from the judgment of the M. R.

The bill prayed for an injunction to restrain the proposed sale, and then for (*inter alia*) a declaration that the defendants might be decreed to deliver up to the plaintiff all documents in their possession or power relating to the indenture of settlement, and manifesting the right and title of the plaintiff as trustee thereof; that the uses and trusts of the said indenture of settlement might be ascertained and declared and carried into execution by the court; and that the said indenture of settlement might be declared to have priority over the mortgage securities hereinbefore mentioned.

Southgate, Q.C. and *Prendergast* appeared for the plaintiff.

Baggallay, Q.C. and *Schomberg* for Mr. Barlow.

C. Hall for Mrs. Barlow.

De Gex, Q.C. and *Surrage* for Mr. George Lockett Robinson; and

C. Parke for other parties.

Southgate, Q.C., in reply.

July 6.—The MASTER OF THE ROLLS.—I shall read the whole of the evidence in this case. My present impression of it may be stated in a few words; but, of course, that impression may be modified when I have read the evidence. I am of opinion that it is clearly and distinctly proved that there was a settlement; and, in fact, nobody can doubt that a settlement was made. I am also of opinion, at the present moment, that the settlement contained an estate for life in favour of George Barlow; an estate for life in favour of his intended wife; a limitation in favour of the children; and that, after that, it contained a general power to George Barlow to sell or mortgage the property, and if he did not do either of those acts, there was inserted a trust in favour of the children of the first marriage. Mr. Robinson, in his affidavit, expressly swears that that is what he believes was the power contained in the settlement. In the first paragraph of his affidavit he says: "The indenture of settlement referred to in the plaintiff's bill of complaint in this suit contained (as I verily believe) a general power, in default of children of his marriage with Mary Brandon, for the said George Barlow to appoint the settled property as he pleased." It was only in default of children. He also says that he was in the habit of putting that power into settlements; and there is no doubt he did so on the present occasion. If so, the case would, even there, be perfectly clear and consistent, and one in which it would be easy for me to declare that in my opinion that was what the settlement contained, together with all usual and proper and necessary clauses for carrying it into effect. But the evidence appears to me to strictly confirm that view. The evidence shows this: the husband got possession of the settlement. He intended to raise money upon it. Mr. George Lockett Robinson knew that, That gentleman assisted him in raising the money; he was his solicitor, and also the solicitor for the persons who lent the money upon it. Moreover, he knew the contents of the settlement. There were in existence, not only the settlement

itself, but the original draft and copy of the settlement. They have all disappeared. The husband, it is admitted, burnt the settlement himself in a furnace of some works. He threw it in. But why should he have done that, unless the settlement fettered him? It is a necessary rule of law that every inference is to be taken most strongly against the person who conceals evidence, or who destroys the means of evidence. It is not necessary for me to refer to any case in support of that proposition, for it is well known to every one that the general rule of law whenever any person keeps back evidence is as I have stated it to be. I am of opinion, therefore, that there was a provision in this settlement which made it impossible for the husband, so long as the settlement existed, to dispose, during the life of the wife and the uncertainty of there being issue of the marriage, of this property. I am also of opinion that Mr. George Lockett Robinson was perfectly well aware of that fact, and that the settlement was within his knowledge at the time the money was raised. But a question which required consideration was very pointedly put by Mr. Baggallay. It was this, whether that which would be evidence against certain persons would also be evidence as against others? Undoubtedly there are very nice distinctions to be drawn from many cases with respect to the extent to which the evidence given by certain persons is evidence against others. I think there is in this case evidence against the whole world of the existence of this settlement. I think that, if the facts to which I have referred in the evidence had been proved by the testimony of a witness in the witness-box, a jury would have found that there was such a settlement against any person whatever. I am of opinion also that they would have found that there were those clauses in the settlement to which I have also referred. I am, therefore, of opinion that all the persons who had notice of the settlement are bound by it. It is certain that all the mortgagees in this case had notice of the settlement. It is true that Mr. George Lockett Robinson had actual and positive notice of it. The trustee of the mortgagees had only constructive notice of it. They are, therefore, in no respect morally implicated in the transaction itself. With respect to them it is quite clear the settlement must have priority over their charges. They are entitled to have every power given to them against the settlement, which could have been conferred upon them by George Barlow; and they will also be entitled to have the costs of the suit added to their charges. The same observation will apply to the second mortgagees—the takers subsequent to the trust. With respect to the rest of the case I will examine it more carefully. I place very little reliance upon such affidavits as those of persons who read the settlement casually afterwards, and who come now to speak to the contents of it. Statements of that nature as to the contents of the settlement, made by persons who were not parties to it, who are brought here to speak with respect to the power of sale contained in it, and to say whether such power of sale overrides all the trusts of the settlement, or was only exercisable in default of there being issue, constitute matters on which I place very little reliance. So much so that my impression is, when I come to read all the affidavits, I shall find it necessary to set off one of them against the other. I have also to consider what property is included in the settlement. I will look at that also more fully. I am perfectly clear that the settlement contained the seven messuages, even if it did not also contain the piece of land adjoining them; but of that first proposition there is no question. I am at present disposed to think that from the ambiguous passage in Mr. Robinson's evidence, the settlement did contain the piece of land adjoining. It was contained in the mortgage; but as to that I will consider the case a little more fully. I must also consider the costs of the suit. This case is, however, undoubtedly one in which it is impossible to say, whether I make Mr. Robinson pay or withhold from him the costs of the suit, that personally there is not a great deal of blame attributable to him. He allowed his clients to advance money upon property which was not a valid security. The story which he tells with respect to the consent of the lady, independently of the contradiction of it by the lady herself, is, in my opinion, highly improbable. I

do not forget the comments which were made by Mr. De Gex upon it; but her affidavit distinctly and positively denies it. Mr. Robinson must have known that her consent given to him across the table—although he might be a commissioner to take the consent of married women—was worth nothing at all. He must have known that it was necessary for her to acknowledge the deed under the Statute of Fines and Recoveries in the regular form; and for him to say that he called this lady into his room (whether it was his house or his office is immaterial) and showed her the settlement lying upon the table, asked her whether she had really and truly consented to it, and examined her in the form that commissioners for taking the acknowledgments of married women would examine married women, is really a story which it is hardly possible for me to consider of any validity. I say that I could scarcely regard it, even if it had actually taken place; but there is a considerable amount of contradiction of it on the part of the lady herself. I am also a little surprised at this state of things; I am at a loss to understand why the draft or the copy of the settlement has not been produced before me. Undoubtedly the usual practice of solicitors is to preserve all their drafts; and a very useful practice it is. I am not sure whether it has been settled that they ought to do so; but it is a very beneficial thing that they should. Nothing of the sort, however, is produced in evidence on the subject. Now, having made those in this case, and there is an anxious withholding of observations, I will carefully read over the whole of the evidence, and I will bear in my mind the observations of Mr. De Gex (which were very pertinent) in the course of his argument, viz., that the case against George Lockett Robinson was in great measure one between co-defendants, and one in which the court cannot properly deal with the case as it now stands. As the case was originally framed, it was one which expressly charged George Lockett Robinson with having been culpably inculpated in the breach of the trust. Those allegations were struck out by amendment. The only charges that remain are those to which I directed Mr. Surragé's attention, when he was addressing me, and in which it is stated that Mr. Robinson acted in concert with George Barlow for the purpose of defeating the settlement, and also as a trustee in committing a breach of trust. Having made those observations I will dispose of the rest of the case to-morrow morning.

July 7.—The MASTER OF THE ROLLS.—I have nothing to add to the observations which I made upon this case yesterday, beyond this: that Mr. Barlow must pay the costs of the suit, including the costs (if there are any) of the separate appearance of his wife. With respect to the mortgagees, they must add their costs to their securities. I shall make no distinction between Mr. George Lockett Robinson and their trustees. You may, therefore, Mr. Prendergast, take a declaration to this effect: Declare that a settlement was duly executed on the marriage of Mr. and Mrs. Barlow; that that marriage-settlement settled the seven messuages in the bill mentioned, and the piece of land thereunto adjoining; that the settlement contained, first, a life-estate to George Barlow, then a life-estate to his wife if she survived him, and then a direction that the property was to be divided amongst the children of the marriage (if any) as the father should appoint; and in default of appointment equally among the children; and that if there were no children there was to be a power of sale or mortgage given to George Barlow, and in default of his exercising it there was a trust for the children of the first marriage as he should appoint; and in default of such appointment, for them equally; and that the settlement contained all the necessary provisoes and clauses for the purpose of carrying it into effect. I am convinced, from the evidence in the suit, that the substance of what I have stated was in the settlement; and at all events there should be added to the provisions of the settlement whatever is usual and common in such cases. I make that declaration upon a careful examination of the whole of the evidence, particularly that of Mr. George Lockett Robinson, and in the absence of the document itself, or of any copy of it. If the document itself, or any copy of it, should be produced, then I may be able to

modify the declaration. As I stated before, I place very great reliance upon the evidence of those persons in whose favour the settlement was made, of the father of the lady, and of the person who prepared the settlement; but I place very little reliance indeed upon the evidence of those persons who, having seen the settlement afterwards undertook to say what, in their opinion, it contained. Affirming the observations which I made yesterday, I think, Mr. Prendergast, that the decree to which you are entitled is such an one as I have this morning mentioned.

[NISI PRIUS.]

SUMMER ASSIZES.—HOME CIRCUIT.

CROMPTON, J., Aug 10, 1865.

PREVOST v. THE GREAT EASTERN RAILWAY COMPANY.

13 L. T. 20.

Liability of railway company to passengers for late arrival of trains—Effect of rules and regulations contained in time-tables—Evidence of negligence—Damages.

CARRIERS.—*The time-table of a railway company stated that a train would leave L. station at 2.37 p.m., and arrive at M. at 2.54. The plaintiff entered L. station during the Whitsuntide holidays at 2.20 p.m., and procured a ticket for M., after being told by the ticket-porter and a guard that a train which was nearly due would stop there. The train in question did not arrive at L. till three p.m. The plaintiff entered the carriage, and, after considerable delays in consequence of stoppages, arrived at S., a station beyond M., at a quarter to five p.m. The train had not stopped at M. The plaintiff, who had an appointment for half-past three at a place about ten minutes' walk from M., took a cab and arrived there at five, but too late for his appointment. The time-table of the company contained the words following: "These tables show the times at which the trains may be expected to arrive and depart from the several stations; every exertion will be used to insure punctuality, but the departure or arrival of trains at the time stated will not be guaranteed, nor will the company hold themselves responsible for delay, or any consequences arising therefrom."*

The jury, in answer to questions from the learned judge, found that there was no negligence or want of care on the part of the company:—Held, that no contract or duty had been proved by which the company could be made liable.

This was an action against the defendants for damages sustained by the plaintiff owing to delay in the arrival of one of the company's trains.

The plaintiff was called, and stated that on the 5th June (Whit-Monday) he went to the Lea Bridge station from Walthamstow in order to return to London. It was then about twenty minutes past two, and it appeared from the company's time-table, which was put in by the plaintiff's counsel, that a train would leave Lea Bridge at 2.37, and arrive at Mile End at 2.54. The plaintiff, who had an appointment for half-past three at Mile End Road, about ten minutes' walk from the station, asked a guard and the clerk who sold the tickets if the next train would stop at Mile End, and was told that it would. He then took a ticket and waited for the train, which did not arrive till five minutes past three. He entered the carriage and the train proceeded, but stopped on the road between Leyton and Stratford, and was delayed for about

twenty-five minutes. It then went on, and after another delay of a quarter of an hour at Stratford, arrived at Shoreditch at a quarter to five, without ever having stopped at Mile End. The plaintiff then, according to his statement, got out, went to the superintendent, and asked to be taken back to Mile End. He was told that it would be an hour before there would be another train for Mile End, and that he must do the best he could. He then took a cab and started for Mile End Road, where he arrived at about five o'clock. He found, however, that he had lost his appointment, and thereupon brought this action against the company.

It appeared from the opening statement of the plaintiff's counsel, that damages were asked for in respect of the loss of this appointment; but CROMPTON, J., having interposed and stated that such damages were not, in his opinion, recoverable, the claim was abandoned.

Bovill, Q.C., for the defendants (*G. P. Bidder* with him), now referred to p. 4 of the company's time-tables (which were in evidence), which contained the words following: "These tables show the time at which the trains may be expected to arrive and depart from the several stations. Every exertion will be used to insure punctuality, but the departure or arrival of trains at the time stated will not be guaranteed, nor will the company hold themselves responsible for delay or any consequences arising therefrom." He submitted upon the authority of *Hurst v. The Great Western Railway Company* (12 L. T. Rep. N.S. 634), where it was held by the Court of C.P. that the mere taking of a ticket did not prove a contract or duty on the part of the railway company, that the train should be at the station at the time when the passenger expected it, that the plaintiff had made out no case.

CROMPTON, J.—Then the company say in their rules and regulations, "Every exertion will be used to insure punctuality, but the arrival or departure of trains at the time stated will not be guaranteed." The company very properly decline to guarantee the time of the arrival or departure of trains, because there may be accidents or other matters which render punctuality impossible. It is, however, the duty of the company to use due and proper care with the view of insuring punctuality. The duty or the contract (for a duty arises out of the contract, and whether the action is founded on a promise or a duty is a question of pleading) is to use due and proper care. The company expressly say, "We will not contract and it shall not be taken as part of our duty to guarantee the arrival of trains," but (they go on to say) we will take the greatest care to insure punctuality. I think that the contract and duty is simply this, that they will use proper care and not be negligent.

Bovill, Q.C., then addressed the jury on the question of negligence, and they found that there was no proof of any such negligence.

CROMPTON, J.—Then I rule that in this case the plaintiff can only recover on the ground that there has been negligence or want of care on the part of the company. Negligence or a breach of duty must be proved to entitle the plaintiff to recover. The jury say that there was none, and the plaintiff must be non-suited.

Plaintiff non-suited.

[ADMIRALTY.]

The Right Hon. Dr. LUSHINGTON, May 18, 23, 30, June 20, 1865.

THE VICTOR.

13 L. T. 21.

Possession—Repairs—Sale.

The necessity which gives the master an implied authority to sell his

vessel abroad must be created by, and depend upon, the particular circumstances of each case.

SHIPPING.—*The vessel was at the Cape of Good Hope, and in need of extensive repairs. The master had no credit, and the ship's agents there had a claim of 300l. against her, and threatened arrest. The master was unable to repair the ship, even temporarily, so as to bring her to England, and the necessary delay of three months to enable the master to communicate with the owner in England would have been prejudicial to the vessel. The master therefore sold her at the Cape:—Held, that, under the circumstances, an adequate necessity existed for the sale, and that therefore the transfer was valid.*

In 1862 the schooner *Victor*, belonging to her master, Jarvis, was lying in Table Bay in need of repairs, and the master, having no means of repairing her, left her there and came to England, where he sold the vessel for 150l. to his brother, the plaintiff William Jarvis, a wine-merchant in the Minories, who immediately caused himself to be registered as sole owner, appointed his brother as master, and sent him back to the Cape with instructions to employ the vessel in the coasting trade there. On arrival at the Cape the master sold the vessel for 135l., at public auction, to the defendant Capt. Hawksley, who brought her to this country, and the present suit was then instituted by the plaintiff William Jarvis, to obtain possession of the vessel notwithstanding the sale at the Cape.

Deane, Q.C., and V. Lushington for plaintiff.

Brett, Q.C. and A. Cohen for defendant.

Dr. LUSHINGTON.—In this case Mr. W. Jarvis, of the Minories, seeks to recover possession of the vessel *Victor* from Mr. Hawksley, of Peckham, who was actually in possession of the vessel when she was arrested by process from the court. Mr. W. Jarvis claims to be owner by a purchase from his brother, Thomas R. Jarvis, whom I shall hereafter call Capt. Jarvis, and that purchase took place on the 5th Feb., 1863, for 150l., whilst the vessel was at the Cape. Mr. Jarvis alleges that he sent his brother (Capt. Jarvis) to the Cape to take possession and navigate her as master according to his directions, and that Capt. Jarvis, without necessity, sold the vessel to the defendant. Of course this last statement, that the ship was sold without necessity, is denied by the defendant, but he also raises what I may call a preliminary defence in the following terms: "The purchase of the schooner *Victor*, alleged to have been made by the plaintiff, was not such an absolute and *bonâ fide* purchase by the plaintiff as to give him a good title to the schooner as against the defendant." It is clear, then, that there are two questions: first, the title of the plaintiff to maintain the action; second, the validity of the sale to the defendant at the Cape of Good Hope. I must consider the right of the plaintiff to sue as the first question to be disposed of, for if I decide it against the plaintiff, there is an end of the case. There is, I think, some obscurity as to the terms in which the defendant states the defect of the plaintiff's title. I perfectly understand that the title of the plaintiff may be denied altogether; but I do not understand how this can be; if I dare use the expression, a mitigated title, not absolute, not *bonâ fide*, not altogether bad, but only bad as relates to the present defendant. I consider that I have no means of deciding this point, but by proceeding straightforward to the question—Did Mr. W. Jarvis really and *bonâ fide* purchase this vessel, or is the alleged sale from his brother to him an empty form, or only a security for the debt Capt. Jarvis owed to W. Jarvis, or was it collusive? Capt. Jarvis is dead; we must not look, then, for other testimony. What was the probability of the case, looking to all the facts, the undisputed facts? I am of opinion that it was probable that Capt. Jarvis should wish to sell the vessel. The vessel had lain at the Cape from Oct. 1862, unemployed, in a state of great disrepair, producing no return, but

entailing great expense. She was lying in Table Bay, without any protection, if not in danger, respecting which there is a conflict of evidence, and a certain degree of deterioration must have taken place. The owner (Capt. Jarvis) was considerably in debt to Searight and Co., merchants, at the Cape. Whether or no there was a lien on the vessel is another consideration. Capt. Jarvis, it is clear from the evidence, had no means to repair her, no credit with Searight and Co., who were his agents. I have no evidence why he did not proceed to sell at the Cape, and to liquidate Searight's demand, and I must not act upon conjecture. I have also no direct evidence why he came from the Cape to England; but I think that all the correspondence, and all the *res gestæ*, show that he was in difficulty and embarrassment. It seems to me, then, quite consistent with probability that Capt. Jarvis should be willing to sell the ship, nor do I see any improbability in the plaintiff Mr. W. Jarvis being the purchaser. Who, except a brother, would purchase a ship in the condition this was, which had been lying at Table Bay from Oct. 1862? Capt. Jarvis was in embarrassment—indeed, without such a sale his prospects were absolutely desperate; and, moreover, his embarrassment, as his brother believed, had been brought about by his own extravagance and improvidence. Then, were the terms of the purchase so extortionate as would justify the court in holding the sale void on that account? It might be difficult to say what was the value of a ship in this predicament. The price was 150*l.* Five months later she sold at auction for 135*l.* This fact alone, I think, would rebut any supposition that the price was so much below the value as to savour of extortion. Moreover, it must have been rather a bold experiment to purchase a ship known to be out of repair, lying exposed at Table Bay. In truth, if by the law of the Cape Messrs. Searight could have arrested and sold her for their debt, the ship was of no value at all. I certainly cannot hold that this transfer from Capt. Jarvis to his brother was void on account of the small amount of the price. Then, as to the payment of the consideration. It is said that no money was paid down, which I believe to be the truth. The consideration on behalf of the plaintiff is alleged to have been, first, a certain quantity of ale sent to the Cape, the proceeds of which were to become the property of Capt. Jarvis, the value being estimated at 85*l.* 2*s.* 6*d.*; secondly, the cancelling of a debt of 50*l.* due to W. Jarvis for moneys advanced to Capt. Jarvis and his wife; and thirdly, a sum of 15*l.* paid for Capt. Jarvis's passage to the Cape. These sums make up altogether about 150*l.* Upon the whole, I am of opinion that this was a sale by necessity, and that neither by law nor by justice am I bound to deprive the defendant of the property of which he was the *bonâ fide* purchaser. My decree must be in favour of the defendant, and necessarily with costs.

[ADMIRALTY.]

1865.

THE D. JEX.

13 L. T. 22.

Wages—Accounts—Master part owner—Merchant Shipping Act 1854, sect. 191—Admiralty Court Act 1861—24 Vict. c. 10, sect. 10.

SHIPPING. A.—*In a suit for wages between an owner and the master, who is also a part owner, the court can take no cognisance of a claim by the master to an equitable share in the vessel.*

This case raised the question whether, in taking the accounts in a suit for wages between a master and his owner, the court can take cognisance of an equitable claim by the master to a share in the vessel. The suit was originally for wages, and the owners having set up a counter-claim, the accounts were referred in the usual manner to the registrar and merchants, and, pending this reference, the court was, on the 13th inst., moved on behalf of the plaintiff, the master, for leave to amend his claim in respect of an equitable share and interest in the vessel, and so increase the amount of the action. The following are the sections referred to in the title.

"Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages; and if, in any proceeding in any Court of Admiralty, or Vice-Admiralty touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due: (Merchant Shipping Act 1854, sect. 191.)

"The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship, provided always, that if in any such cause the plaintiff do not recover fifty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein unless the judge shall certify that the cause was a fit one to be tried in the said court." (Admiralty Court Act 1861, 24 Vict. c. 10.)

V. Lushington for the plaintiff.

Deane, Q.C. for the defendant.

Dr. LUSHINGTON.—This was originally a cause of wages, and there was a reference to the registrar and merchants to take accounts. A motion is now made to the court by the plaintiff for leave to amend his claim by adding a claim in respect of his equitable share and interest in the vessel *D. Jex*, and furthermore, to increase the amount of the action in a decree warrant, and arrest the vessel. This vessel was originally built in New York, in the year 1858. She was owned to the extent of seven-eighths by Josiah Jex, who lived in New York, the remaining eighth belonging to Manuel Guide. Guide sailed as master with this vessel, and in the year 1861 it was deemed convenient by Josiah Jex that this vessel should assume a British character, and accordingly he conveyed to his brother John Jex, of Honduras, his seven-eighth share, and, according to the affidavit of Guide, sworn on May 4, Josiah Jex also conveyed the remaining eighth share without Guide having received any consideration therefrom. Such is the statement of the 5th paragraph. The vessel was accordingly registered as a British vessel, and as such came to this country in Nov. 1864. Mr. Josiah Jex caused the master to be deprived of his command. The master then instituted this suit for his wages, and the question is for the court to decide whether it can permit him to sue for the value of his one-eighth share mentioned in his affidavit. On behalf of the plaintiff reference is made to the 191st section of the Merchant Shipping Act. [His Honour then read the section.] Now what is the meaning of the words "to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding?" It will be observed that it was only in case of a set-off or counter-claim that this power was conferred upon the court. It is true that in this case there has been a counter-claim, but it appears to me that the intention of the Legislature was not to refer to this court the decision of all questions which might exist between the parties on matters entirely foreign either to wages or disburse-

ments. The object of this section was to enable the court to do justice where the owners set up a counter-claim with reference to the ship or her disbursements. All these are matters properly cognisable by the Court of Admiralty; but the wide exposition set up by the plaintiff might include matters wholly foreign to its jurisdiction and to the decision of which it is unaccustomed. I am of opinion, therefore, that this motion cannot be supported under the 191st section of the Merchant Shipping Act. The 10th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), has reference only to disbursements, under which head this cannot be classed. The motion therefore must be rejected, but without costs.

STUART, V.C., June 10, 1865.

Re PILKINGTON'S TRUST.

13 L. T. 35.

Applied, *In re Jones*, [1866] E. R. A. 570; 35 L. J. Ch. 520; L. R. 2 Eq. 328; 14 L. T. 540; 14 W. R. 665 (V.C.)

Will—Specific bequest—Ademption of legacy.

WILL.—*Testator by his will, dated 25th September, 1860, made a bequest of "all his Lake Erie bonds and debentures" and other property, to certain persons, "according to the nature and qualities thereof respectively." At this date he was possessed of some bonds of a company called "The New York and Erie Railroad Company," but an exchange was then being carried out by the holders of the bonds of this company for shares to a like amount in a new company to be called "The Erie Railway Company," and a contract for such transfer had been signed in October, 1859. It did not appear that the testator knew of the negotiations or contract at the date of his will; but he became acquainted with them on or before the 20th July, 1861. On the 5th October, 1861, the testator made a codicil, which did not refer in any way to the above bequest, and on the 27th November, 1861, he died:—Held, that the shares of the Erie Railway Company, of which the testator was possessed at the time of his decease, passed under the specific devise of the testator's "Lake Erie bonds and debentures."*

This petition was presented by the executors of the will of Thomas Pilkington, late of Cheltenham, in the county of Gloucester, Esq., to obtain the decision of the court on the following question.

The testator, by his will dated the 25th September, 1860, amongst other things, gave, devised, and bequeathed "all his Lake Erie bonds and debentures" to the petitioners by the description of his friends George Edmunds Williams, of Cheltenham aforesaid, gentleman, and Henry Darvill, of Windsor, gentleman, their heirs, executors, administrators, or assigns, "according to the nature and qualities thereof respectively," upon certain trusts for sale as therein mentioned, and the testator appointed the said petitioners his executors.

The testator made a codicil to his will, dated the 5th October, 1861, but not in any manner referring to the above specific bequest.

The testator died on the 27th November, 1861, without having altered or revoked his said will save by the codicil, and without having altered or revoked the codicil, and the will and codicil were, on the 31st December, 1861, duly proved by the petitioners.

It appeared that the testator, at the date of his will, was possessed of

five 1000 dollar unsecured bonds of the New York and Erie Railroad Company, and that this company afterwards becoming insolvent, a new company was founded, called the Erie Railway Company. By the arrangements made on that occasion, the holders of bonds of the New York and Erie Railroad Company became entitled, upon surrendering their unsecured bonds, to shares in the preferred capital stock of the Erie Railway Company in respect of those bonds.

The testator accordingly surrendered his said bonds, and received in exchange fifty-eight shares in the preferred capital stock of the Erie Railway Company, and seventy-five dollars in the same stock. Of these fifty-eight shares and seventy-five dollars the testator was at the time of his death possessed; for which he held two certificates of the company, dated at New York, the 20th July, 1861, and he was not, at the time of his death, possessed, or entitled, of or to any bonds or debentures answering to the term "Lake Erie bonds and debentures," or to any debentures, bonds, stock, or other securities in any railway in North America, except the shares and stock above mentioned.

The sole question now was, whether by the alteration of the security, and the non-existence of any property at the testator's death, which could answer the description of "Lake Erie bonds and debentures," the above legacy had become adeemed.

The contract by which the property of the New York and Erie Railroad Company was transferred to the Erie Railway Company was dated the 22nd October, 1859. By that contract the bondholders of the former company agreed to exchange their bonds for preferred stock of like amount in the latter. It did not appear that the testator at the date of his will, 25th September, 1860, was aware of this negotiation and contract, but it was abundantly clear that he assented to it, because he paid to the Erie Railway Company on or before the 20th July, 1861, his share, amounting to 145 dollars, of an "assessment" or contribution of $2\frac{1}{2}$ per cent. upon all the holders of unsecured bonds, assenting to the contract, for cash necessary to complete the purchase, as appeared by a receipt which was produced.

Craig, Q.C., and *Tripp* appeared for the petitioners; and contended that the voluntary conversion of the bonds into shares of a new company was an ademption by the testator of the legacy given by his will. They cited—

Pattison v. Pattison, 1 M. & K. 12. *Barker v. Rayner*, 5 Madd. 208; s. c. 2 Russ. 122. *Pouys v. Mansfield*, 3 M. & Cr. 359. *Slatter v. Noton*, 16 Ves. 197;

and distinguished

Oakes v. Oakes, 9 Hare, 664.

By the Wills Act, every will is to speak as if it had been executed immediately before the death of the testator, unless a contrary intention should appear. Applying that rule to this case, the testator purported to give that which he once had, but which before his death he knew he possessed no longer in the same shape, or capable of description by the same name. Hence, the language could not be treated as merely a mistaken or inaccurate description on his part.

Malins, Q.C., and *Renshaw*, for the respondents, were not called upon.

The VICE-CHANCELLOR.—When the subject-matter of a specific bequest is a debt due to the testator, if that debt is paid in the testator's lifetime, there is a complete annihilation of the whole subject-matter of the bequest. A specific bequest is a thing which must be answered by something in specie, and there would be nothing in specie or existing as a specific thing to which the bequest could apply. Therefore it is that the principle was thus stated by Lord Thurlow, that where the subject is annihilated, and nothing remains

specifically upon which the terms of the bequest can operate, the bequest necessarily fails. It is quite another sort of case where a gift is made a specific thing by description, and another specific thing is found to exist, which it is said is the specific thing which was the subject of the bequest. Now, there may be cases in which a testator gives a specific chattel or a specific thing, and there is found to be another specific thing which is said to answer the terms of the bequest, but in which the specific thing fixed upon by the legatee as answering the description of what is given to him cannot be allowed to pass to him by specific description; for if by the mere voluntary act of the testator, with no motive whatever but the motive of changing the thing for his own purposes, he sells the specific chattel and invests the exact sum of money in another specific chattel, the result is, that by his own voluntary act he annihilates the specific thing which was the subject of the gift, and it can never be held that what he by his own act voluntarily and without any motive but the purpose of a change had thus altered in specie, was covered by the description of the specific thing given by the will. In the present case, what was done, although in a sense a voluntary act of the testator, was a thing done with reference to a peculiar quality of the subject of the bequest which made the operation, if not essential, an act of importance, with a view to the value of the particular chattel which was given. It is of great importance to observe here that the testator by his will inaccurately describes those specific bonds which were the subject of his bequest as "debentures," which they were not. He speaks of all his "bonds and debentures," debentures being only another term for bonds. But, at the date of his will, which was in 1860, those particular bonds, by an arrangement made more than a year before the date of the will (no matter whether that arrangement was known to the testator or not), had attached to them a particular quality which induced the testator afterwards, in order to preserve the value of them as his own property in another specific shape, to take shares in that other railway, which is certainly not the railway, the bonds of which he purports to give, but which was most certainly that railway, the shares in which were, by an act, which was not the act of the testator, created for the purpose of representing the former bonds in another shape, and the bonds were impressed with the quality that they might be converted into the shares of this railway. Now, it is of great importance, I think, to observe that, at the time when the will was made, the bonds were impressed with this quality, for there are some remarkable words in the will that have not been commented upon with reference to this. The testator says that he gives these bonds to the legatees named "according to the nature and qualities thereof respectively." Now, the nature of the bonds at this time was very peculiar, from the circumstances I have stated; but before he made his codicil, which unquestionably confirms his will, and most unquestionably brings the gift of these bonds, which he had given "according to their nature and qualities," down to the date of the codicil, that peculiarity in their nature and quality had accomplished their change into the other specific things now in question, namely, the shares in that particular railway. This is a case, therefore, in which, the testator having given a specific thing with a peculiar nature and quality impressed upon it, not by the testator, but by a power paramount to his, that specific thing, between the date of the testator's will and of his codicil, undergoes that change in its nature, or rather in its description, which probably was contemplated by the testator at the date of his will. It must have been known to him at the date of his codicil; for at the date of his codicil, unless the bonds were understood to be given according to their nature and quality such as they were at the date of his will, when he refers to their peculiar nature and quality, it is allowing the description to remain in his will. and the circumstance of the testator having placed himself in that situation which gave him possession of the other specific things into which the bonds had been converted, keeps the case entirely free from what is stated by

Lord Thurlow, and by every other judge who has accurately defined the principle upon which specific legacies are adeemed, that there must be an annihilation of the specific thing, and nothing remaining upon which the terms of the bequest can operate. How can it be said that there is here nothing remaining upon which the terms of the bequest can operate, when, by the peculiar quality of the thing described, it was capable of undergoing a change which it did undergo, and had undergone, at the time when the testator made his codicil? It seems to me, therefore, it would be contravening that important principle, and the recognised definition of that principle, if we were to overlook the distinction between the utter annihilation of the subject-matter of the bequest, when nothing specific can be found answering the bequest, and the other class of cases where there is a change in the specific nature of the thing bequeathed, arising, not from anything inherent in the nature or quality of the thing given, but from some voluntary act of the testator, which takes away and annihilates in its specific character the thing which he describes as the subject-matter of his bequest. Here I think the quality of these bonds, and the way in which they were dealt with by the testator before the date of his codicil, shew conclusively that the thing which is averred to answer the description of the bequest was really intended by the words of the will; and hence that, upon the true construction of the will, the bequest is good, and the court is bound to give effect to it. No doubt there is this difficulty (and I wish it to be understood that I do not overlook it), that these bonds were for a specific sum, defined by the language of the bonds themselves. By the quality impressed upon them at the time when the testator made his will, it was necessary for him to pay more money in order to acquire that other specific thing, which seems to me sufficiently to answer the description of the subject-matter of the gift. But it seems to me that that cannot alter the construction to be put upon the will, for I think there is here a sufficient description of that specific thing into which it was the testator's wish these bonds, which he had specifically given, should be converted (though by no act of his own), and that he intended they should pass by the description in his will. The shares, therefore, must be declared to have passed by the description of the bonds and debentures. I have not thought it necessary to observe upon the Wills Act, but I do not in the least degree discountenance Mr. Craig's argument as to the application of the Wills Act to the present case; because my impression is that the Wills Act does apply to the case, and that this will must be held as speaking from the death of the testator. It appears that there is not only nothing in the Wills Act opposed to this construction, but the language of the will and the nature of the subject-matter of the bequest seem to me, not to contradict, but to support, the doctrine of the statute, that the will is to speak from the death of the testator.

[COURT OF APPEAL IN CHANCERY.]

CRANWORTH, L.C., July 24, 1865.

BEECHER v. MAJOR.

18 L. T. 54; 13 W. R. 1054; 6 N. R. 370.

Separate estate—Purchase in the name of another—Savings.

HUSBAND AND WIFE.—*A married woman, having a separate income, invested 1000l. in Consols in the name of her niece. She afterwards wrote to the niece, stating that she intended her to have the 1000l. stock for herself,*

but that she (the aunt) was to have the interest of it during her life. She at the same time desired the niece to execute a power of attorney, enabling the aunt to receive the dividends, also to sell and transfer the stock. The niece complied with this request, and shortly afterwards the aunt died, having received the dividends, but not having otherwise dealt with the fund:—Held, that the niece was entitled to hold the stock for her own benefit.

A husband furnished a house over which his wife had a general power of appointment, and subject thereto a life-interest in the rents for her separate use. The wife, with the husband's consent, managed the property, and received all the profits of letting the house in lodgings:—Held, that the husband, after the wife's death, was not entitled to an inquiry as to how much of the profits of the lodgings arose from the furniture.

This was an appeal from a decision of Kindersley, V.C., reported 12 L. T. Rep. N.S. 562, where the facts with respect to the main point on the appeal argued are fully stated.

Two further questions were now raised, which render necessary the following additional particulars.

Mary Beecher, the wife of the plaintiff John Beecher, had a general power of appointment by deed or will over a fund, and subject thereto had a life-interest in the same to her separate use. Her separate income was about 140*l.* a-year, besides which she received the rents of a house in Margaret Street, Marylebone, which was part of the separate estate. This house was let out in lodgings, of which Mrs. Beecher had the sole management, but which had been furnished by the plaintiff.

Mrs. Beecher had been married a little over eight years (as appears above) when she died, having made the investment of 1000*l.* stock in the name of her niece, Mary Major, under the circumstances stated in the previous report.

It now appeared that parts of the two sums of 400*l.* (originally purchased in the name of Helen Stone) and 600*l.* stock, of which this sum of 1000*l.* was made up, consisted of a sum of 50*l.* belonging to Helen Stone, and of a sum of 10*l.* borrowed from a sister of Mrs. Beecher.

Schomberg and *Surragé* supported the appeal on behalf of the plaintiff. —With respect to the 1000*l.* stock, the contention of Mary Major would probably be that it was an advance made to her by her aunt, standing in the relation of a parent to her; but this doctrine has no application where the *quasi* parent is a female. The Vice Chancellor's view was, that the evidence was sufficient to shew an intention on the part of Mrs. Beecher to benefit her niece; but this view would be found to be not sustainable on the evidence. Mrs. Beecher's letter had been lost; and though Colonel and Mrs. Crofton had deposed to its contents, yet it was clear that Colonel Crofton made one mistake as to the purport of the power, and so much depended on a correct report of the wording of a document of that nature, as was observed by Wood, V.C., in *Paterson v. Murphy* (11 Hare, 92), that their evidence, though unimpeachable in honour and conscience, was practically of little value. Even if Mrs. Beecher had made a promise to give the property, which promise she had afterwards left unfulfilled, this would be a *nudum pactum*, and would not amount to a declaration of trust—

Dipple v. Corles, 11 Hare, 188. *Prankerd v. Prankerd*, 1 Sim. & Sm. 1. *Rider v. Kidder*, 10 Ves. 360. *Soar v. Foster*, 4 K. & J. 152.

Mrs. Beecher had a general power of appointment over this fund; hence it must be considered as her property, and liable to the payment of her debts—

Stead v. Clay, 4 Russ. 556. *Eccles v. Cheyne*, 2 K. & J. 676. *Hulme v. Tenant*, 1 Bro. C. C. 16. *Thomas v. Jones*, 1 De G. J. & Sm. 77; 7 L. T. Rep. N.S. 610.

There ought to be an inquiry as to how much of the 1000*l.* stock arose from

the separate estate; and it was quite clear that Mary Major could not lay claim to the two sums of 50*l.* and 10*l.*

J. H. Palmer, Q.C., and Swanston, for the defendant Mary Major, were called upon only as to the two latter points.—It was manifest that Mrs. Beecher might easily have saved the value of 1000*l.* stock in eight years, and as to the profits of lodgings, part of her separate estate, they were clearly her own: *Barrack v. McCulloch* (3 K. & J. 110). As to the debts, some act on the part of Mrs. Beecher (which was not shewn) was necessary in order to charge her separate estate with them—

Vaughan v. Vanderstegen, 2 Drew. 165, 289, 408. *Johnson v. Gallagher*, 4 L. T. Rep. N.S. 72.

Schomberg, in reply.—The bill prayed relief for the plaintiff, either in his marital right, or as administrator, hence it was competent to the court to direct on inquiry as to Mrs. Beecher's debts: *Owens v. Dickenson* (Cr. & Ph. 48). The plaintiff was entitled to an inquiry as to how much of the 1000*l.* stock arose out of separate estate; if not, at least to a direction that a sufficient portion should be made applicable to the payment of the 50*l.* and the 10*l.*

The LORD CHANCELLOR.—The main question raised by this cause is, as to whether or not the defendant Mary Major is to be considered as the absolute owner of a sum of 1000*l.* Consols which has been purchased in her name, or is to be considered only as a trustee of it for the plaintiff, either in his own right or as representative of his wife. It appears that in February of last year Mrs. Beecher purchased in the name of Mary Major 1000*l.* Consols, 400*l.* of which were transferred from the name of Helen Stone, and 600*l.* purchased with her own moneys. The first question is, did she purchase this sum of stock for herself or for her niece? The law upon this subject has been long settled. If a person purchases stock in the name of another, *primâ facie* that other person is only a trustee for the purchaser. But there are exceptions to this rule, namely, when the purchase is made by a father or parent in the name of a son, then *primâ facie* the investment is for the benefit of the son. The same rule prevails in the case of a son-in-law. But in both instances, whether the purchase be in the name of a stranger or of a child, the facts of the case may be varied by evidence. It may be shewn that, although the person in whose name the stock stands is *primâ facie* a trustee, as in the case of a stranger, the purchase may be intended for his benefit; or that, although the purchase is in the name of a child, it was not intended as an advancement. Here the purchase was in favour of a niece, and a niece not of an uncle, but of an aunt; and it has been said, and I dare say correctly said, that the person standing *in loco parentis* must be an uncle, grandfather, or some male relative. That question seems to have been argued in the court below, but has been abandoned on the appeal, and I think there is no evidence to shew that Mrs. Beecher intended to stand *in loco parentis* towards her niece. But it has been now contended that, although there is no evidence to shew that the aunt stood *in loco parentis* to her niece, yet there is abundance of evidence to shew that these sums were intended to be for her benefit. Upon that point the evidence is, to my mind, perfectly irresistible. Mr. Schomberg did not contend that there was any *mala fides* on the part of the witnesses, but contended that they might have been mistaken as to the effect of Mrs. Beecher's letter. But they are admitted to be witnesses of the truth, and I think it must be acknowledged that Mrs. Beecher meant to make this purchase for the benefit of her niece. The evidence, corroborated as it is by the testimony of Colonel and Mrs. Crofton, amounts to this, that Mary Major was on friendly terms with her aunt, and used to receive little presents from her. In February, 1864, she received a letter from her aunt, in which her aunt informed her that she had been very unwell, and that her asthma had given her a great deal of trouble; and shortly after, in the same month of February, she received another letter, with a printed and written paper. The letter

informed her that her aunt had put 1000*l.* stock in her name, which she intended her to have for herself; only that, during the aunt's life, she was to have the interest of it, and therefore she (the niece) was requested to sign the inclosed paper, and to get it witnessed by Colonel and Mrs. Crofton. The aunt's letter also requested that Mary Major would at once destroy the letter, which acting upon Colonel and Mrs. Crofton's advice, she afterwards did. It has been suggested that it was a very extraordinary thing that the niece should have been advised to destroy the letter, and should have done so; but I dare say that Colonel and Mrs. Crofton thought she had no need of any further evidence of the nature of the transaction. [His Lordship read the evidence of Mary Major and Colonel and Mrs. Crofton, and proceeded:] I do not think a case could be clearer. But then Mr. Schomberg thinks the evidence is not to be trusted, because Colonel Crofton describes this power as a power to receive the dividends, whereas it was a power also to sell and transfer the stock. But it was not incorrectly described as a power to receive the dividends, although it was also a power authorising a sale and transfer of the fund. Therefore, as to the main point, it is clear to my mind beyond doubt that the Vice Chancellor came to a correct conclusion—namely, that there was an intention to benefit Mary Major to the extent of the 1000*l.* stock. Then, it was said that this was a purchase by a married woman, and if the purchase were not made out of her savings it was not one that she could make so as to bind her husband or anybody else. It is quite clear, however, that this lady had property settled to her separate use, out of which savings might have been made. It has been argued, however, that the husband furnished the house, and that he is entitled to such of the profits as arose from the letting of the furniture. But the husband suffered the wife to remain in the sole management of the property. How, then, can the husband now raise a question arising out of his own act, and say, "Because I chose to leave my wife in the sole management of property which was partly mine as well as hers, therefore I am entitled to an inquiry as to how much of the profits are due to me, and how much to her"? Such an inquiry would now be impossible to prosecute, and when the husband chooses to let the wife take the whole of the rents and deal with it as she pleases, she has, in my opinion, a right to treat the whole as part of her separate estate. The remaining point is a very small one. It appears that just before the investment Mrs. Beecher borrowed of her niece Helen Stone a sum of 50*l.*, and it appears also that she was indebted to her sister in a sum of 10*l.*; when borrowed does not appear. Mr. Schomberg contends that these were debts of this lady in the sense in which married women may be made liable in respect of their separate estate, and hence that these were payable out of her separate estate, and that his Honour, Kindersley, V.C., ought to have directed a general account of her estate. It is clear that nothing would be liable to an account but the separate estate, and the only existing separate estate was this sum of 1000*l.* stock, which she had invested in her lifetime, and put out of her own possession. There may be a question as to how far that fund may be liable to legacy duty; but I will not go into that. She had no other separate estate beyond her own lifetime; but inasmuch as she had a general power of appointment over the property, and might have exercised the power in such a way as to make the property separate estate, therefore it is said that the same principle is applicable to her as to persons entitled *sui juri*, namely, that her property is liable to pay her debts. But I cannot think that this question is raised upon these pleadings. It is true that Mrs. Beecher had a general power of appointment, but I very much doubt whether that would warrant any such inquiry as is asked for here. The nature of the obligations of a married woman, or of her separate estate, to be liable for debts, is not one that can be raised and disposed of in this incidental manner. But beyond that, it has been distinctly ruled by learned judges, that this doctrine as to a married woman's debts is

inapplicable where there is only a general power of disposition, because, although where a man, being *sui juris*, has absolute power over a fund the Court has said, "We will deal with you as a sole owner," it is very different when you come to apply the doctrine to a wife merely because she might, if she had chosen, have made the property her own by appointing it to her separate use. That distinction is to be found laid down in other cases, as well as in that of *Vaughan v. Vanderstegen*. The case of *Vaughan v. Vanderstegen* seems to me to have been entirely recognised in the later decision of *Johnson v. Gallagher*, and I am not disposed to question its soundness. I can only come to the conclusion that the decision of Kindersley, V.C., was correct, and that this appeal must be dismissed. I may add, that I should have been better pleased to have heard some intimation that the defendant was willing to consent that these sums should be paid out of the fund coming to her; but, upon the questions that have been argued before me, I must dismiss this appeal with costs.

CRANWORTH, L.C., July 27, 28, 1865.

STOKES v. THE CITY OFFICES COMPANY (LIMITED).

13 L. T. 81.

See, *Yates v. Jack*, [1866] E. R. A. 590; 35 L. J. Ch. 539; L. R. 1 Ch. 295; 14 L. T. 151; 14 W. R. 618 (L.C.).

Injunction—Obstruction of ancient lights.

EASEMENTS AND PRESCRIPTION.—*Decree of Wood, V.C., granting an injunction to restrain the defendants from raising buildings beyond their former height in such a manner as to interfere with the plaintiffs' ancient lights, affirmed, and appeal dismissed with costs.*

This was an appeal from a decision of Wood, V.C., which is fully reported at 12 L. T. Rep. N.S. 602.

The question was as to the right of the plaintiffs, who carried on business as wholesale ironmongers, at Nos. 11 and 12, Clement's Lane, a narrow thoroughfare in the City, to the interference of the court, restraining the defendants by injunction from raising buildings to a greater height than that at which they formerly stood, in such a way as to darken the plaintiffs' ancient lights.

His Honour granted the injunction, with liberty to the defendants to apply to the judge at chambers with reference to any scheme they might think fit to bring forward as to the erection of their building.

Amphlett, Q.C., and *Druce* supported the appeal on behalf of the defendants.—They referred to the recent cases, down to and inclusive of—

Jackson v. The Duke of Newcastle, 10 L. T. Rep. N.S. 635.

Giffard, Q.C., and *G. N. Colt*, for the plaintiffs, were not called upon.

THE LORD CHANCELLOR.—Mr. Giffard, I need not trouble you in this case. I have considered the case, and my opinion is that the order of the Vice Chancellor is right. I regret to say that I think so, because the truth is that, in the course of our social progress, everybody has got into a system of building houses much higher than they used to be built, and I suppose it is the same in the city of London as it is in the west-end of the town. But, unless the Legislature interferes, I cannot say that, because it is very common,

and very happily common, I think, to build much better houses, more spacious and airy, and, in consequence, more lofty houses than formerly, that that entitles anybody materially to interfere with the right of his neighbour; and the question really in this case is, whether or not there has been, or is in course of erection, such building, or row of buildings as will materially interfere with the use to the plaintiff of his counting-house and different warehouses and matters connected with his business, as will justify his applying to this court. Now, this is a question of a nature which is always the most difficult of any to deal with, and for this reason it is a question always of degree. Nobody can say, probably, that, if my opposite neighbour raises his house one foot, I could not recover any damages at all at law, but, whether I could or not, this court would never grant an injunction. That is always an exceedingly difficult question. We are obliged, therefore, to deal with it in very vague language, couched, perhaps, for the very purpose of concealing the difficulty we are in laying down any specific rule upon the subject. I think that the only practical rule we can act upon is this, that, if what is proposed to be done is such as to materially interfere with the comfort and enjoyment of a house for a private residence, or its utility for carrying on trade if it be a manufactory, or a warehouse, when this is done to a material extent, this court will interfere. Now, under the statute passed a few years ago, in some cases this court may not interfere by injunction, but may give compensation—not such compensation as you get at law, which is an action *toties quoties* for all interference with your light, but once for all a compensation for having your light permanently obstructed. I should have great difficulty in doing that, where what is done is really an interference, so that it may be doubtful whether the business could be carried on afterwards; or, even, short of that, if it has materially rendered it less convenient and less profitable to the parties who are seeking it, I should have great difficulty in saying that the parties ought to have anything else but an injunction. But it would be impossible to give that sort of relief here, because these parties are only tenants twelve or thirteen years, and then their landlord, who is to have it in reversion, is no party to this proceeding, and consequently that course of dealing with the subject would be out of the question. Equally am I precluded from acting at all in the mode in which Lord Westbury acted in the case of the Duke of Newcastle, because what Lord Westbury said there was, that there was no injury to the house in its then state—that is, no injury while it was used as it was then used; and though, if it could be used for other purposes afterwards, what was proposed to be done by the Duke of Newcastle might cause an injury, Lord Westbury did not think that that prospective possible injury from a use of the premises, the light of which was obstructed, necessarily called upon him to grant an injunction. Now here the two matters that I fix upon as shewing to me that this is a case in which relief ought to be given are these. In the first place, I think it is quite clear that this is a *bonâ fide* application. This is a very old-established wholesale ironmongery business, the returns of which are sworn to be upon an average of from 90,000*l.* to 100,000*l.* a-year—not profit, but returns; and, further than that, it is quite clear that the apprehension of these parties is a *bonâ fide* apprehension. Now I come to that conclusion not merely upon their affidavits, but upon the fact that I see that all the contrivances they have to secure what light they now get are made with great care and attention. The counting-house is glazed all round into the warehouse, so as to catch every possible ray of light which they would fail to catch from the out-of-doors ordinary light. I think the back of the counting-house is all glazed, in addition to which they have a contrivance by reflectors to get every ray of light they can to be thrown upon the interior of that warehouse, which otherwise is very insufficiently supplied with light. As the buildings now exist (using the word “now” to mean as they were before the projected alterations; because now, as I understand it, they are levelled to the ground), taking them as they were, and

the height at which they were, there is this evidence, which I cannot find at all satisfactorily contradicted, namely, that if you draw a line so as to get the ray of light which would be intercepted at the opposite corner of the building into your own premises, it would form a ray of light falling upon the ground in the interior of their building five feet three inches, I think, from the outer wall; therefore that gives a direct ray of light five feet three inches into the warehouse or building. That gives a perfect light upon the counter where the goods are to be seen, because those five feet three inches on the floor of the warehouse would leave the counter quite free and quite exposed to the light. If the opposite houses are raised from the height of thirty-six feet, which they were before, or thirty-five feet and a fraction, I call it thirty-six feet—if they are raised twenty-four feet more, which is two-thirds in addition, from thirty-six to sixty feet, I think it requires no architect to tell us—a common mechanic could draw a line and shew where light would fall. I think it would fall within one foot six inches, or something like that, of the wall; and not only would it not go on to the flooring of the warehouse at all, but it would actually strike, impinge, upon the counter itself; so that even the whole of the counter itself would not be exposed to the outer light. It appears to me, considering this to be a *bonâ fide* application of persons using their utmost endeavours to secure every possible ray of light they can for their business, I cannot come to any other conclusion than that raising the opposite houses in a street only twenty feet wide, from thirty-six feet to sixty feet, or to fifty-nine feet and a half—I call it from thirty-six to sixty feet—is likely to be such a material interference with the reasonable enjoyment of their own premises for the purpose of their trade that they are entitled to the injunction which the Vice Chancellor has granted. I may observe that a good deal of the argument, though I do not mean to say that the case was put upon that, is entirely out of place, namely, the argument that upon the whole this will benefit the plaintiffs, because it will make a better thoroughfare, and so on—that is out of the question; nor is it at all to be considered that there are other places in the city of London where they have no better light. It may be one of the great advantages of any particular place, that, by reason of the opposite buildings being low, they get better light, and they may pay a higher rent upon that account. I think that the Vice Chancellor has taken a proper view of this case. In my opinion his conclusion is perfectly right, and the appeal must be dismissed with costs.

WOOD, V.C., May 4, 5, 1865.

DEAN v. HANDLEY.

13 L. T. 89; 6 N. R. 95; 11 Jur. N.S. 686.

Will—Construction—Gift over in case of death without leaving issue.

WILL.—Real and personal property was devised and bequeathed in trust to pay an annuity, out of the income, to the testator's widow during her life, and after her decease the property was devised to the testator's son; but, if he should die without leaving issue, the trustees of the will were directed to distribute the property among certain persons:—Held, that the gift over only contemplated the death of the son in the lifetime of his mother.

Ralph Handley, of Fenton, in the parish of Stoke-upon-Trent, coalmaster, by his will, dated the 16th October, 1858 (after directing payment of his debts, funeral and testamentary expenses), devised all his real estate to the plaintiffs, James Dean and Henry Hopkins, upon the trusts thereafter declared concern-

ing the same; and (after making various bequests) he bequeathed his business to the plaintiffs, and directed them to carry it on. And he also bequeathed to the plaintiffs all other his personal estate upon trust to get in the same, and (after applying such sums as might be necessary to carry on his business) invest the residue. And he declared that his said trustees should stand possessed of his real and personal estate upon trust, out of the rents, profits, and annual produce thereof, and the profits of his business, to pay his wife Martha Handley, during her life, an annuity of 120*l.* for the maintenance and support of herself and of his (the testator's) son William Handley the younger; and from and after the decease of his wife he devised all his real and personal estate and effects, including all accumulations, and also including his business and all engines, machinery, and other effects employed therein, unto his said son William, to hold to him, his heirs, executors, and assigns for ever. Provided always, and his will and mind further was, that in case his said son William should depart this life without leaving lawful issue him surviving, then he directed his said trustees to sell and dispose of, and call in and convert into money his real and personal estate, and to stand possessed of the moneys to arise from such calling in and conversion, upon trust, as to one equal half part of or share thereof, to pay the sum of 100*l.*, part thereof, unto his brother William Handley, his heirs, executors, and assigns; and he further gave unto the plaintiffs for their personal use the sum of 50*l.* each, and as to the residue of the said moiety, to pay the same to his next-of-kin to be divided amongst them according to the Statutes of Distributions; and as to the remaining moiety, to pay the same to such person or persons in such shares and proportions, and in such manner as his said wife should, by any deed, will, or other instrument legally executed, appoint; and in default of such appointment the testator bequeathed the remaining moiety to his next-of-kin, to be paid and divided amongst them according to the Statutes of Distributions.

On the 7th March, 1864, the testator's widow, Martha Handley, died, having made her will dated the 21st February, 1862, whereby, in pursuance of the power given to her by her said husband's will, in the event of her son, the said William Handley, dying without leaving lawful issue him surviving, she appointed, gave, and bequeathed all the moneys and estate, over which, under or by virtue of her said husband's will, she had any disposing power, as therein stated.

Batten, for William Handley, contended, that the gift over was limited to William Handley's dying without leaving issue in Mrs. Handley's lifetime. He cited—

Edwards v. Edwards, 15 Beav. 357. *Galland v. Leonard*, 1 Swanst. 161. *Home v. Pillans*, 2 Myl. & K. 15. *Barker v. Cocks*, 6 Beav. 82. *Davenport v. Bishopp*, 2 Y. & C. C. C. 463. *Allen's Estate*, 3 Drew. 380.

Amphlett, Q.C., and *Fry*, for Mrs. Handley's appointees, contended that the gift over was intended to take effect if William Handley died without leaving issue either in Mrs. Handley's lifetime or afterwards. They cited—

Cooper v. Cooper, 1 K. & J. *Smith v. Spencer*, 6 De G. M. & G. 631.

Batten, in reply.

The VICE-CHANCELLOR said, that he had considered all the authorities, and he was of opinion that a general rule of construction had been built up from them applicable to a case like the present—a rule which did not depend on any minute indications of intention in the particular will. But of course the whole will ought to be looked to, and due weight given to everything in it which seemed to militate against the proposed construction. The rule which had been established by the authorities was, that if the gift of the whole income of a fund during a lifetime (and the rule would probably be held to extend to a gift for any period) was followed by an absolute gift to A., with a gift over in the event of A.'s dying without children or without issue, the court would take the death

of a tenant for life (or other period of distribution) as the point of bifurcation, and construe the gift over as a direction to the trustees of the fund to distribute it in one way if A. died before the period of distribution, and in another way if he died afterwards. Sir Thomas Plumer appeared to have first dealt with the case in reference to this general principle in *Galland v. Leonard* (1 Swan. 161). The case was followed by a series of other similar decisions; and the result of all the cases had been summed up very carefully by the M. R. in *Edwards v. Edwards* (*loc. cit.*), and Kindersley, V.C. had adopted the decision of the M. R. in *Re Allen's Estate* (*loc. cit.*). The case of *Smith v. Spencer* (*loc. cit.*) at first sight appeared to be an authority the other way; but independently of its not being a gift for life, with a distribution at a given epoch, there was a gift over of certain accumulations in the event of the same person dying under twenty-one without leaving issue. It was apparent, on the face of the will, that the testator meant dying without leaving children at any period whatever. The principal question argued in that case was, whether F. S. Spencer took a vested interest on the testator's death. The Warwick Street property was devised upon trust to apply the rents for the benefit of F. S. Spencer until he attained twenty-one, and then in trust for him. This, in accordance with *Boraston's* case (3 Rep. 19), was held to give him a vested interest from the testator's death, and the case was thus brought within the second rule in *Edwards v. Edwards*, that a gift over on death without issue, following an immediate absolute gift, was to be construed as referring to death at any time. This was a well-established rule, though it was difficult to reconcile it with that now under consideration. In the present case the testator had given an annuity to his wife, and directed the surplus income to be accumulated during her life. It was possible that the effect of the will was, to give these accumulations absolutely to his son; but no solid distinction could be founded on the fact of the annuity of 120*l.* being given, and the rest directed to be accumulated; and he must deal with the estate for life exactly as if an estate for life had been given to the widow, or to some one else during her life. He preferred to rely upon the general rule, but the provisions of the particular will were strongly in favour of the rule being applied. By the provisions of the will two courses were open to the trustees. In the one event they were to divest themselves of the whole property, and hand it over bodily to the son. In the other event, namely, his dying without issue, they were to dispose of it as described by the will. Therefore, upon the particular will, he had no hesitation in holding that William, having survived his mother, was absolutely entitled to the property.

Wood, V.C., June 13, 1865.

WILMOT v. FLEWITT.

13 L. T. 90; 13 W. R. 856; 11 Jur. N.S. 820.

Referred to, *Kumar Tarakeswar Roy v. Kumar Shoski Shikareswar*, 1883, L. R. 10 Ind. App. 51 (P.C.).

Will — Construction — Accruing shares — Survivorship — Share becoming payable.

VESTED, CONTINGENT AND FUTURE INTERESTS.—A., by will, directed the proceeds of his real and personal estate to be divided between and amongst his four children by name, "but if any one or more of his said children should die before his or her share should become payable, leaving no lawful issue, then such share or shares should devolve and go to his surviving child or children":—Held, that the time when the survivorship took effect was to be the death of the

particular legatee, and that an accruing share went over in the same manner as an original one.

John Dean by his will, dated the 5th October, 1847, gave all his personal estate to his wife for life, and after her decease among his four children, Catherine, William, Samuel, and Thomas, as tenants in common. And he devised all his real estate to trustees upon trust to permit his said wife to receive the rents, &c., during her life, and after her death upon trust to sell the same, and to stand possessed of the moneys to arise from such sale upon trust to pay and divide the same amongst the said four children, Catherine, William, Samuel, and Thomas, as tenants in common; but if any one or more of his said children should die before his or her share or shares of and in the said trust moneys, or in his, her, or their respective share or shares of his said personal estate thereinbefore by him bequeathed to them on the decease of his said wife, should have become payable, leaving lawful issue, then such issue should take and be entitled to his, her, or their respective parents' share or shares of and in the said trust-moneys, and also of and in the said personal estate by him bequeathed as aforesaid; but if any one or more of his said children should die before his or her share or shares become payable, leaving no lawful issue, then such share or shares should devolve and go to his surviving child or children, and if more than one, in equal shares as tenants in common.

The wife and the four children named survived the testator, who died in 1847. Samuel and William died unmarried in the life of their mother, the tenant for life.

Thomas died in 1863, having married and left one child, Amy Dean, and also his widow, Sophia Clifford Dean, him surviving.

The testator's widow died in March, 1864, leaving only one of the testator's four children surviving, viz., Catherine, who had married defendant, William Flewitt.

The bill was now filed by the surviving trustee under the will to have the opinion of the court, and a declaration of the rights of the several parties in the proceeds of the real and personal estate of the testator which had been sold and converted.

Buchanan, for the plaintiff, the surviving trustee, submitted the question to the court.

H. Cadman Jones, for Mr. and Mrs. Flewitt, contended that the survivorship of the four children was to be governed by the time of the death of the widow, the tenant for life, and that, consequently, the shares of William and Samuel survived to his client Mrs. Flewitt, she being the only surviving child at that time. He relied principally upon

Young v. Robertson, 4 Macq. H. L. C. 314; and referred to

White v. Baker, 2 De G. F. & J. 55; 1 L. T. Rep. N.S. 475. *Crowder v. Stone*, 3 Russ. 217. *Crips v. Woodcott*, 4 Madd. 11: *Ive v. King*, 16 Beav. 46. *Littlejohns v. Household*, 21 Beav. 29. *Bright v. Rowe*, 3 My. & K. 316. *Cambridge v. Rous*, 25 Beav. 409. *Re Pell's Trusts*, 3 De G. F. & J. 291.

Willcock, Q.C., for Sophia Clifford Dean, the child of Thomas, contended that Thomas, in the events which had happened, became entitled to one moiety of the proceeds of the testator's estate, but that on his death the accrued shares did not go over to his issue like the original share, but became part of his personal estate.

J. Phear, for Amy Dean, contended that the interest of Thomas, both in the original and accrued shares, went over to his issue. He cited—

Hodgson v. Smithson, 8 De G. M. & G. 604. *Eyre v. Marsden*, 4 Myl. & Cr. 231.

H. C. Jones, in reply, referred to
2 Jarm. on Wills, 714.

The VICE-CHANCELLOR said, the effect of the authorities cited was to establish a very nice distinction. The authority of *White v. Baker*, which had been decided by the full court of appeal, but which had been shaken by the decision of the House of Lords in *Young v. Robertson*, if not expressly overruled by it, would have governed the present case unless some distinction could be shown. It was admitted that if there was a gift to A. for life, and after his death to B., C., and D., or the survivors of them, the death of the tenant for life was the period of ascertaining the survivorship. In such cases as *Crowder v. Stone*, and others, it was equally established that if the gift was to A. for life, and then to several persons, with a divesting clause giving over the shares of any one dying to the survivors, unless there were words which bring the period down to a later time, the word "survivor" related to the last event mentioned, viz., the death of the legatee dying. Another class of cases, such as *Littlejohns v. Household*, were instances where under the special words of the will the court had held that the words of survivorship must be referred to the period of distribution. In the Scotch case of *Young v. Robertson*, there was no gift over to the issue of those who died leaving issue. In the present case the court, looking accurately to the grammar of the will, saw quite clearly of what period the testator was thinking. He speaks of two events, a legatee dying leaving issue, and a legatee dying without issue, both of which were to take place in the lifetime of the tenant for life. With respect to the former event, it was clear that the gift was to the issue immediately, but with respect to the other event, of the legatee dying without issue, there was this remarkable expression, "Then such share or shares shall devolve and go to my surviving child or children." Here were no words directing a division, but the share of a legatee leaving issue being given directly to the issue, the question was whether the survivorship in the other event did not point to the same period of time, viz., the death of the legatee so dying. The case had been very ably argued by Mr. Cadman Jones, who had said that too much stress ought not to be laid upon the words quoted, according to the later authorities, and in this he agreed. No doubt the words would be more plain if "share or shares" were read as applying to a plurality of shares coming to one individual. On the whole, therefore, he thought that that was the sounder construction. The language of the will was not very accurate. If he had said in each case "his, her, or their share or shares," the words might have been interpreted *reddendo singula singulis*; but in the clause on which the whole question turned his or her "share or shares" indicated a plurality of shares in one individual. This distinguished the case from *Young v. Robertson*. He should, therefore, follow the decision in *White v. Baker*, and hold that the accrued shares went over in the same way as the original shares. The declaration would be that, in the events which had happened, the fund was divisible in equal moieties between Amy Dean and Catherine Flewitt.

Decree accordingly.

[PRIVY COUNCIL.]

The RIGHT HON. LORD CHELMSFORD, and KNIGHT BRUCE and TURNER, L.JJ.,

July 27, 1865.

COMMERCIAL BANK OF CANADA *v.* GREAT WESTERN RAILWAY
COMPANY OF CANADA.

13 L. T. 105.

*Railway company—Authority to borrow money—Liability of shareholders
—Power to borrow by bond—Authority of directors.*

COMPANY.—*The G. railway company had by their original statute of incor-*

poration no power given to borrow money, but a subsequent statute gave power to borrow money from time to time for maintaining and working their railroad, to pledge the lands, tolls, and revenues for due payment thereof, and to make bonds or debentures for securing the repayment of any sums so borrowed in certain terms:—Held, first, that the securities on which the company had power to borrow were not restricted to bonds or debentures; Secondly, that a statute having passed to legalise a loan of money already illegally made by the G. company to another company, it became as lawful to apply the funds of the G. company for that other company as for maintaining the G. company's own railway.

A statute legalised a loan already made of 250,000*l.* by the G. company to another company, and also authorised the G. company to use its funds by loan or otherwise to facilitate access to other railways, provided no such expenditure should be incurred unless sanctioned by a vote of two-thirds of the G. shareholders:—Held, that a bank, in advancing money to the directors of the G. company, was bound to ascertain for itself, at its own risk, whether the loan was authorised by the G. shareholders, and had no right to assume that the G. directors must have authority to borrow.

This was an appeal from a judgment of the Court of Error and Appeal of Upper Canada.

The action was brought by the appellants to recover moneys alleged to have been lent to the respondents, and the defence generally was, that the respondents had no power to borrow money for the purposes for which it was advanced.

The Court of Queen's Bench of Upper Canada decided in favour of the appellants; but, on appeal to the Court of Error, this judgment was affirmed only as to two loans of 150,000*l.* and 100,000*l.*; as to the rest of the claim the court gave judgment for the respondents, and ordered a new trial. The present appeal was then brought to Her Majesty in Council.

The facts are fully stated in the judgment.

Bovill, Q.C., and G. Shaw Lefevre, for the appellants.

Rolt, Q.C., Mellish, Q.C., and S. Percival, for the respondents.

Authorities referred to—

Royal British Bank of Turquand, 6 E. & B. 327. *Bank of Australasia v. Breillat*, 6 Moo. P.C. 152. *Maclean v. Sutherland*, 3 E. & B. 38. *Burmester v. Norris*, 6 Ex. 796. *Mackinnell v. Robinson*, 3 M. & W. 434. *Reuter v. Electric Telegraph Company*, 6 E. & B. 341. *Henderson v. Australian Navigation Company*, 5 E. & B. 409.

LORD CHELMSFORD.—This is an appeal from the judgment of the Court of Error and Appeal in Upper Canada, reversing the judgment of the Court of Queen's Bench of that province, and ordering a new trial in an action by the appellants against the respondents. The action, which was upon the common money counts, was brought to recover the balance alleged to be due to the appellants for money lent and advanced to the respondents. The respondents pleaded that they were not indebted. The appellants, the Commercial Bank, were incorporated under an Act of the Colonial Legislature, and have their principal office at the city of Kingston, with a branch office at Hamilton, and other branches in Canada. The respondents, the Great Western Railway Company, were incorporated under a statute of Upper Canada, 4 Will. 4, c. 29, but the extent of the undertaking and their powers have been since modified and enlarged by several other Acts of the Canadian Legislature. Under these Acts the company constructed its main line of railway from the suspension bridge on the Niagara river to the town of Windsor on the Canadian side of the river. Detroit. On the opposite bank of the river was the terminus of a railway in the United States, called the Detroit and Milwaukee Railway, which, when completed, was to extend across the State of Michigan in a westerly direction so

as to secure a large portion of the traffic of the Western States of America. Prior to 1857 the directors of the Great Western Railway Company had become impressed with the importance of securing the completion of the Detroit and Milwaukee line, with a view to the increase of the traffic upon their own railway. Accordingly a traffic arrangement had been entered into between the two companies, and the shareholders of the Great Western Railway Company had invested in bonds of the Detroit and Milwaukee Company to the extent of 200,000*l.* In 1857 the Detroit and Milwaukee Company being in difficulties and wanting funds to complete their line, they entered into negotiations with the directors of the respondents' company for a loan of 150,000*l.* The subject of this loan was brought before the shareholders of the company on the 8th October, 1857, when a resolution was passed, "that the directors be authorised to advance to the Detroit and Milwaukee Railway Company such an amount not exceeding 150,000*l.* sterling, as may be necessary to insure the completion of the railway across Michigan, in connection with the Great Western Railway of Canada, such advance being made as a temporary loan, and on sufficient security, the expenditure of the same being subject to the control of the Great Western Railway Company." On the 1st January, 1858, a mortgage-deed was executed, transferring to Mr. Charles John Brydges, the managing director, Mr. Thomas Reynolds, the financial director, and Mr. Beecher, one of the general directors of the respondents' company, as trustees, all the property, both real and chattel, acquired and to be acquired by the Detroit and Milwaukee Company, so far as they were not affected by previous mortgages, and vesting the entire control of the expenditure of funds to complete the line in the trustees, and also the management of the railway, and the disposal of the net income for assuring the repayment of the money advanced or to be advanced by the Great Western Railway Company, with interest at the rate of 10 per cent. per annum. By a resolution of the English board of the respondents' company, the expenditure of funds advanced by them for the works upon the Detroit and Milwaukee line was to be wholly under the direction and control of Mr. Brydges and Mr. Reynolds, and the respondents having by agreement with the Detroit and Milwaukee Company the power to nominate the members of the board of that company, and having named (amongst others) Mr. Brydges and Mr. Reynolds, they were respectively elected president and vice-president of the Detroit and Milwaukee Company. On the 7th October, 1858, at a meeting of the proprietors of the Great Western Railway Company, a resolution was passed "that the directors be authorised to advance to the Detroit and Milwaukee Company a further sum of money not exceeding 100,000*l.* sterling to be expended by and under the control of the Great Western Railway board of directors." In order to carry out the resolutions for the advance of the funds of the Great Western Company to the Detroit and Milwaukee Company, Messrs. Brydges and Reynolds on the 29th December, 1857, entered into an arrangement with the appellants, the Commercial Bank. The respondents' company had in August, 1857, transferred their banking account from the Bank of Upper Canada to the appellants' bank upon an arrangement that the company was to have an overdrawing credit of 50,000*l.*, to be available when required by the company for ordinary expenditure of whatever nature, and upon other terms unnecessary to be noticed. For the purpose of the proposed expenditure on the Detroit and Milwaukee line it was arranged that a separate account for the Great Western Railway should be opened at the branch Commercial Bank at Hamilton, so that the expenditure might be kept distinct from the ordinary cash transactions of the Great Western Railway, that the account should be headed and known as the "Detroit and Milwaukee account, Great Western Railway," that the bank should make advances from time to time on this account and that such advances should be covered monthly by sterling bills on the Great Western Railway Company, London, and that the available traffic receipts of the Detroit and Milwaukee line should also be applied in reduction of these advances. This account was accordingly opened on the 30th December, 1857, and operations upon it continued down to December 30th,

1859. In the course of the transactions the following letter was written by Messrs. Brydges and Reynolds to Mr. Park, the manager of the bank, at Hamilton, dated 16th December, 1858: "With reference to the conversation which took place yesterday between you and Mr. Campbell and Mr. Reynolds, upon the subject of the Detroit and Milwaukee Railway Company's account with the Commercial Bank, we beg leave to state that the Great Western Railway holds itself liable to the Commercial Bank for all over-draught on the Detroit and Milwaukee Company's account with the said bank. This is quite understood by us; but as you expressed a wish to have it placed on record, we now do so by means of this letter." At the close of this account a balance was alleged to be due to the bank amounting to upwards of 945,000 dollars, upon which the action was brought. At the trial it was agreed that, if the plaintiffs were entitled to a verdict, the amount for which it should be entered should be ascertained by reference, and an indorsement to that effect was made upon the record, which will be the subject of future consideration. At the conclusion of the plaintiffs' case, the counsel for the defendants applied for a nonsuit upon various objections to the action in point of law, and leave was reserved to move the court to enter a nonsuit. The defendants then called witnesses, and after a discussion between the learned Judge and the counsel on both sides as to the question of fact to be submitted to the jury, the following questions were put to them and answered as follows: 1. To which company was credit given by the bank—to the Great Western or to the Detroit and Milwaukee, or was credit given upon the responsibility of Messrs. Brydges and Walker? Answer.—To the Great Western. 2. Had Messrs. Reynolds and Brydges authority from the Great Western Company to make financial arrangements for the Detroit and Milwaukee Company, on account of the Great Western Company, to the extent of 250,000*l.*, agreed to be loaned by the Great Western Company to the Detroit and Milwaukee Company, and was the account of the Commercial Bank opened and conducted by them in pursuance of such authority?—Answer. They had the authority, and the account was opened and conducted by them in pursuance of that authority. 3. Had the Commercial Bank notice at any time while the account was going on that Messrs. Brydges and Reynolds had exceeded their authority, or that more than two loans amounting to 250,000*l.* had been expended?—Answer. The bank had no notice that Messrs. Brydges and Reynolds exceeded their authority. 4. Suppose the original credit was given by the bank to the Great Western Company on the opening of the account, was there any understood limitation between the parties as to the question of liability at the time the letter of the 16th Dec. 1858 was given, either to the extent of the second loan of 100,000*l.* sterling or otherwise, or was the account continued on after that period in the same manner as before by the parties?—Answer. There was no limitation, and the account was continued in the same manner as before the letter of the 16th Dec. 1858 was given. 5. Did the Great Western Company by its dealings with the Detroit and Milwaukee Railway Company reap the benefit of the expenditure made by the Commercial Bank on the Detroit and Milwaukee account?—Answer. They did. The verdict was accordingly entered for the plaintiffs subject to a reference as to the amount in the following terms indorsed by the learned Judge on the record: "It is agreed by the counsel for the parties in this case that the amount for which a verdict shall be entered, if the plaintiffs shall be entitled to a verdict, shall be ascertained by a referee or referees to be chosen by the parties respectively in term or otherwise, and if the parties cannot agree upon a person or persons for that purpose, then it is agreed between the parties that I shall nominate the referee as upon a compulsory reference. The referee to have power, at the request of either party, to report upon the different classes of the account; such as amounts paid upon coupons, upon cheques, upon promissory notes or otherwise, and to draw up a statement of facts for the opinion of the court." In the following term the defendants moved the Court of Queen's Bench for a nonsuit upon the leave reserved for that purpose, and also for a new trial for misdirection and want of direction on the part of the learned Judge, before whom the cause was tried, and

for the reception of improper evidence. This latter ground, however, was abandoned by the counsel for the appellants in the course of the argument upon the present appeal. In considering the grounds upon which it was insisted that there should be either a nonsuit or a new trial ordered, it will be convenient to confine attention to those points which have been relied upon in the argument before their Lordships. These, as to the nonsuit, were said to be the 4th and 5th points in the rule *nisi* for setting aside the verdict and entering a nonsuit, viz. : 4th. That Messrs. Brydges and Reynolds could not bind the defendants at all, even though under the formality of a seal, as they had no power to borrow money on behalf of the defendants for the present purpose, the plaintiffs being aware that it was for the Detroit and Milwaukee Railway Company that the money was required. 5th. The act allowing the defendants to lend to the Detroit and Milwaukee Railway Company does not authorise a borrowing, and contemplates having the funds in hand before lending, and so the borrowing was *ultra vires*, and the plaintiffs being aiders in the illegal object of the borrowing cannot recover against the defendants. Leaving aside for the present the question of how the funds were obtained by means of which the first advance of 150,000*l.* was made to the Detroit and Milwaukee Railway Company, there can be no doubt that this advance being for a purpose foreign to the objects of the incorporation, would be *ultra vires* and not in itself binding upon the shareholders of the respondents' company. But with respect to this loan all objection is removed by the Act of the Canadian Legislature, 22 Vict. c. 116, by the 11th section of which it is provided that the loan of "seven hundred and fifty thousand dollars (150,000*l.*) already made by the said company to the Detroit and Milwaukee Railway Company is hereby declared to be lawful." So with respect to the advance of the 100,000*l.* to the Detroit and Milwaukee Railway Company, which was made after the passing of the Canadian Act just mentioned, that advance is not objectionable on the mere ground that it was made for purposes foreign to the undertaking of the Great Western Railway Company, because by the same 11th section of the 22 Vict. c. 116, it is enacted that "the Great Western Railway Company shall have full power and authority to use its funds by way of loan or otherwise in providing proper connections, and in promoting its traffic with railways in the United States of North America, provided that no such expenditure shall be incurred unless sanctioned by a vote to that end of two-thirds of the shareholders voting in person, or by proxy, at a general meeting of the shareholders specially called for that purpose." It is not disputed that the proper authority was obtained from the shareholders before this advance was made. But it is said with respect to the advance of 150,000*l.*, the Act only renders the loan itself lawful, but does not legalise the borrowing by which it was made. And as to the 100,000*l.* that the Act merely gives power and authority to the company to use its own funds in providing connection with or promoting the traffic of foreign railways but gives them no power of borrowing for these purposes. If the company had no borrowing powers, or none which could be employed upon such advances as those in question, it might be necessary to consider whether a distinction might not be taken between the loan of 150,000*l.* which having been already made was expressly sanctioned by the Legislature with (as it might be contended) all its circumstances, and the statutable power of applying the company's funds in future, the terms of which would require to be strictly pursued. But when the question upon the borrowing powers of the company comes to be considered, there will be found to be no necessity for making a distinction between the two advances. It is extraordinary that (as appears from the statement of counsel) there were no borrowing powers conferred upon the respondents' company by the original Act of incorporation; but these powers are only to be found in a subsequent Act for increasing the capital stock of the company, and in a section expressed in a declaratory form. This section is the 16th of the Canadian Act of the 16 Vict. c. 99, by which it is declared and enacted that the company have had and shall have power and authority to borrow money from time to time for making, completing, maintaining, and working the said railroad as they might

or may think advisable, and to pledge the lands, toils, revenues, and other property of the company for the due payment thereof, and might or may make the bonds or debentures issued by them for securing the repayment of any sums so borrowed or to be borrowed convertible into stock of the said company, on the terms and conditions expressed or to be expressed in such bonds and debentures or in the bye-laws of the company." It was said by the counsel for the respondents that this section gave them power to borrow only on bonds and debentures; and from the language of the section it may fairly be argued that the Legislature supposed that all the borrowings of the company would be upon securities of this description. But it is not said that they shall not have power to borrow except upon "bonds or debentures issued by them for securing the repayment of the sums so borrowed." If, therefore, money were borrowed by the company for the legitimate purposes of the undertaking, it would be no answer to the lender seeking to recover his money to say that he had no bond or debenture as a security for his loan. The 11th section of the Act of the 22 Vict. c. 116, makes it lawful to apply the funds of the company to promote the traffic of other railways. The money lent for this purpose is just as legitimately employed as if it were spent in maintaining and working their own line; and if they have a right to borrow for the one purpose, they have equally a right to borrow for the other. And although the first loan of 150,000*l.* to the Detroit and Milwaukee Company was originally unlawful, yet when it was made lawful by the 22 Vict. c. 116, it was in the same predicament as if it had been so from the first, and consequently no sound distinction can be made between the borrowing from the bank in respect of this loan, and the borrowing for the advance of 100,000*l.* There seems to be no ground, therefore, for holding that a nonsuit ought to have been entered. The rule for a new trial for misdirection, or want of direction, presents much more difficulty. The questions to be submitted to the jury were, with two exceptions, acquiesced in by the counsel on both sides. It is unnecessary to consider these questions in detail. The Court of Queen's Bench held that there was no misdirection or want of direction involved in any of them. And although the judges in the Court of Error and Appeal did not enter into examination of the mode in which the case went to the jury, they must have been of opinion that there was nothing in the form of the questions which amounted to misdirection. In this opinion their Lordships concur, and are satisfied that, as far as the direction went, the facts to be tried were substantially left to the jury. But the Court of Error and Appeal proceeded upon a ground which (as the Chancellor of Upper Canada said) "was not presented to the court below, not prominently discussed before them," reversed the judgment of the Court of Queen's Bench, and directed a new trial. This ground was, that "there was neither previous sanction nor knowledge from time to time, nor subsequent ratification by the shareholders, or even by the directors of the railway company, of the dealings between Messrs. Reynolds and Brydges and the Commercial Bank, in respect of the Detroit and Milwaukee Railway account, beyond the 250,000*l.*, and therefore that the company were not liable beyond that amount. And the Court of Error thought that the extent of the company's liability upon the evidence furnished should have been declared by the court, and that in this view there ought to be a new trial." It certainly appears that the opinion of the Judge as to the liability of the company beyond the 250,000*l.* was not in any way expressed upon the trial. The point was incidentally noticed in the third and fourth questions submitted to the jury, the third being, "Had the Commercial Bank notice at any time while the account was going on that Messrs. Brydges had exceeded their authority, or that more than the two loans, amounting to 250,000*l.* sterling, had been expended?" and the fourth, "Suppose the original credit was given to the bank by the Great Western Company on the opening of the account, was there any understood limitation between the parties as to the question of liability at the time the letter of the 16th Dec. 1858 was given, either to the extent of the second loan of 100,000*l.* sterling or otherwise; or was the account continued on after that period in the same manner as before by the parties?" But the learned Judge gave no intima-

tion of his opinion upon the question as to the extent of the company's liability, which was an essential element in the determination of the amount which the bank was entitled to recover in the action. The point was raised, though not so distinctly as it might have been, upon the motion for a new trial; for in the rule one of the objections to the Judge's charge was in his not directing that the expenditure of money by the defendants on the Detroit and Milwaukee Railway was a matter beyond the scope and power of the defendants, except to an extent authorised by a vote of the shareholders, and so illegal." And the question seems to have been discussed, though, as the Chancellor says, "not prominently discussed," before the Court of Error and Appeal. The counsel for the appellants object to the judgment of the Court of Error and Appeal, ordering a new trial, upon the ground that the company are liable to the bank in respect of their dealings beyond the 250,000*l.*, as the bank had no notice of any excess of authority, supposing any to have taken place; and also that the extent of the company's liability can be determined in the reference of the amount of the verdict agreed to at the trial without sending the parties before another jury. If the question as to the dealings beyond the 250,000*l.* had arisen between the shareholders and the directors of the respondents' company, there would be very little difficulty in deciding that the shareholders were not liable. The objects to which the moneys were applied would not have been a legitimate application of the funds of the company without the Act of 22 Vict. c. 116, and that Act expressly provides that no such expenditure shall be incurred unless sanctioned by a vote to that end of two-thirds of the shareholders voting in person, or by proxy, at a general meeting of the shareholders specially called for that purpose. If the conditions of the statutable power are not complied with, it is not lawfully exercised. But it is said that the bank is in a different position from the shareholders of the company; that, according to the case of *The Royal British Bank v. Turquand* (6 E. & B. 327), the bank had a right to presume that there had been a resolution of the shareholders authorising the borrowing beyond the amount of the 250,000*l.*, and the jury at the trial expressly found that "the bank had no notice that Messrs. Brydges and Reynolds exceeded their authority." It must be observed, however, that the bank had the fullest information that the account which was opened on behalf of the Great Western Company was for the purpose of their making advances for the Detroit and Milwaukee Railway. They must have known that the company could not apply its funds in aid of another company without the authority of the Legislature. They must, therefore, upon the opening of the account, have been directed at once to the source of this extraordinary power, and must have learnt the conditions under which it was to be exercised. The words of the Act are negative and prohibitory: "No such expenditure shall be incurred unless by a vote to that end of two-thirds of the shareholders." The case differs in this respect from *The Royal British Bank v. Turquand*, for there the clause of the deed of settlement was an empowering clause, enabling the directors to borrow on bond such sums as should from time to time by a general resolution of the company be authorised to be borrowed; and this very distinction was taken by Jervis, C.J., in that case, for after observing that parties dealing with the bank were not bound to do more than to read the statute and deed of settlement, "he adds, "And the party here, on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions." The right of the bank to claim in respect of the dealings beyond the 250,000*l.* was clearly a question which ought to have been decided as a guide to the referee in ascertaining the amount of the claim, and as there was a miscarriage in this respect on the part of the Judge, there must necessarily be a new trial, unless under the terms of the reference as to the amount of the verdict, the question can be raised for the decision of the court. Upon this point, however, their Lordships, with every desire to save the parties the expense of another trial, are compelled to come to a conclusion adverse to the view presented by the appellants. The reference, which is evidently framed upon the provisions of the Canadian C. L. P. A., is to ascertain the amount for

which a nominal verdict for the plaintiffs ought ultimately to be entered. The duty of the referee under this reference would be to call for vouchers and proof of the different items contained in the particulars of demand. The referee is to have power to report upon the different classes of the account, such as amounts paid upon coupons, upon cheques, upon promissory notes or otherwise, and to draw up a statement of facts upon each for the opinion of the court. There is nothing in this language which enables the referee to say, "I will not look at the account beyond a certain date, because I think there was no liability of the railway company after that date;" and any report upon the limit to the liability which he could make would not be "upon classes of the account, such as amounts paid upon coupons, &c.," but it would be a statement as to the provisions of the Act empowering the loan to the foreign railway the resolutions of the shareholders of the respondents company, and the facts which would prove knowledge, or want of knowledge, on the part of the bank of the excess of authority. This consideration will be sufficient to show that the extent of the liability of the respondents was not intended to be within the province of the referee, and that it is not comprehended in the terms of the reference. A new trial seems to be the inevitable result of the omission to decide this question, and their Lordships will therefore recommend to Her Majesty to affirm the judgment of the Court of Error and Appeal, and to dismiss the appeal with costs.

Judgment affirmed.

[HOUSE OF LORDS.]

June 13, 1865.

HUNTER v. EARL OF HOPETOUN.

13 L. T. 130.

Landlord and tenant—Covenant for perpetual renewal—Equitable relief of tenant—Waiver of condition.

LANDLORD AND TENANT.—*T., a tenant under a lease for nineteen years perpetually renewable on twelve months' previous notice before the expiration of each term, instituted a suit to compel L. the landlord to renew from 1842 to 1861. In defence L. pleaded that the lease had been forfeited for breach of covenants. The suit, however, was allowed to stand still, and the parties then began to negotiate about a draft of a renewal, L. proposing alterations and threatening, if they were not accepted, he would insist on his original defence of forfeiture. Pending these negotiations, and the delay not being caused by T., the time arrived for T. giving notice of renewal of another term from 1861 to 1880, which T. did not give:—Held, that while the lis pendens as to the existence of the former lease existed, T. was excused from making demand for a further renewal, and had not lost his right of renewal, it being inequitable in L. to insist on compliance with a covenant of which he denied the existence.*

This was an appeal from a decree of the Court of Session made in a suit brought by the landlord (the respondent) against his tenant (the appellant) to have it declared that the appellant was not entitled to a renewal of a lease in terms of a covenant for perpetual renewal.

By lease of 1747 George Cockburn let to Andrew Wight the lands of Westfield, of Ormstown, alias Cotterwell, for a term of nineteen years, at a rent of 53*l.*, with entry at Whitsunday (15th May) 1747. The lease contained the following covenant:

That upon the said Andrew (Wight), &c. tendering and paying to him, the said George (Cockburn), the sum of 53*l.* sterling money, as a year's rent of the said farm, by way of fine and consideration to the said George, &c., over and above the yearly rent after mentioned, and demanding a new lease from the said George, &c., in a legal manner, before a notary and two witnesses, at least twelve months before the expiry of the said term of nineteen years, that then, upon the said Andrew, &c., making such tender, payment, and demand, the said George, &c. shall reiterate and renew this lease or tack in favours of the said Andrew, &c., upon his or their proper charges or expenses, for other nineteen years longer, for payment of the same yearly rent, at the same terms, and with and under the same conditions, provisions, and qualifications contained in this present lease, and so forth thereafter the said lease of the foresaid farm and others above mentioned shall be renewable in favours of the said Andrew, his heirs, &c., from nineteen years to nineteen years for ever, upon their making the like tender, payment, and demand at the end of every nineteen years, and in the terms above mentioned, and observing and performing the conditions, provisions, and prestations contained in this present tack.

The lease was duly renewed up to 1842. At that time the respondent, the Earl of Hopetoun, had become the landlord, and the father of the appellant the tenant. On 12th May, 1841, a demand was duly made for a renewal for another term of nineteen years from May, 1842, to May, 1861. The landlord, however, refused to grant a renewal in consequence of some dispute as to repairs and timber. But though no renewal was granted the tenant remained in possession, and paid rent during certain negotiations for a new stipulation in the lease. In consequence of the landlord's refusal, the tenant, in 1845, instituted a suit to compel specific performance of the covenant to renew. The landlord set up the defence that the tenant had violated the conditions and obligations of the lease, and that the lease had thereby been forfeited; at all events, that the lease should be varied in its terms. The suit remained in dependence, and had never been brought to a conclusion. Soon after the above defence was made by the landlord the parties began to negotiate about a draft renewal of the lease, and great delay occurred in the correspondence chiefly on the part of the landlord, as to the settlement of its clauses. The landlord's solicitor, during the course of the correspondence, several times reminded the tenant's solicitor that if the tenant did not accept the proposed alterations in the draft lease the landlord would fall back on his original defence to the suit, viz., that the lease had been forfeited.

During this correspondence, and when the parties were supposed to be nearly arriving at some agreement, the 15th May, 1860, arrived, when it behoved the tenant to demand and the landlord to agree to a renewal of the term from 1842 to 1861. The tenant said he did not make the tender and demand at that time in consequence of the lease for the previous term of nineteen years not having been yet adjusted. But after that date the landlord resolved to take advantage of the want of this demand of renewal in 1860, and accordingly announced that he was not now bound to grant a renewal.

The landlord accordingly commenced the present suit to have it declared that in consequence of the tenant having failed in 1860 to demand a renewal the lease was forfeited, and the plaintiff was no longer bound to grant a renewal. The Court of Session held that the failure of the tenant to demand a renewal at the stipulated time was fatal, and made a decree in favour of the plaintiff (the landlord).

The tenant now appealed against that decree.

Rolt, Q.C., and *Sir H. Cairns, Q.C.*, for the appellant, contended that it was inequitable in the landlord to insist on the tenant making a formal demand of renewal, seeing that the lease for the previous term of nineteen years had not been adjusted, and was matter of negotiation at the time,

especially as the landlord had pleaded to the former suit that the lease was forfeited at that time. The landlord could not be allowed at one and the same time to deny the existence of any relation of landlord and tenant, and insist on the terms of the lease being carried out:

Harris v. Bryant, 4 Russ. 89. *Butler v. Elgin*, Sugd. Prop. in H.L. 553. *Cruise Dig. Estate on Land*, tit. 13, c. 2, s. 24. *Duke of St. Albans v. Shore*, 1 H. Bl. 270. *Hockster v. Latour*, 2 E. & B. 678. *Planche v. Colburn*, 8 Bing. 14.

Sir F. Kelly, Q.C., and *Anderson, Q.C.*, for the respondent.

Cur. adv. vult.

The LORD CHANCELLOR.—My Lords, the last lease granted by the Earl of Hopetoun, the father of the present plaintiff, was executed in April and May, 1825. It was for a term of nineteen years from Whitsunday, 1823, and was granted in pursuance of the covenant for renewal contained in the original lease. But the covenant for renewal contained in the last granted lease of 1825 is somewhat differently expressed from the covenant contained in the original lease of 1747. For the purposes of this cause, however, I think the difference is immaterial. The right to a renewal must be regulated by the terms of the covenant in the lease of 1825. In conformity with this covenant the late Mr. Hunter, to whom the lease of 1825 had been assigned, did on the 12th May, 1841, being more than twelve months before the expiration of the lease, duly demand a renewal in his favour. With this demand the landlord refused to comply, and insisted that, by reason of certain alleged breaches of the covenant contained in the lease of 1825, Mr. Hunter was not entitled to a renewal, or to continue in the tenancy of the farm. In consequence of this refusal, Mr. Hunter, in the month of December, 1845, commenced an action against the Earl of Hopetoun, concluding to have it declared that the earl should renew the lease for the term of nineteen years from Whitsunday, 1842, on payment of the same rent, on the same terms, and with and under the same conditions, provisions, and qualifications as were contained in the lease of 1825. In his defence to this action the earl insisted that the obligation to renew was dependent not only on the tenants making tender and demand at least twelve months before the end of every term of nineteen years, but also on the tenants observing and performing the conditions contained in the lease, and the earl proceeded to specify various breaches of covenant, concluding in these words: "First, In consequence of the violation of the conditions and obligations imposed on the tenant by the lease, the plaintiff, as assignee of the lease, and as standing in right of the original tenant, is not entitled to demand a renewal. The original right of lease is forfeited. Secondly, even if the plaintiff were entitled to obtain a renewal of the lease of 1825, he is not entitled to insist that the renewed lease shall be drawn up so as to make the obligation as to furnishing timber for the repair of houses, &c., apply to buildings recently erected upon the farm." This suit has never been disposed of, no further step having been taken since the defences were lodged, but it is still *lis pendens*. This is admitted by the respondent in his answer. From the issues raised in this action by the respondent two things are plain: firstly, that the landlord denied the existence of any tenancy, and refused to grant the lease which, if granted, would have contained that covenant to renew which the appellants would have then been entitled to exercise. Secondly, that until the second defence and the question thereby raised was disposed of, the tenant could not know what would be the exact terms of lease to be granted by the landlord, and what he would be entitled to receive under the covenant. The question is whether, pending this denial by the landlord of the relation of landlord and tenant, and his refusal to grant a new lease, which it is now in effect admitted was unfounded, the landlord has a right to insist that it was the duty of the tenant to have treated the refused lease as granted, and to have given notice

of renewal twelve months before the day on which the lease so refused by the landlord would have expired. It is difficult to understand how the landlord, refusing the lease and insisting that the relation of landlord and tenant was at an end, can yet be heard to allege that he has a right to that lease as if it had been granted instead of being withheld, and to require the lessee to fulfil the obligations which would have attached to him if the relation of landlord and tenant had been admitted, and the lease had been executed in pursuance of the covenant to renew. The landlord seeks to avail himself of two inconsistent defences. If the tenant gives notice to renew, the landlord claims the benefit of his defences to the action, and denies the tenancy, and if the tenant, by reason of the suit, does not give notice, he immediately treats him as a tenant, and insists on the want of notice in conformity with the covenant. Such conduct is plainly inequitable. Until the lease of 1841 was duly constituted, no legal formal notice could be given. In fact, there was nothing in existence that could be the subject of renewal, or of a demand of renewal. That Mr. Hunter's action was not more actively prosecuted, must be attributed to the evasive conduct of Lord Hopetoun's agent. It is true that in his letter of the 18th April, 1846, and also in his letter of the 4th November, 1846, the agent, Mr. Hope, carefully reserves and saves all the benefit of the defences put in by the earl to Mr. Hunter's action. But the correspondence of Mr. Hope, and the acts done by him, are such as to induce Mr. Hunter and his representatives to believe that the lease claimed would be granted, and this is continued until the death of Mr. Hunter. There had been much correspondence between the agents as to the form of the intended lease, the draft of which had been prepared by Mr. Hope, and, with some alterations, had been remitted to him by Mr. Hunter's agent for final adjustment. This draft lease remained in the possession of Mr. Hope, and Mr. Hunter's agent was unable to obtain from him any answer as to completion of the lease. After the death of Mr. Hunter, the trustees of his will applied to Mr. Hope for Lord Hopetoun's consent to their sub-letting the farm. This was on the 14th December, 1860. A correspondence ensued, in which there is no intimation by Lord Hopetoun's agent that the earl would refuse to renew. At length, on the 12th February, 1861, the agent of Mr. Hunter's trustees wrote to Mr. Hope, the agent of Lord Hopetoun, a letter containing the following passage: "As to Cotterwell lease, the draft of which you have not yet adjusted, I see the term of it expires at Whitsunday. I made no tender and demand, as the lease had not been adjusted; but I have now to submit that the draft be altered so as to include another nineteen years. The present fine and interest as well as the former one, are of course ready to be paid whenever you please." The mask is then thrown off by Mr. Hope, who, by a letter of the 16th February, 1861, stated in answer: "Cotterwell. As no demand for renewal of this lease has been made by the tenant, the obligation to renew has come to an end." This assertion, however, is, in my judgment, founded on a mistake in law. The relative position of the parties at the time when, as the landlord now alleges, notice ought to have been given, is to be considered. At that time the landlord had cautiously preserved the benefit of his defences in the suit by which the existence of the relation of landlord had been repudiated and denied. The demand made by the tenant of the lease of 1841 was of course a demand of the covenant for renewal which that lease, if constituted, would have contained. Until that covenant was granted, the tenant had no power, nor was under any obligation, to make any other demand for renewal than that involved in the subsisting suit. I concur in the observations of Lord Neaves, where his Lordship uses the following words: "The pursuer's present plea is that the defender has lost his right to any renewal from his failing to fulfil with strict accuracy the conditions which would have been inserted in the lease of 1842, if the pursuer had granted it, but which are not to be found in any such lease, which in point of fact he did not grant. The lease of 1825 did not contain any obligation to grant a lease in 1861, and the defender held

no such formal obligation granted in 1825 to grant another obligation in 1842, which would have inferred such a renewal in 1861. The defender was insisting on getting that obligation from the pursuer, but without success, and as long as the pursuer was in default in that respect, I do not think he can maintain the present action, by which he seeks to prejudice the defender for not complying with a contract which had no actual and formal existence in consequence of the pursuer's default." There is an attempt by the respondents in the present suit to show that the objections to granting the lease of 1861 were tacitly withdrawn by the landlord, and that it was understood that Mr. Hunter and his representatives should hold and enjoy the farm as if the renewed lease had been actually granted. It is a sufficient answer to say that at the commencement and throughout the whole of the correspondence and treaty, the agent of the landlord carefully saved and reserved the benefit of the defences in the pending action. The agent, of course, knew that the principal object in demanding the renewed lease was the covenant for renewal that would be contained in it. But if his object had been to keep Mr. Hunter in play, and induce him not to prosecute his suit until after the time for demanding a renewal had expired, he could not have acted more effectually. This is exemplified by Mr. Turnbull's letter of the 15th October, 1847, and Mr. Hope's answer of the 16th October, 1847, and again by Mr. Turnbull's letter of 29th December, 1847, and Mr. Hope's answer of the 1st April, 1848. Under these circumstances the Earl of Hopetoun commenced the present action on the 2nd April, 1861, by which he seeks to have it found and declared that all right of renewal of the lease has ceased and determined, and that the defenders, the present appellants, had no right to require the earl to grant any lease or any renewal of any lease of the farm. To this action the action commenced by Mr. Hunter in 1841, and still pending and undisposed of, was in reality, in my judgment, a defence. If the landlord ought to have complied with the demand of the tenant in 1841, and granted a renewed lease, his refusal to do so was, in my judgment, an answer to the present action. The court below, however, has apparently assumed that the lease of 1841 ought to have been granted, and that the case must be treated as if it had been actually granted; and on that basis it has pronounced an interlocutor in terms of the conclusions of the summons. For the reasons I have given, I submit to your Lordships that this view of the case is not the correct one. I must therefore advise your Lordships, by your order on this appeal, to declare that, having regard to the action commenced by Mr. Hunter in 1841, which is still undisposed of, and to the defences to that action, and the subsequent treaty and correspondence between the agents of the pursuer and the defender respectively, this House doth reverse the decree complained of, but without prejudice to any question that may fall to be determined in the said other action.

LORD CRANWORTH.—My Lords, it is not in dispute that before Whitsunday, 1841, Mr. Hunter duly tendered his fine, and applied for a new lease for nineteen years from Whitsunday, 1842. He did not tender the fine before the end of nineteen years from Whitsunday, 1841, and the question whether he is entitled to the lease seems to me to depend upon this, whether by the conduct of the parties, it had or had not been agreed that the new lease should be considered as granted, and that the parties should stand in the same light as if they had legally constituted between them the relation of landlord and tenant. Whether they had or had not so done depends upon the effect of the correspondence which passed between them. I have gone very carefully through the correspondence, and have come to the same conclusion with my noble and learned friend. The fair import of what passed is, that Mr. Hunter, after his tender in 1841, pressed the landlord to send the draft of a new lease, and that after a delay of above four years, during which several letters passed, he raised an action to compel implement of the covenant to grant a lease. The landlord's agent answered that he was not

bound to grant a lease. Nevertheless he eventually sent the draft of a lease which he was willing to grant, desiring the tenant to consider it. This he did, and returned it with several alterations, to all of which, except three, the landlord agreed. The tenant pointed out reasons why he could not agree on the three points, but proposed an arbitration. After two letters from the tenant's agent, the landlord's agent, after nine months, apologised for his delay, and six months afterwards he wrote that he hoped matters might now be settled. But in spite of a further application from the tenant, he eventually let the matter drop. I think the blame of the delay is to be attributed to the landlord's agent, and that till the landlord had granted, or acknowledged his obligation to grant, a lease on the terms agreed upon, he has no right to complain that the tenant has not tendered money, and done acts which, if the lease had been granted, he would have been bound to tender and do, but his obligation to tender and do which did not exist until the lease was made. I am, therefore, clearly of opinion (without going further into detail) that the conclusion at which my noble and learned friend has arrived is that which your Lordships ought to adopt.

LORD KINGSDOWN.—My lords, the grounds on which the appellant relies in this case are: first, that the respondent had denied his liability to grant any lease at all, and had insisted that the tenant had forfeited his right to demand one. It is contended that, under those circumstances, the tenant was relieved from the obligation to give a notice which he was entitled to consider that the landlord had by anticipation refused to comply with; second, that if the appellant were bound to give the notice, he was lulled into security, and prevented from doing so by the acts or neglect of the respondent. With respect to the first point, it must be remembered that, in Hunter's suits, two questions were at issue: first, whether the plaintiff was entitled to a lease at all; and, secondly, what were to be the terms of the lease, if one were granted? Now it seems to me that if this case is to be decided according to strict law (as the respondent insists, and has a right to insist that it shall be), the appellant may, with reason, say that, before he exercised his option as to requiring a renewal of the lease, he was entitled to know what the terms of it were to be. That point had been settled by the decree in Wight's case. No doubt, in Hunter's case, it was really as immaterial to Hunter to have the terms settled, as to Lord Hopetoun to receive the notice. He was sure to desire a renewal in either case; but if form be insisted upon on one side, it must also be allowed to prevail on the other. It seems to me that the old lease being the foundation of the right to the renewal, and the defendant having denied the right to the old lease, he could not complain of a failure on the part of the plaintiff to comply with any condition which could be capable of performance only on the foundation of the old lease; and further, until the terms of the old lease were settled (unless the omission to settle them could be attributed to the fault or default of the tenant), he could not be required to exercise his opinion. In this view of the case the question would be, by whose default was it that these points were not settled before the time for giving the notice had expired? Upon this question I think no doubt can be entertained. On looking at the whole effect of the evidence, I think that Lord Hopetoun must be considered to have retained to the last the position which he had assumed in the suit with Hunter, and to have insisted on the pleas which he has filed, and which his agent, by his letter of the 18th April, 1846, had expressly declared were to be treated as reserved, notwithstanding any correspondence which might take place till a lease was actually signed, and on which he had again insisted after the draft lease had been sent, and had been the subject of discussion in his letter of the 4th November, 1846. I think, therefore, that notwithstanding Lord Hopetoun received the rent according to the lease, and did not attempt to disturb the possession of the tenant, he has no right to say that he acknowledged the right of the tenant to have such a lease granted. On the contrary, I think

that he must be treated as having repudiated his obligation to grant any lease, and to have insisted on the forfeiture which he had set up in the suit, which, although it had fallen asleep, was, when the notice should have been given, and I imagine still is, a *lis pendens*. If Lord Hopetoun denied the right to any renewed lease, the immediate lease sought was the foundation of the right to the renewal. He cannot, therefore, in my opinion, complain that a claim was not formally made, which, in fact, could not arise till the right to the immediate lease was either decreed or admitted. I think further, that before the tenant exercised his option as to claiming a renewal, he had a right to have the terms of the immediate lease, which would have settled at the same time the terms of the renewed lease. It appears to me that it was owing entirely to the fault of my Lord Hopetoun's agents that these terms were not settled long before the time for giving the notice had passed. Under these circumstances, I think that Lord Hopetoun is precluded in equity from availing himself of the plea that the notice was not given in proper time; and I therefore concur in the judgment proposed by the Lord Chancellor.

Decree reversed.

WESTBURY, L.C., June 28, July 1, 1865.

CROKER v. KREEFT.

KREEFT v. CROKER.

13 L. T. 136.

Partnership articles—Construction—Guarantee—Accounts.

PARTNERSHIP.—By articles of partnership between the plaintiff and two defendants it was agreed that the plaintiff should reside and manage the business abroad, and that he might draw for his private use to the extent of 500*l.* until the yearly balance-sheet was made, and the amount of profit ascertained. After payment of specified expenses, the partners were declared entitled to the gains and profits of the business in the following proportions: the defendant K. to four-tenths, the defendant H. to two-tenths, and the plaintiff to four-tenths. In case the gains should be found insufficient to pay the expenses, the deficiency was to be borne in the same proportions; and, in consideration of the plaintiff devoting his whole time to the business, the defendants agreed to guarantee to the plaintiff "that the said four-tenths shares in the profits to be received by him during the first two years should not be less than 500*l.* per annum; and further, that, if the net profits should at any time, upon the division thereof, exceed 1500*l.* a year, the plaintiff should receive an additional bonus of 10*l.* per cent. upon the gross earnings."

Wood, V.C., having considered the construction of the above clause to be that, come profit or come loss, the plaintiff was to receive 500*l.* a year during the first two years:—Held, upon the construction of the articles (reversing the decision of the V.C.), that the true construction was, that if there should be a profit, and four-tenths of that profit should be less than 500*l.*, the plaintiff was to take 500*l.*, but if there should be no profit, then that the guarantee was not to emerge.

Upon the dissolution of the partnership, the chief clerk found the plaintiff to be indebted to his co-partners in certain sums on the authority of partner-

ship books kept by the defendants. The plaintiff having alleged that the books were erroneously and fraudulently compiled, and that the debts were not partnership debts, it was referred back to the chief clerk to ascertain and certify the amounts due from and to the plaintiff and defendants respectively, with liberty to state special circumstances.

This was an appeal against an order made by Wood, V.C., on the 30th May last. The motion before his Honour was an application to vary the certificate on behalf of the plaintiff Bland William Croker.

The questions were twofold, one turning upon the construction of a deed of partnership, the other involving the principle whether, in taking accounts between partners, the books appearing to contain the partnership accounts are in all cases to be adopted as conclusive, although kept by two out of three partners at their private office, and challenged by the third partner (who in accordance with the terms of the partnership-deed was living abroad) as being fraudulent, and, in fact, compiled since the dissolution.

The plaintiff, describing himself as of Vienna, a civil engineer, by his bill alleged that in 1857 he entered into a negotiation with the defendants Siegerich Christopher Kreeft and John Howard with a view of establishing a partnership to carry on the business of commission and general agents at Vienna and in London.

On the 16th June, 1857, articles of partnership were entered into, whereby, after reciting that the plaintiff and defendants had agreed to establish themselves as a firm at Vienna under the style of Kreeft, Croker, & Co., for the transaction of the above business, and that the plaintiff should reside and conduct the business at Vienna, and the defendants in London, it was agreed (omitting the immaterial portions) as follows :

1. That the partnership should continue for seven years from the date, subject to sooner determination after the first five years as therein mentioned.
3. That the plaintiff should reside at Vienna, and devote his whole time to the business; provided nevertheless that nothing therein contained should prevent the plaintiff from carrying on his business of consulting civil engineer, in which case it was agreed that all profits arising therefrom should be divided as follows: one half to plaintiff, and two-thirds of the remaining half to the defendant Kreeft, and one-third to the defendant Howard.
4. That the plaintiff might draw for his private use to the extent of 500*l.* per annum, and not more, until the yearly balance-sheet was made, and the amount of profit ascertained.
5. That all interest of capital, rent, taxes, insurance, wages of clerks, and other servants, and all other trade expenses, and all debts and duties which should be owing, and all losses and damages from bad debts or otherwise, should be sustained and borne out of the gains and profits of the business; and after payment thereof the parties should be entitled to the balance of the gains and profits of the business in the following proportions; the defendant Kreeft to four-tenths, the defendant Howard to two-tenths, and the plaintiff to four-tenths; but in case the gains and profits of such business should be found insufficient for the payment of the said trade expenses, wages, losses, or damages, such deficiency should be borne by the parties in the same proportions as they took the profits of the business, viz., Kreeft four-tenths, Howard two-tenths, and Croker four-tenths; and in consideration of the plaintiff Croker devoting the whole of his time and attention to the said business, the defendants Kreeft and Howard thereby, for themselves and their respective heirs, executors, and administrators, "agreed to guarantee" unto the plaintiff, his executors and administrators, "that the said four-tenths share in the profits of the said business to be received by him during the first two years of the existence of that agreement should not be less than 500*l.* per annum; and further, that if the net profits of the business should at any time, upon the division thereof, exceed the sum of 1,500*l.* per annum, the plaintiff should be entitled to, and should receive, a bonus of 10*l.*

(ten pounds per cent.) upon the gross earnings, in addition to his said fourteenth share of the said profits." 6. That proper books should be kept both in Vienna and London, wherein should be made full and true entries of all moneys received or paid, and of all contracts or other matters necessary for the full manifestation of the state or proceedings of the business. 7. That on the 31st December in every year during the partnership, or within three calendar months following, a general account or rest in writing should be taken of the partnership business, &c., and such account should from time to time be reduced to a general balance, and be written in a book which should be signed and subscribed by the partners, who should be bound and concluded thereby, unless some manifest error should be made therein to the amount of 20*l.* or upwards. 8. That if either of the partners should at any time, after the determination of the first five years of the term, be desirous of putting an end to the partnership, he should be at liberty to do so on giving six months' notice.

The plaintiff went to Vienna and proceeded to carry on business under a power of attorney from the defendants which was rendered necessary by the laws of Vienna, the plaintiff being a British subject. In May, 1858, the plaintiff advanced 1,000*l.* to the general capital of the firm, which was duly acknowledged by the defendants. A great portion of the business consisted of iron contracts, some of which were not fulfilled at the date of the dissolution below mentioned. The plaintiff alleged that the profit which would accrue from these contracts would exceed 30,000*l.*

The plaintiff alleged that he sent monthly accounts to the defendants, but did not receive any from them. In October 1858, however, he received from them what purported to be a balance-sheet up to June, 1858, with which the plaintiff expressed himself dissatisfied in some particulars, and on the 12th Jan, 1859, he came to England at defendants' request, and had an interview with them, when the defendants insisted upon the correctness of the account, and asked the plaintiff to advance the firm more capital. This the plaintiff refused to do, unless he were satisfied as to the account, whereupon on the 13th January, the defendants wrote to the plaintiff informing him of their intention to cancel by circular the authority they had given him, alleging gross and wilful disregard of the defendants' wishes and instructions. On the same day, by another letter, defendants gave notice of their intention to dissolve, and a circular was issued by them in German, to the effect that they had withdrawn their power of attorney to the plaintiff.

The plaintiff thereupon filed a bill for an injunction to restrain the defendants from obstructing or interfering with the plaintiff in the conduct of the partnership business; an interim injunction was granted; and an agreement was entered into on the 29th January, 1859, upon the following terms:

First, that the Chancery proceedings should be abandoned; secondly, the plaintiff to be reinstated in his position at Vienna; thirdly, the letters above mentioned to be withdrawn; fourthly, that the plaintiff should retire from the partnership within three months from the date, the plaintiff to retain his interest in the remaining contracts and order, and "to share the profits and loss thereof according to the terms of the articles of partnership;" and also to be allowed to draw 500*l.* per annum out of the business until the final settlement of accounts; fifthly, any disputes connected with the accounts to be referred to an accountant, and the plaintiff to have full liberty to inspect all books, papers and documents connected with the contracts and orders then in existence."

The plaintiff returned to Vienna; but, as he was about to retire, the defendant Kreeft also went to Vienna, and assumed the exclusive management of the affairs of the business. The plaintiff then became anxious lest he should be excluded from the benefit of the bonus of 10*l.* per cent., on the



ground that he was not managing the business, and a correspondence ensued to have this point settled.

On the 16th April, 1859, the defendants wrote to the plaintiff a letter to the effect that, "as he (the plaintiff) said he was ready to sign notice of dissolution of partnership the next day, and carry out the agreement of the 29th January at once, provided defendants wrote to say that the construction of article 4 should be defined as meaning that the plaintiff should share profits and losses according to the deed of partnership, and take the commission of 10l. per cent. entirely as stipulated therein, should it accrue; and, moreover, that plaintiff should be entitled to the same participation in all business or contracts existing or taken by the defendants there up to the 29th instant," the defendants thereby confirmed that construction.

Plaintiff accordingly, on the 18th April, 1859, signed the notice of dissolution.

Plaintiff then stated that he claimed on the balance of accounts for the year ending June 31, 1858, a sum of 1,400l. as due to him in addition to the 1,000l. advanced by him, and that he had retained a sum of 2,130l. partnership moneys, which had come to his hands before the dissolution, in respect of his claim.

Defendants brought an action to recover this sum, but were nonsuited; and the plaintiff then (16th November, 1860) filed this bill alleging that the defendants refused to adjust and settle the partnership accounts, and praying for an account on the terms of the partnership articles, the agreement of January, 1859, and the letter of the 29th April, 1859, and other relief.

The chief clerk, by the certificate (11th March, 1865) found that there was nothing due to the plaintiff for commission on the gross earnings of the partnership, on the footing of the articles of partnership, the agreement, and the letters. He also found that there was a balance due from the plaintiff to the defendants of 4,404l. 11s. 8d.; and that there were also due from the three copartners to certain alleged creditors named in the certificate, sums amounting to 5,963l. 13s. 1d.; that the defendants had already paid, in respect of the debts, losses, and expenses of the firm, and beyond the sum of 4,104l. 11s. 8d., sums in proportion to their liability equal to the said sum of 5,936l. 13s. 1d., and that therefore this latter sum was, as between the copartners, payable by the plaintiff.

The accounts were taken in the following way. A balance was struck at the end of the first year of the partnership, the 30th June, 1858, upon which there appeared a profit, of which the share due to the plaintiff was found to be 1,324l. 9s. 5d. Then a second balance was struck at the date of the dissolution, the 18th April, 1859, for the intermediate period of ten months, shewing a loss, upon which there was found to be due from the plaintiff a sum of 638l. 10s. 4d. On the debtor side of this account, however, was inserted a sum of 4,827l. 8s. 10d., "reserved to meet the contingent loss by exchange." An account was further prepared of the trading of the firm with respect to the matters in which the plaintiff retained an interest by the terms of the dissolution in respect of unfinished contracts from the 18th April, 1859, to the 5th July, 1862, the date of the decree, upon which there appeared a balance of capital of the two defendants of the sum of 2,673l. 14s. 7d., and that the plaintiff was a debtor to the estate in the sum of 9,351l. 0s. 9d. A further account of trading with respect to matters in which the plaintiff retained an interest from the 5th July, 1862, to the 31st December, 1863, shewed a balance of capital due to the London partners of 4,203l. 9s., and that the plaintiff was indebted to the estate in the sum of 10,560l. 2s. 1d.

The plaintiff's contention was that, although the accounts as brought in by the defendants shewed a profit for the first year to an extent which did not bring the clause as to guarantee into operation, yet that the allegation of losses during the second year raised the question of the construction of that clause. He protested against a rest being made in the accounts at the period

of dissolution, and against the debit of the sum of 4,827*l.* 8*s.* 10*d.* as a reserved fund for contingent loss by exchange. He also contended that, although the withdrawal of the last-mentioned debit would probably turn the loss into a profit, and thereby exclude the operation of the guarantee clause, yet that there were very heavy losses after the dissolution, and that, at all events, assuming that the accounts of the defendant were correct, they shewed a loss on the whole business up to the time of carrying in these accounts. He also contended that, the partnership having been dissolved by mutual consent within the first two years, all the subsequent business must be considered as a winding-up, and that the accounts must be taken on the principle that all the losses on such winding-up were losses accruing during the existence of the partnership. Also that the guarantee given to the plaintiff by the fifth clause of the articles of partnership was in effect a guarantee against all loss on the first two years' trading, and also a guarantee that there should be profits to the plaintiff on each of those years of not less than 500*l.* per annum; in fact, that there should be profit to him to that amount, and no loss, on those two years. Further that, although the fifth clause was based upon a consideration of the services of the plaintiff in devoting his time and attention to the business, those services were confined by that clause to the existence of the partnership. He had rendered those services up to the dissolution, and the agreement for dissolution expressly absolved him from future services of that nature after the dissolution; and although in the words of the agreement for dissolution it was declared that the plaintiff should retain his interest in the existing contracts and orders, and share the profit and loss thereof, according to the articles of partnership, such declaration could only be considered as what the law would have implied, and not as intending to render Croker liable to "loss," which he was not then liable to under the articles of partnership. The real explanation of the provision just adverted to was, that the parties were doubtful as to the actual rights of each, and meant to declare that, whatever were those rights as to profit and loss, the dissolution should not prejudice or affect those rights.

His Honour, the V.C., in delivering judgment upon the points above stated, expressed himself as follows: "I think with reference to the question of guarantee the clause is by no means difficult to be construed, because it stands thus: by articles of the company the guarantee is not to be less than a certain sum which we may consider as income. The fifth clause of the articles of the company is, that all interest of capital, taxes, wages of clerks and servants, and all other trade expenses, shall be sustained and borne out of the gains and profits of the said business, and then after payment thereof, the said parties are to be entitled to the balance of the gains and profits in the following proportions, viz., Kreeft shall be entitled to four-tenths, Howard to two-tenths, and Croker to four-tenths, but that in case the gains and profits of the said business shall be found insufficient for the payment of the said trade expenses, such insufficiency shall be borne by them in the same proportions. Now comes, what is given very often, some benefit or other to a man who takes the active lead in the business, and there is some contrivance or other for remunerating him. The contrivance in consideration of Croker devoting the whole of his time and attention to the business, was that he was to have four-tenths of the profits, and then Kreeft and Howard were to guarantee to him that such four-tenths share of the profit to be received by him during the first two years of the existence of this agreement should not be less than 500*l.* per annum. Therefore, that in an indirect way was not at all indemnity for loss given, but given as an indirect advantage to him for being the manager. It would result no doubt in an indemnity for loss if any loss had resulted during the first two years, but they in effect say, 'Come profit, or come loss, you shall have for the first two years of the existence of the agreement (the consideration being that you are the person who will devote your whole time and attention) you shall have 500*l.* per annum.' He would

still have the 500*l.*, because, whether there are profits or loss, he is to get 500*l.* per annum. That is very important to bear in mind when you come to the words of the agreement for dissolution. It may be given as profit in the one case, and it is given as guarantee whether there be profits or whether there be loss, taking the circumstances into consideration. At the least, he would have more profit deducted from his share of the profit; and therefore, in that view, he is only to get four-tenths (subject to the second question about the 10*l.* per cent. for anything over the 1,500*l.*). He is to get the 500*l.* during the existence of the agreement, and then comes the article of dissolution, which of course puts an end to that arrangement, except so far as it may be embodied in this clause of the subsequent agreement. The important clause is this. [His Honour read article 4 of the agreement of January, 1859.] The date falls short of the two years. Mr. Croker is to retire from the partnership within three months from that date. The three months would not be up until the end of April, and the two years would certainly not end until June. 'Mr. Croker is to retain his interest in the existing contracts and orders, and to share the profits and loss thereof, according to the terms of the articles of partnership.' Mr. Tatham suggested—and I do not say that it was otherwise than an ingenious suggestion—that it comes under the articles of partnership, and that therefore he is to share the profit or loss according to the articles of partnership, viz., that, inasmuch as there was a contract going on, or in the course of being entered into, within the two years, it was a matter within the two years, and that you must look at the loss on these existing contracts, and must consider all things entered into during the two years as bearing upon it, and that they must be taken into profit and loss according to the terms of the articles of partnership, and that any losses are included in the guarantee, during the first two years, of 500*l.* It appears to me to be a very forced construction, and for this reason: the way in which it is first put is this, that it is not 500*l.* given *quid* profit, or given in that way at all. It is a sum given to him for his benefit in consequence of his taking the management, and it is to be his, whether there be any profit or not, as remuneration paid to him even if there should be a loss. It is made pending the existence of the agreement, which agreement is determined by the articles of dissolution, and therefore it was determined because it only depended upon the existence of the agreement for the partnership which was terminated by the subsequent dissolution. I think it is most important to observe what it is given to him for. It is to be given in consideration of his devoting his whole time and attention to the business. There is also another thing, I think, not unimportant in construing this agreement. He is to be allowed to draw 500*l.* in anticipation of the final settlement of accounts. That is a different payment altogether, because it is no longer anything to do with his giving his time and attention. But it is a drawing of 500*l.* a-year, which is another matter. There is also another thing of some importance. The Pola Roofs contract is to be exclusively the property and liability of Mr. Croker, so that, according to this view, he takes out of the existing contract something which would have been under the articles of partnership, and which, if they had been existing, would have gone towards establishing his 500*l.*, and would go towards compensating the others for loss. That shews that it is a forced argument to say that it is profit according to the articles of partnership. It is modified by the articles, now that it appears he is no longer to devote his whole time and attention. Another argument which goes to shew the termination of the 500*l.* is here given, because it takes out a profitable contract from the share of the profits, viz., the Pola Roofs contract; and he has that still, notwithstanding these articles of dissolution. It is also said to be plain that the 500*l.* a-year for the first two years must extend to the second year, but it never did extend to the two years, and therefore the 500*l.* must be considered as a mode of remuneration during the existence of that partnership, and that the 500*l.* a-year determined as soon as the partnership determined,

which is before the two years were out, and that, I think, disposes of the first question."

Rolt, Q.C., and *Fooks* supported the appeal.

Giffard, Q.C., and *Speed* appeared for the defendants.

The LORD CHANCELLOR.—In this case of *Croker v. Kreeft*, the first question that has been argued before me is one of some nicety. It turns upon the construction of the partnership articles. Three gentlemen entered into partnership, and it seems that it had been agreed between them that one of them, the plaintiff, should be resident at Vienna, and conduct the business at that capital. The profits or losses of the partnership are to be divided among them in definite shares; four-tenths of the gains of the partnership are to be received by the plaintiff, and the losses are to be borne by him in the same proportion; four other tenths to the defendant Kreeft, and the remaining two-tenths to the defendant Howard. Now there is a positive contract that the profit or loss should be borne in those proportions. There is another collateral contract founding itself upon those divisions of profit, and which is peculiarly worded. It assumes the shape of a guarantee by Kreeft and Howard to the other partner Croker, the plaintiff, and the guarantee is thus expressed—that Croker shall receive 500*l.* a-year, or at all events have 500*l.* a-year; but the expression is, that his four-tenths of the share of the profits of the business to be received by him during the first two years shall not be less than 500*l.* per annum. That was to be augmented, if not; so that 500*l.* a-year is his share of the profit. If there be a share of the profit less than 500*l.* per annum, the guarantee emerges, and takes effect; if there be no portion of the profit there is nothing to which the guarantee is applicable. It is founded, of necessity, upon the basis of there being a share of profit attributable to Croker during each of the first two years, because the two years are to be taken separately and distributively. I must, accordingly, find something to answer the description of the plaintiff Croker's four-tenth share, and if I find that to be less than 500*l.*, then I apply the guarantee to augment it to 500*l.* Now, it was very correctly observed by Mr. Rolt, that of necessity four-tenths share of the profit implies that the losses, or rather that the debts and liabilities of the partnership have been first discharged; but, inasmuch as this operation of ascertaining the four-tenths share is to be performed at the expiration of each of the two years, some reasonable limit must be put upon the word "profit." There may be contracts involving very great and serious liability, partially performed during the first year, but as to the major part, or the obligation remaining to be performed during successive years, the money received and the money expended in respect of that contract may shew a profit; but, if the whole of the contract was taken into account to the completion of it, the result of the entire contract might be a considerable loss. But, inasmuch as this was intended to give to Mr. Croker, probably as part of his means of support, a certain definite income of 500*l.* per annum, provided there was a profit, I must of course ascertain, before I can apply the guarantee, that there was a realised profit during each of the two years. Now, what I understand the accountant to have done has been this: he has attributed to the first year a very large profit indeed to Mr. Croker. The four-tenths of the share of the profit, if it had been actually realised, would have prevented the guarantee from arising, because it would have been more than 500*l.* But I am told (and that representation seems to be confirmed by the state of the accounts) that that sum of money has been attributed to Mr. Croker in the account as profit, by means of a computation or estimate in the account at the end of the first year upon the engagements and dealings of the concern. The estimate that has been put was of course conjectural; and an estimate, merely conjectural, if it be made the basis of the account of the profits, puts the account upon a mere hypothetical basis. It may possibly happen, therefore, in reality, that

Mr. Croker, instead of having attributed to him 1,800*l.* odd as his profit during the first year, may be found entitled upon the realised profit to a sum less than 500*l.*; and if it turned out that he was entitled upon the realised profit to less than 500*l.*, then the guarantee would attach, and enable him to claim from his copartners 500*l.* I am of opinion that any money received by him under the guarantee, or rather I am of opinion that the 500*l.*, if received by him through the operation of the guarantee, cannot be detracted from or affected by any subsequent loss. I am not at all, therefore, satisfied with the state of accounts, nor can I adopt the construction which I am told is the construction that was given to this clause by the Vice Chancellor, which I must take of course for the purpose of having it ascertained what was the actual sum of realised profit during the first year of the partnership, and during the ten months after the first year which preceded the dissolution of the partnership, the partnership having lasted only one year and ten months. That being so, it would affect, and it might affect very materially, the subsequent account of the losses of the partnership, because, if Mr. Croker was entitled to have the four-tenths share of realised profit, if it had been less than 500*l.*, made good to him, he may be entitled to credit as against his copartner based upon that guarantee, which guarantee has not been allowed to him in the form in which the accounts have been taken, because the accounts have been taken upon the following basis: proceeding upon the estimate to which I have referred of partnership credits, a sum of 1,800*l.* (which may turn out to be a merely nominal sum) has been attributed to Mr. Croker as profit. In reality, for the reasons I have given, the realised profit, the sum of 1,800*l.*, may perhaps be reduced to 200*l.* or to 300*l.*, and the like operation has been pursued with regard to the ten months. I desire, in order to know whether the guarantee emerges at all, to have it ascertained what was the actual realised profit, independently of any estimate of credits actually received by the partnership during the first year and during the second year, down to the dissolution thereof. There is another circumstance also which materially affects the state of the accounts as they appear in the chief clerk's certificate. Upon the whole account of these partnership dealings, in taking the accounts of the partners *inter se*, the chief clerk's certificate declares that Mr. Croker is indebted to his copartners in two distinct sums of 5,946*l.* 13*s.* 1*d.* and 4,404*l.* 11*s.* 8*d.* Those sums are put together, and the total is represented as the debt due from Mr. Croker to the partnership. Now it appears to me that, of this entire sum, the largest portion, viz., the 5,936*l.*, is the amount of debts at present alleged by the defendants to be still due and owing from the partnership; but I apprehend it is quite wrong to enter those sums of money in the accounts as if they had been ascertained debts of the partnership and paid by the other partners. What the ultimate result of the state of accounts may be I cannot altogether ascertain; but I think that was an erroneous mode of taking the accounts, and that in that respect the sum certified as due from Mr. Croker to his partners must be corrected, and in lieu thereof the 5,936*l.* should be stated, according to what is the truth, namely, as the amount of debts alleged to be still due from the partnership. There remains the question with regard to the 4,404*l.*, which is the subject of the "four-day" order. Now it is an exceedingly vexing and embarrassing thing, when there has been any mistake in taking complicated accounts of this nature, that one is obliged to suspend acting upon the result, though one may feel morally convinced that that result will remain still, notwithstanding the directions that must be given for the purpose of rectifying the process that has been gone through. But it is impossible, I think, for one to allow the defendants to act upon this "four-day" order, seeing that this 4,404*l.* is the result of the accounts in which it has been assumed that all the losses that have been sustained will be losses of which Mr. Croker is to bear four-tenths, and against which he will not be entitled to set off as between him and his partners any sum of money in respect of that guarantee of 500*l.* a-year. All that unfortunately

has arisen from the accounts having been taken upon the basis of a construction put upon the articles with which unfortunately I am unable to agree; the Vice Chancellor having come to the conclusion that the articles were to be construed as a guarantee to Mr. Croker of 500*l.* a-year for the duration of the partnership, independently of the question whether there was a profit or not. Then he has attributed all the losses that have accrued under the process of winding-up the affairs of the partnership, and has held them to be governed by the memorandum of dissolution made on the occasion of the partnership coming to an end, and under which memorandum, without any repetition of the guarantee or reference to the guarantee, it is agreed between Mr. Croker and his partners, that all the losses shall be borne between them in the same shares in which they were to bear the losses of the dissolved partnership. The effect of that course has been to throw upon Mr. Croker the whole amount of four-tenths of the losses incurred in the partnership, treating the losses as having arisen and having been realised since the dissolution of the partnership. Now I think I must have it ascertained what Mr. Croker was entitled to in respect of this guarantee; and whether, having regard to my construction, the guarantee of 500*l.* did or did not arise during the copartnership, and what sum of money Mr. Croker was entitled to have credited to him in respect of that guarantee. That may affect the question of the 4,404*l.* I am very sorry to have arrived at a conclusion which will render it necessary to retrace the accounts of the partnership; but I do not mean to send it back to the Vice Chancellor. I mean to make an order founding myself upon that part of the agreement in the dissolution by which the parties have mutually stipulated that any dispute connected with the accounts shall be referred to an accountant to be agreed upon. I mean, therefore, to refer it to an accountant to answer me from the accounts these specific questions, and it will not be difficult to apply the result of those questions to the balance that has been found due. I have still to state what is the proper order or direction that ought to be substituted for what I find in the certificate with regard to the 5,936*l.* The facts appear to be of a very singular character. It is alleged on the part of the plaintiff that this sum of money has arisen from the separate dealings of the defendants, and it is alleged on the part of the defendants, that these debts have arisen from the partnership dealings. Now, it does not appear to have been sufficiently investigated in chambers, and in chambers it appears to have been taken that the whole of those sums were debts of the partnership. It appears that one of the alleged creditors, the principal one, brought an action against the three partners. To that action Mr. Croker, the plaintiff, appeared, and thereupon the alleged creditor has taken no further proceedings. That evidently is a circumstance involving a great deal of suspicion with regard to that debt being a partnership debt of the firm. I must, of course, alter that part of the certificate, or direct that part of the certificate to be altered; and I must either direct an inquiry into the constitution of those debts, which would be probably an expensive and dilatory thing to do, or I must leave the finding in the certificate that there are those debts outstanding and must require the plaintiff to indemnify the defendants against the costs of any proceeding that may be taken by the creditors, which the plaintiff may think proper to defend. There remains another point which has been very much insisted upon before me, namely, that there has been no sufficient examination of the general accounts of the partnership. It has been said, first of all, that these books themselves are not *prima facie* evidence, and then that the books have been allowed as conclusive evidence with regard to items that do not fall under that rule of the books being *prima facie* evidence, or that, with regard to items that were so challenged or disputed, some further testimony ought to have been given. Now, it is an exceedingly difficult thing to sit in judgment upon proceedings in chambers in taking a very long and complicated account, when the objections to the result of the account so taken have not been stated first of all

with great precision and accuracy, in chambers, and when the exact process adopted with regard to each item in chambers cannot be ascertained and presented to the appellate tribunal in such a manner as the appellate tribunal can know what were the *rationes decidendi* of evidence, upon which the decision was founded that came before the court in chambers. I shall not, however, interfere with the accounts in that respect, because I do not find on the part of the plaintiff that there were anything like definite specified objections to certain items in this account, which objections were brought before the Vice Chancellor with as much accuracy and precision as would require from the Vice Chancellor a distinct and definite statement of the manner and the grounds upon which he allowed the items in favour of the defendants. In a word, the plaintiff has not furnished me with sufficient materials to enable me to come to the conclusion that items that ought not to have been allowed upon the faith of the books have been allowed upon the faith of those books, and to which the books were not properly applicable, and which were so far contrary as that some additional testimony in aid of the books ought to have been given. I cannot at all relieve the plaintiff from the observations that have been made on the ground of the great delay that has taken place. The decree is made in July, 1862; the accounts are not carried in until the 2nd January, 1864, and copies are sent to the plaintiff in the month of February. No effective steps appear to have been taken by the plaintiff until nearly the middle of the month of July. He had an opportunity of examination during the whole of the long vacation, of which he has not availed himself. He reserved the process of giving evidence on his behalf by filing affidavits in the month of November, and also in the month of December. There appears to have been on the part of the Vice Chancellor a dedication of an unusual amount of time to the investigation of these accounts, personally on the 13th December, on the 17th January, and again on the 27th January; and those items about which I was disposed to have inquired appear to have been sifted and examined before the Vice Chancellor. I must assume, therefore, as the contrary is not shewn, that there were sufficient grounds brought before the Vice Chancellor for his allowing those items, and therefore I do not entertain any part of the complaint that the books have been improperly allowed where they were not evidence, or that there is anything in that part of the account that requires my interference. I limit my interference first, to declaring the construction of the fifth (I think) article of the contract of partnership; consequently upon that construction it becomes necessary to inquire into the profit during the partnership. I put upon the word "profit" the interpretation of actual realised profit. I desire to have that ascertained without the process of going back to chambers. On the other hand, the statement in the certificate of the debts of the partnership, I think, is irregular, and I think that permitting those debts to enter into the balance alleged to be due from the plaintiff was also irregular. I think they should have been stated in a separate finding, namely, the fact of there being such debts, not stated as actually due from the partnership, but stated as alleged by the defendants to be due, but as to which the plaintiff disputed the liability of the partnership. I think that no further directions should be given upon that point, the plaintiff indemnifying the defendants against the costs of any proceedings that might be taken by these alleged outstanding creditors. And with regard to the "four-day" order, I suspend the operation of it until the result of the inquiries that I have directed, because I am by no means sure that the result of that inquiry might not alter the balance of the 4,404l.

The declarations were finally settled in the following shape: Suspend all proceedings against the plaintiff under the four-day order. Declare that if there were profits actually realised during the first year of the partnership, and the plaintiff's four-tenths share thereof fell short of 500l., he is entitled to have the same made good by his copartners, or one of them, to the extent

of the deficiency. Declare that if there were profits actually realised during the ten months succeeding the first year of the partnership, and the plaintiff's four-tenths share thereof fell short of five-sixths of 500*l.*, he is entitled to have the sum made good by the said defendants, or one of them, to the extent of the deficiency; and the Lord Chancellor having appointed Messrs. Pullen and Young for the purpose, refer it to them to inquire and state whether, &c. (following the declaration). Declare that the chief clerk in his certificate ought not to have found that there were due from the three copartners to certain alleged creditors sums amounting to 5,936*l.* 13*s.* 1*d.*; but that he ought to have stated that these sums were alleged to be due from the partnership to the said persons, and ought not to have allowed the same as debts. Having regard to the last-mentioned declaration, refer it to the chief clerk to ascertain and certify what is the amount which is due from or to the plaintiff and defendants respectively to or from each other; with liberty to state special circumstances.

LORDS JUSTICES, July 14, 22, Aug. 3, 1865.

WILLOUGHBY v. BRIDEOAKE.

13 L. T. 141; 13 W. R. 1056; 11 Jur. N.S. 706.

Reversionary interest—Sale of by a son to father—Rentals—Lapse of time.

COMPROMISE.—*In 1847 the plaintiff assigned to his father (since deceased) a vested revisionary interest in a sum of 1000*l.* stock, to which he would become entitled on the death of his mother, then aged sixty-seven. The plaintiff was at the time imprisoned for debt, and the manner in which the purchase-money (500*l.* in all) was made up and paid was recited in the assignment. No receipt for the consideration money was indorsed upon the deed. In Nov. 1849 the father assigned the reversion to the testatrix of the defendants, who died in 1859. The plaintiff's father and mother were now both dead, and the bill was filed to set aside the sale on the grounds of pressure, untruth in the recitals, nonpayment of alleged consideration according to the tenor of the deed, and inadequacy of consideration:—Held, that, as between the purchaser from the father and the plaintiff, and particularly having regard to the lapse of time, the consideration must be taken to have been duly paid or satisfied, and that the testatrix was entitled to believe, as against the plaintiff, that the recitals in the original assignment were true; and as the evidence shewed no inadequacy of price in the original sale.*

The decree of Stuart, V.C., dismissing the bill, was affirmed.

This was an appeal from the plaintiff from a decision of Stuart, V.C., dismissing his bill with costs. The original hearing is reported at 12 L. T. Rep. N.S. 173, where the circumstances are sufficiently stated.

Bacon, Q.C. and Rowcliffe, for the plaintiff supported the appeal.

Malins, Q.C. and Sargant, for the representatives of Mrs. Brideoake, supported his Honour's decision.

Lonsdale appeared for the trustees of the assigned fund.

The following authorities were referred to:

Cockell v. Taylor, 15 Beav. 103. Foster v. Roberts, 29 Beav. 467; 4 L. T. Rep. N.S. 760. Jones v. Ricketts, 31 Beav. 130; L. T. Rep. N.S. 43. Peacock v. Evans, 16 Ves. 512. Gowland v. De Faria, 17 Ves. 20. Walker v. Symonds,

3 Swanst. 1. *Edwards v. Burt*, 2 De G. M. & G. 55. *Bradwell v. Catchpole*, 3 Swanst. 78, note (a). *Edwards v. Browne*, 2 Coll. 100. *Aldborough v. Tyre*, 7 Cl. & Fin. 436. *Salter v. Bradshaw*, 28 Beav. 161. *St. Albyn v. Harding*, 27 Beav. 11. *Longmate v. Ledger*, 2 Giff. 157; 2 L. T. Rep. N.S. 256. *Talbot v. Staniforth*, 1 John. & Hem. 484; 5 L. T. Rep. N.S. 47. *Perfect v. Lane*, 3 De G. F. & Jon. 369; 6 L. T. Rep. N.S. 8.

Their Lordships reserved judgment until the 3rd August, when

Lord Justice KNIGHT BRUCE said:—The first question in this case is, whether as between the representatives of the late Mrs. Brideoake, the purchaser from the late Mr. Joseph Willoughby, on the one hand, and the plaintiff Mr. Thomas Willoughby on the other, the 500*l.*, the alleged consideration for the purchase deed of 1847, impeached by Mr. Thomas Willoughby's suit, ought to be considered as having been fully and *bonâ fide* paid or satisfied to him by his father according to the tenor of the deed of 1847? And considering the lapse of time between the execution of that purchase-deed and the institution of Mr. Thos. Willoughby's suit, a period of more than fourteen years, during which Mr. Joseph Willoughby had died, considering also the language of that purchase-deed, I think that this question must be answered in the affirmative. Mr. Thos. Willoughby is not entitled, I think, to contend, against Mrs. Brideoake's representatives, that she, in 1849, ought not to have believed the allegations of fact contained on his part in the deed of 1847, which, upon the materials before us, she must, I conceive, be taken to have done. The particular form and language of that deed appear to me to render the absence from it of an indorsed receipt not material for any present purpose, and the present controversy stands substantially upon the same footing with respect to Mrs. Brideoake's representatives as if Mr. Thomas Willoughby had been an actually assenting party to the assignment of 1849. But then arises the question whether, on the assumption in favour of Mrs. Brideoake's representatives of the payment or satisfaction of the 500*l.* by Joseph to Thomas Willoughby according to the tenor of the deed of 1847, that amount was less than their fair market value at the time of the reversionary interest for which it was the expressed consideration? And looking at the evidence on both sides, and particularly that of Mr. Marsh, which seems to me entitled to much attention, I am of opinion that the fair market value of the reversionary interest sold in 1847 did not at the time of that sale exceed 500*l.*, or amount indeed to so much; and this without laying any stress against Mr. Thomas Willoughby on the provision for repurchase contained in the deed of 1847—a provision upon which I conceive it to be impossible to lay any stress in his favour. This conclusion seems to me not to conflict with the decision in *Edwards v. Burt*, cited more than once during the argument, or to be opposed to any rule or principle there laid down. The decree, therefore, under appeal in the present instance seems to me to be right, but it may be as well to add to it a declaration, that it is to be without prejudice to any question between Thomas Willoughby and the estate of his deceased father, which is, I apprehend, not represented in either of the cases now before us.

Lord Justice TURNER said:—I agree and for the same reasons.

Wood, V.C., April 4, 7, 9, 10, 26, 1865.

DANGERFIELD v. JONES.

13 L. T. 142.

Patent—Injunction—Application of a general principle in mechanics as an improvement—Licence.

PATENT.—*If, having a particular purpose in view, a person takes the general principles of mechanics, and applies one or other of them to a manufacture to which it has not before been applied, this is sufficient ground to warrant an application for a patent; assuming such manufacture to be new, desirable, and of public utility.*

ESTOPPEL. PATENT.—*A licensee under another's patent is not estopped thereby from contesting the novelty, &c., of such patent.*

This was a bill filed by Wm. Dangerfield, a patentee, for an injunction to restrain the infringement of his patent by the defendants Joshua and Richd. Daniel Jones.

The letters patent had been granted, and bore date the 5th March 1864, for "an improved mode of, and apparatus for, bending wood for the handles of walking-sticks, umbrella and parasol sticks, and other purposes:

The specification was as follows:

My invention of an improved mode of bending wood has for its object to bend into a curved or hook shape the ends of sticks and canes suitable for walking-sticks, parasol or umbrella sticks, and various other articles in which bent forms of wood are required.

The invention consists principally in a novel mode of applying heat to the wood for the purpose of softening its fibres, and then bending down the stick and securing it in place by means of a clamp and a flexible piece of metal.

In carrying out my invention I find it convenient to soften the ends of the sticks which are to be bent, by placing them in moist sand, and which may be heated if required. After remaining in the sand for a suitable time, the sticks are to be removed to the bending apparatus. That end of the stick which is to be bent to form the handle is to be held securely in the jaws of a clamp or vice, and the extremity of the stick is then drawn round or bent over a tube or hollow mandril, provided with an annular half-round recess. The diameter of this mandril should correspond with the hook or curve the stick is intended to receive, and the groove should be of a size to suit the diameter of the stick. Inside this tube or hollow mandril a gas jet or burner is introduced for imparting heat to the tube or mandril, which heat is transmitted to the stick from its being drawn in close contact therewith. The stick is kept in this position by means of a band of steel, which is bent over the stick to retain it in a bent position. This steel band is held in the vice in contact with the stick to be bent, and it is fitted at one end with a handle for operating it, and at the other with a stud for carrying a catch or hook, which drops over the handle of the steel band when the same is lapped round the mandril, and thereby retains it together with the bent end of the stick in the curved position. Heat may be applied externally to the stick if thought desirable, by causing a jet of ignited gas to play upon the steel band.

As an obvious modification of the above described apparatus, a hollow chamber of suitable shape may be used as the "former," and heated by gas as described, and in place of the flexible band, a solid piece or block of metal of suitable form may be applied to the outside of the curved stick and heated from the outside in any convenient manner. When the end or handle of the stick has remained sufficiently long in this bent position to receive a permanent set, it is released from the apparatus, and the operation may be repeated. Having now described my invention of "an improved mode of, and apparatus

for, bending wood for the handles of walking-sticks, umbrella and parasol sticks and other purposes," and having explained the manner of carrying the same into effect, I claim the application of a flame of gas or other combustible fluid or liquid as described, for softening the fibres of the wood while being bent in combination with a clamping apparatus for securing the wood in its bent form until the fibres are set, so that the hook may remain permanent as herein set forth.

The bill then went on to state the usual allegations of profit being made by the plaintiff, and the circumstances of the alleged infringement of his patent; that defendants had, on the 3rd February, 1865, accepted a licence from the plaintiff to use his invention, and the revocation of this licence on the 24th February; that defendants had since made similar machines for the purpose of bending sticks, &c., and undersold him in the market; and prayed an injunction and account.

The defendants, by their answer, alleged principally that, before the date of the plaintiff's patent, "they had been in the habit of using a vice for the purpose of holding the stick intended to be bent, and of bending a plant or shoot cut from a root by drawing the same round a solid mandril, and for the purpose of bending wood cut out of a plank, and had used a band of steel which was fitted at one end with a handle, and the other end secured to the vice; after pulling the stick round within the band of steel, it was held in the required position by means of a piece of string or wire; and during the process of bending heat was applied externally to the stick and to the band of steel, for the purpose of hardening the fibres, and making the same set in the required position by causing a jet of gas to be played upon the said steel band; and that the object of applying heat to sticks during this process of bending was to dry the fibres of the wood, and cause them permanently to set, and not, as in plaintiff's specification, to soften the fibres; and a general denial of the validity of the plaintiff's patent.

The cause now came on as a motion for decree.

Giffard, Q.C., J. J. Powell, Q.C. (common law bar), and *Winterbotham*, for the plaintiff.

Rolt, Q.C., and *Freeman* for the defendant.

The effect of the evidence in the cause, the arguments of counsel, and the principal cases relied on, are fully stated in the V.C.'s judgment.

April 26.—The VICE-CHANCELLOR said, that the plaintiff had established his right to the patent.—As to the question of novelty, there is not the slightest doubt, nor is there any ground for contention in that respect. The only real question is, with regard to the construction of the specification, with respect to which there might, perhaps, be some argument, whether it did not include too much, whether it did not describe some small things as new which are not so in reality. But, with regard to its being an invention for making these sticks, or rather an improved mode of bending wood for the handles of walking-sticks and other things, he thought it beyond all doubt that, up to the date of the plaintiff's letters patent, it was a great desideratum to have umbrella-sticks and canes so bent as not to indicate by any mark any charring of the wood. When it is said, as one of the witnesses had stated, that because wood is bent by coachmakers and others in a variety of ways by the application of heat to wood, you cannot have a patent for the application of heat to the making or bending of walking-sticks, that is the same sort of reasoning which was pressed ineffectually upon the court with reference to an invention for an improvement in navigation. [He referred to the screw-propeller.] It was said that the operation of a propelling power by presenting a screw surface to the action of the water was nothing new; that a screw-propeller was an instrument for advancing a ship in the water by presenting a screw surface to the water, and that it was like the action of

a windmill with reference to the wind. That reasoning, however, did not succeed. If, having a particular purpose in view, you take the general principles of mechanics, and apply one or other of them to a manufacture to which it has never been before applied, that is a sufficient ground for taking out a patent, provided that the court sees that that which has been invented is new, desirable, and for the public benefit. A mere trifling matter, or thing of no value, will not do, inasmuch as the whole theory of the patent law is based upon the assumption that it is something of real value. You must show that you have invented something useful—a new and useful improvement in manufacture. Now, up to this time it is clear, from all the evidence, that nobody produced these sticks from sawn timber without any mark upon them. The course of proceeding with regard to ash twigs and other things of natural growth which would submit to twisting, was to subject them to a process which is well described in the answer of the defendants. It is this: "For some time previously to the plaintiff obtaining his said letters patent, we have been in the habit of using a vice for the purpose of holding the stick intended to be bent, and of bending a plant or shoot cut from a root, by drawing the same round a solid mandril." There seems to have been a plan when the plant was taken away from the root, of heating it in hot sand, so as to make it more susceptible of being bent, and then to secure it round a solid mandril without heating it; at all events, there was no charring heat which would produce that unseemly appearance which is found in some of those which have been exhibited before me. That being the case, the plaintiff says that his invention is an improved mode of bending wood, and has for its object to bend into a curve or hook shape the ends of sticks and canes suitable for walking-sticks and other articles here mentioned in which bent forms of wood are required. We shall presently see how he describes his process. Finding that the old process with regard to plants, ash plants, or shoots, was an awkward mode of working, he thought that they could be bent in a different way. The course was to draw the twig or force it round a post, and then to fasten it by a string so that the hook might be formed. And then it appears that he thought of another way of dealing with sawn timber in which case heat had been applied differently. No mandril, it would seem, had been applied to sawn timber. I take that from paragraph 12 of the defendants' answer, in which they say that "for the purpose of bending wood cut out of a plank we used a band of steel which was fitted at one end with a handle, and the other end secured to the vice; after pulling the stick round within the band of steel it was held in the required position by means of a piece of string or wire, and during the process of bending heat was applied externally to the stick, and to the band of steel for the purpose of hardening the fibres and making the same set in the required position." How? "By causing a jet of gas to be played upon the said steel band; and we say that this object of applying heat to sticks during the process of bending is to dry the fibres of the wood and cause them permanently to set, and not, as stated in the plaintiff's specification, to soften the fibres, as the same must, before this process of bending commences, be sufficiently softened in heated wet sand or otherwise by means of moist heat." That does not exactly give a true explanation of it, that it was heated by causing a jet of gas to be played upon the steel band; it was also on the other side of the band next to the wood with no mandril interposed, there was the steel band which gave it the curve, and you applied the heat both upon the steel band and the side next to the wood, keeping it in the required position by means of a piece of string or wire, and in that way you gave a curve to the stick. The plaintiff says, "My plan was to bind the thing round a mandril, and then to heat the mandril;" at least that is what he says in the argument at the bar. Instead of heating the steel band, although it may be that alone would not char the wood, or applying it to the steel bend on the one side and the wood on the other, I turned it or bent it round a mandril of iron instead of using a wooden post,



and then I fixed it by a clamp and heated the mandril and so obtained the application of heat to the stick in a way which did not affect the wood by charring." That seems to have been one of the improvements which this invention was intended to effect. Now there appear to have been several experiments made with a view to the same object; and the very circumstance that experiments were made shows their desirableness. But I have far better evidence against the defendants, for it appears that in the month of February, 1865, they took out a licence from the plaintiff to use the machines in their trade. Now, I do not mean to say that binds them in any way, or that it operates by way of estoppel. They might have found it was not so useful or profitable as they thought it would be when they took out the licence; but they submitted to the inconvenience of making payments for the privilege, and they entered into covenants with reference to the use of the invention and the prices to be charged for articles bent by the apparatus. Now, that is a strong circumstance. It clearly shows that, unless to them it had not been a wholly new affair, they would never have submitted to make payment for the use of it, nor would they have subjected themselves to the restrictions and inconveniences imposed upon them by the covenants. [The V.C. then commented upon the evidence of prior user.] Then comes the question upon the patent itself. There were two objections made: first, that there was no novelty; and, secondly, that there was no infringement. Then, as regards the description of the invention, it was objected, first, that there is a description of a clamping apparatus, which they did say is perfectly old, and that there are other parts of the apparatus which were perfectly familiar to persons acquainted with such matters before the date of the plaintiff's patent, and that the apparatus was taken from others, Vidler, and other persons, [The V.C. here went into a comparison of the evidence upon these points, and continued:] Now, I do not forget the L.C.'s decision in the case of the sewing machine with regard to the distinction between a machine or apparatus entirely new, and one partly new and partly old. Where the whole thing is new he is not bound to describe and distinguish the different parts, but where, as in the case before the L.C., the invention consisted of a machine which was only an improvement upon an old machine, you must distinguish and describe all the parts which you claim as new. This is a new machine altogether for making walking-sticks and other articles. The plaintiff says that the principle of his machine is a new mode of applying heat to wood, and then he tells you how it is applied, namely, through a tube or mandril, which heat is transmitted to the stick by its being drawn into close contact therewith. I have got, therefore, an apparatus, a forming instrument, which is to be heated by the action of the fire, and then that heat is to be communicated to the wood. It appears to me, therefore, that this gentleman has described the process or apparatus sufficiently, and that it is novel. He says, "I claim with respect to my machine or apparatus a novel mode of applying heat in combination with a clamping apparatus. The latter may be as old as the hills, but my process cannot be carried into useful effect by your mode of doing it. I claim it as that which is proposed by applying heat through the medium of the mandril to the wood, and holding it by clamping apparatus." He says, as an obvious modification of the above described apparatus, a hollow chamber of suitable shape may be used as the "former," and heated by gas as described, and in place of the flexible band, a solid piece or block of metal of suitable form to be applied to the outside of the curved stick, and heated from the outside in any convenient manner. When the end or handle of the stick has remained sufficiently long in this bent position to receive a permanent set, it is released from the apparatus, and the operation may be repeated. These things are modifications of the apparatus. Having described his invention, and having explained the manner of carrying it into effect, he says, he claims the application of a flame derived from gas or other combustible fluid or liquid as described for softening the

fibres of the wood. Perhaps, when you come to analyse it, it might better be expressed by saying simply "applying heat to soften the fibres of the wood," as he has stated in the previous part of his specification, where he says, my invention consists principally in a novel mode of applying heat to the wood for the purpose of softening its fibres, and then bending down the stick, and securing it in place by means of a clamp, and a flexible piece of metal. Now the mode of applying the heat is by means of the hollow mandril, and no doubt that is the best mode of getting it. What you have got to do is to heat the mould. He says, I heat my "former" or hollow mandril, and then he tells you his contrivance for doing so, which appears to him the best mode. It is open to the defendant to say, his is a better way: if so it is only an improvement upon it, of which he can avail himself hereafter. The principle of the plaintiff's invention is the application of heat through the medium of the hollow mandril, instead of applying it directly to the wood, and it appears to me that there is nothing erroneously stated in the plaintiff's patent or specification, and that the subject-matter is clear, and that in a mercantile sense it is a useful, valuable invention, as the defendants themselves have shown by taking out a licence from the plaintiff. That being the case, the plaintiff is entitled to be protected in the exercise of his right against any innovation of the defendants, however much it may be called an improvement. I am of opinion, therefore, that the plaintiff is entitled to have an injunction granted and an account.

Decree accordingly.

Wood, V.C., June 30, July 4, 1865.

DOWSELL v. REECE AND OTHERS.

13 L. T. 156; 11 Jur. N.S. 764.

Judgment-debt—Docketing—Puisne mortgage—Priorities—1 & 2 Vict. c. 110—2 & 3 Vict. c. 11.

JUDGMENT.—*An old judgment of 1826 was on the 3rd May, 1854, duly registered under the 1 & 2 Vict. c. 110. On the 6th June, 1854, the legal personal representatives of the party entitled to the debt in respect of which the judgment had been entered up revived the judgment. The judgment-debtor having come into possession of considerable real estate, mortgaged it on the 1st October, 1853, for an advance of 5,000l., and on the 6th June, 1854, charged all the property by three memoranda of that date with certain sums in favour of three relatives. On the 19th June, 1858, a suit was commenced by the parties entitled to the debt to redeem and foreclose, and for a sale:—Held, that the judgment-creditor, on bill filed by him against the first mortgagees and the puisne incumbrancers, was entitled to be paid the full amount of his judgment-debt in priority to the three incumbrancers.*

This was a bill filed by Henry Doswell and Eliza, his wife, against William Reece and various other parties, claiming, under various securities granted by one John Ford, on his real estates and against his personal representative, to set aside certain mortgages as against the plaintiffs and Ford's other creditors, with an alternative prayer that, if the court should be of opinion that certain of the defendants, who were sub-mortgagees, were entitled to retain and be paid the amount secured to them, an account might be taken of the amounts due to them respectively, and that the premises remaining unsold might be sold in the usual way, and the proceeds applied in payment

of the balance due to the plaintiffs on the security of a judgment recovered against Ford, and the costs, and of the balance due to the last-named defendants, if entitled thereto.

A decree was made in this suit, bearing date the 29th July, 1861, when so much of the bill was dismissed as sought to set aside the various mortgages and charges, and a sale of the property was directed.

The circumstances were these:

On the 22nd March, 1826, a judgment of the Court of King's Bench was signed under a warrant of attorney against John Ford for 3,600*l.* and 35*s.* costs, in an action of debt at the suit of John Louis Seward. This judgment was on the same day entered of record in the same court, and a memorial of the warrant of attorney and defeasance enrolled in Chancery.

The warrant of attorney was given as security for the payment of an annuity on a principal sum of 1,800*l.* on the 16th November, 1843.

Seward died on the 30th March, 1838, leaving a will, by which he appointed his wife Eliza executrix, who duly proved same on the 26th March, 1854.

She subsequently, on the 30th June, 1843, married the plaintiff, Henry Doswell.

On the 3rd May, 1854, the judgment not having been revived, was registered on behalf of the executors of Seward in the Common Pleas in the usual way.

On the 6th June, 1854, the plaintiffs revived the judgment against Ford, and on the 9th June it was re-registered, and again on the 30th April, 1859.

John Ford, the judgment-debtor, became entitled, in the year 1853, to considerable real estates, and recovered possession of them, they being of very considerable value.

On the 1st October, 1853, he mortgaged part of the property to Wm. Reece, to secure the sum of 5,000*l.* and interest. There was a transfer of this mortgage, and a further charge made on behalf of one Higgins, on the 7th October, 1854. By three memoranda of charge, dated respectively the said 6th June, 1854, Ford charged all his estates with certain sums in favour of E. B. Ford, E. Ford, and Sarah Ford.

Under the decree in the cause the properties had been sold.

By the chief clerk's certificate, dated the 6th February, 1865, it appeared that the existing incumbrances were, the sum of 1,030*l.* 19*s.*, due on the mortgage securities, dated the 1st and 7th October, 1853, and the sums of 1,695*l.*, 1,130*l.*, and 2,543*l.*, then due on the three memoranda, dated the 6th June, 1854, to Wm. Reece, C. M. Chamberlain, and Sarah Ford, and the sum of 3,881*l.* 18*s.* 6*d.* due to the plaintiffs under the judgment of the 22nd March, 1826. As to the priorities, he found that 1,030*l.* 19*s.* was the first charge, and that the defendants W. Reece, C. M. Chamberlain, and Sarah Ford claimed to have priority over the judgment of the plaintiffs. He also certified that no evidence had been produced to shew that the defendants E. Ford, E. B. Ford, Wm. Reece, C. M. Chamberlain, and Sarah Ford, or either of them, had at the date of the memoranda of the 6th June, 1854, any notice of the judgment or the registration thereof, unless the entry in the register was to be deemed notice to them of such judgment.

The cause now came on for further consideration on the chief clerk's certificate, and the point raised was, whether the sums secured by the memoranda of the 6th June, 1854, was entitled to priority over the judgment-debt.

Willcock, Q.C., E. F. Smith, Q.C., and Druce, for the plaintiffs, contended that the registration of the old judgment under the 19th section of the 1 & 2 Vict. c. 110, created a charge upon all the lands of the judgment-debtor, and was good against purchasers and mortgagees. The plaintiffs, having a charge on the 3rd May, 1854, it must necessarily take priority over the memoranda of the 6th June, 1854. They cited—

Beavan v. Lord Oxford, 6 De G. M. & G. 492.

Chapman Barber for those defendants taking interest under the memoranda of June, 1854.—The judgment was not properly registered, such registration can only be made by a party to the judgment, and not by those who had become entitled to the debt by devolution of title. By the 2 & 3 Vict. c. 11, s. 5, also, these memoranda became definite charges on the land, and the parties to them became mortgagees. A sale having been made by order of the court did not at all affect the question. He cited—

Neate v. Duke of Marlborough, 3 Myl. & Cr. 416. *Stileman v. Ashdown*, 2 Atk. 607.

Jessel, Q.C., for parties in the same interest.

Geo. Lake Russell for Wm. Reece.

Wm. M. James, Q.C., Freeman, Bird, and Thos. Hughes for the other defendants.

Willcock in reply.

July 4.—The VICE-CHANCELLOR took time to consider his judgment, and on this day, after stating the question raised before him, said:—The bill has been filed by the executor of a creditor on a very old judgment, to set aside certain securities given by the judgment-debtor on a large real estate which had accrued to him after the date of the judgment. At the hearing of the cause the bill was dismissed so far as those securities were sought to be set aside; but the bill concluded with a prayer in the alternative for an account of what was due to the plaintiffs and the holders of the other securities, and for a sale of the unsold portions of the estate. The case is therefore reduced to that of a judgment-creditor and a prior mortgage, the judgment-creditor asking for a sale. The first point made before me on the arguments was as to the registration of the judgment, and it was contended that, as at the time when it was registered the judgment-creditor was dead, therefore there had not been a due registration. Then it was contended that, if that were not so, yet the 2 & 3 Vict. c. 11 expressly enacts that, though a judgment-debt be thus registered, it shall not, as against purchasers or mortgagees without notice, be held to be of any further force than it would have been independently of the statute 1 & 2 Vict. c. 110; therefore it was argued and truly said, that as regards the subsequent creditors, they having been shown to have had no notice, it must stand on the footing of judgments as if the Act of 1 & 2 Vict. had not been passed, subject to certain conditions contained in 2 & 3 Vict. c. 11, and thereupon a double contest was raised: First, that as the judgment was never docketed, and the consequence of the 1 & 2 Vict. c. 110 being out of the way, the plaintiffs stood in the position of a judgment-creditor under the old law, and was obliged to have his judgment docketed before it could affect land. That, however, does not appear to be tenable, for the reasons I shall presently state. It was then contended that, as in the case of *Stileman v. Ashdown*, the plaintiffs being judgment-creditors not having a charge on the land, by the effect of the 1 & 2 Vict. c. 110, they could only be paid out of one moiety of the purchase-money, if they had originally filed this bill for a sale. As to the first question, it appears to me—indeed, I have no doubt upon the point—that the judgment was properly registered. The executor was entitled to prove and afterwards did prove the will, and caused the judgment to be registered, and what is required by the statute is simply registration, in order that notice may be given to all the world; and even if it had been an administrator instead of an executor, he would be entitled to adopt the agency of the person who had done this act for him, and such registration would stand good against all the world. The reason I mention that registration at all, notwithstanding the clause of the subsequent Act as to purchasers without notice, is this—the subsequent Act does provide for registration in this way: the 2nd section says, that as to all judgments already docketed and entered up under the provisions of the statute of William and Mary, none of them shall, after the 1st August, 1841,

affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, except they are registered as prescribed by the 1 & 2 Vict. c. 110. Then sect. 5 of the subsequent Act says, that as against purchasers and mortgagees without notice of any such judgments as aforesaid, viz., those that are registered in the manner described by the Act, none of such judgments shall affect any lands otherwise, although duly registered, than a judgment of one of the Superior Courts aforesaid would have bound such purchaser or mortgagee before the Act of the 1 & 2 Vict. c. 110, where it had been duly docketed according to the law then in force. That statute means that it substitutes the registration under the Act of the 1 & 2 Vict. for docketing; but then it says, that although registered, and although to be taken as docketed, yet nevertheless it shall have no effect as against purchasers or mortgagees without notice, beyond what a docketed judgment would have. The case of *Stileman v. Ashdown* was this: a single judgment-creditor came for himself alone simply to remove a legal obstacle to his having execution on his judgment. In that case the Court said, all it would do for the judgment-creditor was to remove out of his way the obstacles to enforcing his legal remedy. Lord Eldon, in the subsequent case of *Burroughs v. Elton* (11 Ves. 33), observes: "I have looked at the case of *Stileman v. Ashdown*, and the reporter represents Lord Hardwicke to have stated that where one judgment-creditor sues for satisfaction of his own debt against real assets, this court will give him no other execution than precisely what he would have had at law, viz., against a moiety. Then how do I know there is any other judgment or specialty creditor, in which case there is a different kind of satisfaction?" When you see that expanded afterwards, as Lord Cottenham puts it in *Neate v. Duke of Marlborough*, that whenever you come to administer assets, or have a sale of property to discharge incumbrances according to their priorities (I think there is no distinction), then, inasmuch as you could not sell without the concurrence of the judgment-creditor, and he not bound to stir a step until his debt is paid, you then satisfy the judgment-creditor for the whole amount of his debt out of the whole of the assets, because he stands in priority to those who are claiming the assets the produce of the sale, and there could be no sale without his concurrence. That also is the case of *Tunstall v. Tapps* (3 Sim. 286), and it seems to have been founded on this: that the judgment-creditor had a right to come to this court to redeem, and when he came to the court for that purpose, there being a prior mortgage, he redeemed that mortgage, and then you could not get back the estate without redeeming the whole of his judgment-debt as well as the mortgage which he had redeemed. In the last edition of Seton on Decrees I find a decree of the year 1745. In that case a bill was filed by a judgment-creditor and her trustee against the first mortgagee and the mortgagor with foreclosure over. The decree is in this form:—"The judgment-creditor redeems the first mortgage, and thereupon he is not to be redeemed by those coming afterwards without payment of what he has paid the first mortgagee and the whole of his judgment-debt." If the bill in the present case had been framed in the alternative for redemption and foreclosure, it would have been exactly that case. But, instead of that, all parties seem to have thought it desirable that at the hearing a sale should have been decreed. There was a prior mortgagee who was to be satisfied; then there was the judgment-creditor; then the holders of the other securities in their order of date. That being so, if foreclosure had been directed, the decree would have been exactly like that to which I have alluded. In principle, the sale can make no substantial difference. Lord Cottenham, in *Tunstall v. Tapps*, puts it upon its proper footing, that where you have to distribute assets, the proceeds of a sale of real estate, the judgment-creditor should first be paid in full. I must therefore hold that the plaintiffs' claim, and the amount found due to them, has priority over the sums secured by the memoranda of the 6th June, 1854.

Order accordingly.

KINDERSLEY, V.C., July 7, 1865.

Re WILTS, SOMERSET, AND WEYMOUTH RAILWAY COMPANY,
Ex parte BREWER.

13 L. T. 207; 13 W. R. 959.

Ward of court—Infant—Purchase-money paid into court.

INFANT.—*Where the land of a female infant is taken by a railway company, and the purchase-money paid into court and invested, the infant is not thereby constituted a ward of court.*

In this case purchase-money of lands belonging to a female infant and taken by a railway company had been paid into court, and invested in Consols. The lady, now of age and married, joined with her husband in petitioning for payment of the fund out of court to the husband. A question, however, arose whether the above transaction had not constituted the infant a ward of court.

Bush in support of the petition.

G. L. Russell for the railway company.

The VICE-CHANCELLOR, after consulting the registrars, said that he had not been able to discover any authority. He was of opinion that the infant had not been constituted a ward of court.

KINDERSLEY, V.C., July 12, 1865.

THE ATTORNEY-GENERAL *v.* AUST.

13 L. T. 235.

Dissenting chapel—Independents—Particular Baptists—Change of doctrine—Trust-deed—Construction.

CHARITY.—*Under the deed of endowment, a certain chapel was "to be used and enjoyed as a place of public religious worship for the service of God by the society of Protestant Dissenters of the denomination of Independents, and professing the doctrines contained in the Catechism of the Assembly of Divines held at Westminster, and commonly called the 'Assembly's Catechism,' and also by such other persons as should thereafter be united to the said society, and attend the worship of God in the said meeting-house."*

Several years after the date of the deed the surviving trustee and the congregation of the chapel converted the nature of their religious worship into that of the "Particular Baptists":—Held, that the use of the chapel must be restored to those professing the original Independent doctrines, the trustee removed, and new trustees appointed.

This was a suit instituted to determine the question whether, under the terms of a deed of trust, dated in 1824, which endowed the chapel of Colerne, near Box, in the county of Wilts, any persons other than the denomination of Nonconformists termed "Independents" were eligible to occupy or possess the chapel.

In 1851 the defendant, who was the sole surviving trustee of the deed of 1824, and the whole of the then existing congregation, totally altered the

character of their religious worship, which they converted into that of the "Particular Baptists."

The information therefore prayed that Mr. Aust might be removed from the office of trustee of the chapel, and that new trustees might be appointed.

The material words of the deed of 1824, so far as related to the nature of the intended worship, were that the chapel was "to be used and enjoyed as a place of public religious worship for the service of God by the society of Protestant Dissenters of the denomination of Independents, and professing the doctrines contained in the Catechism of the Assembly of Divines held at Westminster, and commonly called the 'Assembly's Catechism,' and also by such other persons as shall hereafter be united to the said society, and attend the worship of God in the said meeting-house."

Baily, Q.C., and *Bush* for the plaintiffs.

Glasse, Q.C., and *Bristowe* for the defendants.

Baily, Q.C., in reply.

Cases cited:

Attorney-General v. Pearson, 3 Mer. 400. *Attorney-General v. Gould*, 28 Beav. 488; 2 L. T. Rep. N.S. 494. *Attorney-General v. Shore*, 11 Sim. 592. *Attorney-General v. Etheridge*, 8 L. T. Rep. N.S. 14.

The VICE-CHANCELLOR.—I entertain hardly any doubt upon the principal question in this case. The general principle applicable to these cases is clearly laid down in *The Attorney-General v. Gould*, and in several other cases, and it is, that it is the duty of the court to ascertain in the first instance the nature of the religious worship intended at the time of the origin of the chapel, and as it is very often impossible to ascertain this with certainty, from the absence of any instrument of endowment, or from the words of such instrument being ambiguous, that the court must then resort to the usage of the congregation in order to discover what these doctrines were. But if, on the other hand, from there being an actual deed of endowment, or from the fact that such a deed had existed being proved, the court has discovered the nature of the original doctrines and worship, it will maintain the worship prescribed by the original endowment. It appears to me that, in the present instance, the language of the deed is clear from all reasonable doubt. There is no difficulty in arriving at a conclusion with respect to what is meant by "Independents" in the deed. They are defined to be those who hold the doctrines laid down in the Catechism of the Assembly. But, as we find to be the case with the Church of England, some members hold more strongly than others what are termed Calvinistic doctrines. In the Catechism of Assembly, Calvinistic doctrines are laid down very strongly, and from that fact there is not much difficulty in determining what class of persons are referred to. The deed expressly says, that they are to profess the doctrines laid down by the Assembly of Divines held at Westminster, and we have then the class clearly defined by reference to the doctrines which they are to profess. The deed, however, continues, "and also by such other persons as shall hereafter be united to the said society, and attend the worship of God in the said meetinghouse." Two classes may here be included: first, Independents who agree with the catechism; and, secondly, persons not of that class, nor Independents, but persons who may happen to sit in the chapel and join in the worship. It would, however, be extraordinary to attribute to the persons who framed this deed such a meaning as to include within the objects of the trust this latter class of persons. The word "united" does not mean sitting in the same chapel, or joining in acts of worship, but it is used in the sense of holding communion with each other. The deed refers to persons who have a community of doctrine, and to persons who, though they are not now members of the society, may afterwards become united to it. The next question for consideration is, whether, if the congre-

gation have usurped the use of the chapel and introduced doctrines not in accordance with those contained in the Catechism of Assembly, the court will take steps to restore the chapel to its original use. In 1851 a majority of the congregation met together, and plainly agreed (there being no subterfuge or theological discussion introduced into the pleadings or argument) that they would then establish a new church, and they also agreed that they would, of their own authority, establish new doctrines. They denied the propriety of baptism by mere sprinkling, and insisted on total immersion. Under these circumstances it is clear that the court must restore the chapel to the Independents, viz., to those professing the original Independent doctrines, and there must, therefore, be a declaration according to the prayer of the bill. As to costs, it is hard upon Mr. Aust to make him bear personally the costs of the suit; but the congregation have, in fact, excluded the rightful owners, and the common rule must prevail.

Wood, V.C., Nov. 4, 1865.

Re WOODBURN'S TRUST.

13 L. T. 237.

Lands Clauses Consolidation Act, 1845—Payment out of court—Costs by a company—Title.

COMPULSORY PURCHASE.—*Where it is doubtful under a testator's will whether a good title to the premises taken by a joint-stock company can be made out, and there is no wilful default or delay on the part of the owner of the premises, the Court being called upon to put a construction upon such a will, the company, on the application of the owner to obtain out of court the purchase-money agreed to be paid for the land, was ordered to pay the costs according to their Act.*

This was a petition by a Mr. Woodburn, the owner of some land and premises, situate at Dalton, in the county of Lancaster, which had been agreed to be taken and purchased by the Furness Gas and Waterworks Company under their Act of 1854, in which was incorporated the Lands Clauses Consolidation Act of 1845, and the amount of such purchase paid into court by them, to have a sum of 1591l. 5s. paid out to him, and that the company might pay the costs incurred in consequence of such purchase and the application.

John Fell, by his will, dated the 24th December, 1833 (*inter alia*), directed—

That a valuation should be made by the trustees or trustee for the time being acting in the execution of his said will in such manner as he or they should think fit, of all the real and personal estate and effects thereafter demised and bequeathed as soon as might be after his decease. And that if he should have any son who should attain his age of twenty-one years, or die under that age leaving issue surviving him the testator, and he the testator should on such event have any other son, or the issue of any other son, then living, all the real estates and so much as should consist of leasehold hereditaments of the personal estate, should be divided by the said trustees for the time being into as many divided allotments of equal value as nearly as possible according to a valuation to be made thereof at that time by the said trustees as the testator should have sons then living, or who should have previously died leaving issue then living, and that one of the said shares

should be allotted to the said trustees for each of his (the testator's) sons then alive or who have previously died leaving issue then living, and that the only one or each of his said sons who then should have attained twenty-one years should have the devise, according to seniority, of the share to be allotted to him. And the testator devised all the freehold hereditaments of or to which he or any person in trust for him was seised or entitled, or of which in exercise of any power he was entitled to dispose (except mortgage and trust estates), to the use of the trustees for the term of 500 years, upon certain trusts therein expressed (which became unnecessary and incapable of taking effect), and after the determination of the said term, and in the meantime subject thereto and to the trusts thereof, to the uses therein mentioned and set forth, viz.: as to the whole thereof, if he should have one son who should attain twenty-one years, and if no other son should attain that age, or die under that age leaving issue who should attain that age (in case he should leave more than one such son), as to each divided share thereof—so allotted for every son who should attain twenty-one years, to the use of each such son in fee; and as to the whole thereof, if he (the testator) should have a son who should die under the age of twenty-one years leaving issue who should attain that age, and no other son who should attain that age, or die under that age leaving issue who should attain twenty-one years, or in case he should have more than one son who should attain twenty-one years, or die under that age, leaving issue who should attain that age, as to each undivided share thereof so allotted for every son who should die under twenty-one years leaving issue, to the use of the issue respectively.

The will then contained a direction to raise for each daughter attaining twenty-one or marrying, a portion equal in value to one-half of the average value of the son's share in the real and leasehold estates, and subject thereto the residuary personalty was given among the children equally, except the elder son, who was to have a double share if one-half of such average value should amount to 4,000*l.* or more; but should the residuary personalty not produce as much for each daughter, then a charge was made upon the real estate and secured by a term of 500 years, in order to make up the daughters' shares to 4,000*l.* or so much more as the one-half of each son's shares of the freeholds and leaseholds should amount to. It then contained a proviso that if the freehold, leasehold, and personal estate should not produce a portion for each of the testator's children amounting to 4,000*l.*, then the freehold, leasehold, and residuary personal estate was directed to be divided equally between all the children.

The Furness Gas and Water Company, on the abstract being forwarded to them, objected to the title, contending that having regard to the amount of the testator's residuary personal estate (with which they had been furnished), his real and leasehold estates, and personal estate, ought not to have been divided and allotted in the manner which the executors had adopted, and that under the powers contained in the will such several estates ought to have been sold and converted, and the proceeds divided equally amongst all the testator's children, male and female, who attained the age of twenty-one years, and that thus a good title was not made.

Wm. Pearson (Rolt, Q.C., with him), in support of the petition, contended that, upon a fair construction of the will, what had been done under it was justified by the powers contained therein. He referred to—

Re Sterry's Estate, 3 W. Rep. 561. *Stalliers of Sunderland*, 1 Drew, 184. and Sects. 76, 77, 78, 79, and 80 of the Lands Clauses Consolidation Act, 1845.

F. Currey, for the company, contended that, a good title not having been shown, the company ought not, therefore, to pay the costs of the application, &c.

The VICE-CHANCELLOR, after quoting the words of the will, said that the language of it was extremely confused, and that it was very difficult to get

at what the testator really meant as to the division of this property. An idea seemed to have impressed itself upon his mind that, wishing that all his children should take equal shares, but that the minimum of his daughters' shares should be 4,000*l.* each, and feeling that it might happen that all might not have equally, he had inserted the proviso which was to be found at the end of the will. But, although not clear what he did mean, he could not have meant that the whole should be sold and the proceeds divided equally, as the company had contended. He saw no reason to say that any wilful neglect to make out the title had been shown by the petitioner, and therefore the company must pay the costs according to the terms of their Act of Parliament.

Order accordingly.

[IN THE COMMON PLEAS.]

Nov. 2, 1865.

BOUNDY AND OTHERS v. HEATON AND OTHERS.

13 L. T. 238.

Goods sold and delivered—Change in firm of purchasers—Continuing contract—Partnership—Statute of Frauds.

ASSIGNMENT. CONTRACT.—*The defendants contracted in writing with the first-named plaintiff to supply him with all the brass ashes produced at their mill at a certain fixed price, the ashes being agreed to be equal to a certain sample. Some ashes were delivered under this contract, and then the said plaintiff took the co-plaintiffs into partnership, and ashes were delivered by the defendants to the new firm without any new or special contract. Neither the ashes supplied before the formation of the new partnership nor those supplied afterwards were equal to sample, and the plaintiffs commenced an action to recover damages in respect of the breach of agreement:—Held, that the plaintiffs could not recover in respect of the deliveries of ashes which took place prior to the formation of the new partnership, but that they could do so in respect of those which took place afterwards, on the principle that those deliveries took place in pursuance of a new contract made with the new firm on the same terms as the old contract with the one plaintiff, and that the requisitions of the Statute of Frauds with respect to this new contract being satisfied by the part delivery, the old written contract might be looked at to prove that the sale was of ashes equal to sample.*

This case was tried before Shee, J., at Cardiff, at the Summer Assizes for Glamorganshire.

The declaration stated a contract between the plaintiffs and defendants for the supply of brass ashes by the defendants to the plaintiffs according to a sample shown to the plaintiffs, and alleged that the brass ashes delivered had not been according to sample.

The first and second pleas respectively traversed the making of the contract, and alleged that the goods were equal to sample; and the third plea alleged that the goods were not bought by the plaintiffs, or sold and delivered by the defendants under and by virtue of the alleged contract.

It was proved at the trial, that in November, 1864, a sample of brass ashes was sent by the defendants to the plaintiff William Boundy, who was then trading alone, and he agreed to buy, at a fixed price of 30*s.* per ton, all the brass ashes from the defendants' mill, provided they were equal to sample. The contract was contained in letters which passed between William Boundy

and the defendants. Quantities of brass ashes were accordingly delivered from time to time during December, 1864. On the 1st January, 1865, William Boundy took into partnership Charles Boundy and John William Hughes, the other two plaintiffs, and he notified this fact to the defendants. Early in 1865, William Boundy paid for the brass ashes supplied up to the end of 1864, complaining at the time of the quality. Brass ashes were delivered to the new firm from time to time in 1865, up to the end of March, and the demand for payment being met by complaints of quality, the defendants commenced an action against the plaintiffs for the price, and the plaintiffs paid the amount. The present action was then brought to recover damages for the inferiority of the ashes delivered to sample, both in 1864 and 1865. It was contended by the defendants at the trial that the contract to sell according to sample was made with William Boundy, and not with the new firm, who were the plaintiffs in the present action, and that there was no continuing contract with the plaintiffs that the ashes should be according to sample; and that there was no written contract with the plaintiffs satisfying the Statute of Frauds.

A verdict was found for the plaintiffs for 44*l.* damages in respect of the goods supplied, both in 1864 and 1865; the defendants having leave to move to enter a verdict for them; the court having power to draw inferences of fact.

H. Giffard, Q.C. (G. B. Hughes with him) moved accordingly.

ERLE, C.J.—I think that there should be no rule provided the defendants will consent to give up that portion of the damages which is in respect of the delivery of goods below sample previous to the 1st January, 1865. There was a written contract entered into in 1864 under which the defendants were bound to deliver brass ashes equal in quality to a certain sample, and the plaintiff William Boundy was bound to pay for it at the rate of 30*s.* per ton. The first and all subsequent deliveries ought to have been assumed by the jury to have been made under this written contract. The defendants have the advantage of the change made in the plaintiffs' firm on the 1st January, 1865. At law a contract cannot be assigned, and the new firm was a new contracting party able to sue only on contracts made by themselves. I am of opinion, however, that the plaintiffs have the benefit of the written contract entered into by William Boundy, so far as regards all ashes delivered after the 1st January, 1865, on the principle of law, that if there is a course of business with a firm, and new partners come in, and the business is continued without anything said about a change in the terms of it, a jury ought to assume that the old terms were to go on, unless some statute intervenes. No statute intervenes here, because there has been not only a partial delivery, but a total delivery of the goods to the defendants. The plaintiffs have a right, therefore, to say that the contract as to the quality continued binding on the defendants. It is ascertained as a fact that the goods were not according to sample, and therefore the plaintiffs are entitled to retain their verdict for damages in respect of deliveries made after the formation of the new firm.

WILLES, J.—I am of the same opinion. Between the old firm and the defendants there was a contract in writing contained in certain letters. So soon as goods were delivered in pursuance of the contract the operation of the Statute of Frauds was excluded, and the letters became distinct evidence that the goods were purchased according to sample. Then came a change in the firm. If the firm had had a corporate capacity, it would have been able to sue both in respect of the old and new transactions. But there is a rule of law preventing the assignment of *choses in action*, and precluding us from dealing with the matter as if the firms were identical. Therefore the new firm cannot recover damages in respect of the goods supplied before the 1st January, 1865. But for goods supplied after that date there is no

difficulty with the case, as that of the new firm entitled to recover in respect of a new contract entered into with them. The transactions must be taken to have been of a similar character to the previous transactions, the letters which passed in November showing the terms of the contract, and the Statute of Frauds being excluded by the part delivery.

BYLES and KEATING, JJ., concurred.

Rule refused, provided the plaintiffs agreed to a reduction of the damages; otherwise rule absolute.

[PROBATE.]

Nov. 3, 4, 1865.

EDMONDS v. LEWER.

13 L. T. 248; 11 Jur. N.S. 911.

Practice—Will—Custody of—Rule of the Prerogative Court—Testatrix and attesting witnesses—Marks-people—Costs.

WILL.—Where a party opposing a will has given notice that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of it, he may on the eve of the trial recall such notice, and substitute another expressive of his intention to produce, if necessary, witnesses on the trial of the cause. But, in such event, the hearing will be adjourned if the party propounding the will desire it.

The testatrix and attesting witnesses were all three marks-people, and the will after execution was handed by the testatrix to the plaintiff, who retained the custody of it. He was executor and principal legatee, and he propounded the will three years after her death.

The Court not being satisfied with the proof, refused probate, but declined to condemn the plaintiff in costs, notwithstanding grave circumstances of suspicion with which the case was surrounded.

This was a suit to establish the validity of a paper writing, dated 11th April, 1854, as the will of Louisa Edwards, widow.

Dr. Twiss, Q.C. (with him *Clarkson*), for the plaintiff, the executor and principal legatee.

Dr. Tristram, for the defendant, niece and next of kin of the testatrix.

The defendant gave notice, in the progress of the suit, that she merely insisted upon the will being proved in solemn form of law, and only intended to cross-examine the witnesses produced in support of it. On the 31st October the cause standing in the list for trial on the 3rd November, the second day in term, but the first of the sitting of the court, she withdrew the same, and gave a second notice that she would, if necessary, produce witnesses on the trial of the cause. The Judge Ordinary ruled that she was not entitled to do so if it put the plaintiff to any detriment, and that he would, in consequence, if the plaintiff desired it, allow further time for the trial. The plaintiff elected to proceed.

The testatrix, Louisa Edwards, a widow, made the acquaintance of the plaintiff in the lifetime of her husband, and continued it after his death.

She occupied a room adjoining his in the house in which he lodged, and, as he alleged, she being then unwell requested him, in the month of January, 1854, to make a will for her. He did so. The will appointed him executor, and also gave him the bulk of the property, which was estimated at between 300*l.* and 400*l.* The testatrix, who was unable to write, made her signature by three marks. Five or six hours afterwards, a person of the name of Charles Tubbs, who described himself as a soldier in the second battalion of the Coldstream Guards, but who at the time was not in uniform, was called in at the instance of testatrix, who sent a messenger for him, and he attested the will also by mark. The testatrix kept the will. The plaintiff shortly afterwards joined H.M. ship *Miranda* as one of the carpenter's crew. The testatrix visited him at Sheerness while the ship was in dock, and having learned in the interval that the will had not been properly executed, took the opportunity, on the 11th April, 1854, to cure the defect by acknowledging her signature in the presence of two witnesses who subscribed their marks in attestation of it. She then delivered the will to the plaintiff, who shortly afterwards sailed for the Crimea, and he retained the custody of it (keeping it, as he alleged, in his pocket all the while) until his return to England in 1858, when he endeavoured to obtain probate of it. The attesting witnesses were then both dead, one having been shot in the White Sea in July, 1854, and the other having died of fever in July, 1855. The testatrix died in January, 1855. The intelligence reached the plaintiff through an advertisement in the newspapers, which was inserted for the purpose of ascertaining whether she had left a will, and he thereupon sent home a copy of it from Malta.

In support of the will the plaintiff, whose evidence was to the effect above stated, called three witnesses. One, who had been master-at-arms on board the *Miranda*, stated that he was present in the dockyard loft when the will was executed (according to the plaintiff's affidavit, the only persons present were the attesting witnesses and himself); that the plaintiff showed it to him while the ink was wet on the paper, and that he subsequently saw it with him at Malta. The second, a legatee in the will for the sum of 5*l.*, declared that he heard the testatrix say that Edmonds (the plaintiff) would have the management of her affairs after her death, and that none of her relations should have her property; and the third, the father of the last witness, recollected having written a letter for the testatrix to Sheerness, and having heard her say that she had been at Sheerness; but he specified no time. This was the only evidence offered to establish the identity of the testatrix with the woman who executed the will at Sheerness. The little girl, the messenger who was sent to fetch Charles Tubbs, and who was named for a small legacy in the will, is now dead, but the only evidence of the fact was the statement of the plaintiff. On the other hand it was proved, on the part of the defendant, that there was no such person as Charles Tubbs, in 1854, in the second battalion of the Coldstream Guards.

Sir J. P. WILDE.—There are some circumstances of suspicion in this case at which I shall glance, but I wish at the outset to point out that the court has not on this occasion to pronounce an opinion that this is a fraud. The court is not bound to come to the conclusion whether or no a fraud has been committed. The property of this deceased woman would, by law, devolve on her relations, and the onus is cast upon those who would interfere with that devolution of property by means of a will, of proving to the satisfaction of the court that that will really was executed. That is the question, and the only question, which is before me to-day. And without, therefore, deciding upon the question, and without proposing to come to any conclusion, aye or no, that a fraud has been committed in this case, I shall address myself to the more narrow issue, whether or not enough has been laid before the court to warrant it in saying that this paper was the duly executed will of Louisa Edwards. Now, it is a will written from first to last in the handwriting of

the man who takes, subject to some small legacies, the whole of her property. It was carried about by him, according to his own account, for four years in his pocket. The woman died in 1855, and it is now propounded in 1865. It is true that it contains the marks of three witnesses; but all the witnesses, as well as the testatrix, are supposed to have been marks-people, and, as I said before, we have no writing upon it, except that of the person who is to take the benefit. That is a matter alone which ought to make the court extremely wary and cautious how it allows probate. There was a rule in the Prerogative Court which, like most of the rules that governed the proceedings of that court, was founded in excellent good sense, and that was, that the custody of a will was a most material matter for consideration; and when a will did not come from the proper custody, either of the deceased or his agent, the court was most unwilling to grant probate, even where there was the circumstance that the testator's handwriting might be proved by competent witnesses. I think they went too far to say that a will not coming from proper custody, or from satisfactory custody, should not be admitted to probate, even though the handwriting were proved, unless there appeared adminicular circumstances that would eke it out. What custody does this will come from? From the pocket of the man who is benefited chiefly by it. Therefore it becomes the court to be wary. What is the proof of execution? When this will was first propounded in 1858, an affidavit was made by the plaintiff intending to show that Charles Tubbs had been present at the time when the testatrix put her mark on the paper. That was a positive oath, not made in a hurry, but made three years after the woman's death, and made for the purpose of obtaining probate of this will, though I quite agree that, from other parts of the affidavit, it is quite plain that the execution alone was known not to be sufficient; but still the affidavit was made at a time when the circumstance must have been comparatively fresh in the recollection of the plaintiff. In the same affidavit he states that the only persons present at the execution of the will on the 11th April, 1854, besides the testatrix, were the attesting witnesses, Richard Knight, King Marshall, and himself; and yet, to-day, seven years after that was sworn, he produces a man who says that he was not only in the room at the time, but that the plaintiff actually came to him immediately after, and, while the ink was wet on the paper, showed him the execution, and that Edmonds had asked him to get leave from the captain to stay over time in the loft in order that they might attest the will. The court finds great difficulty in understanding how, if that account is true, the plaintiff, when he made the affidavit, could have thought that only those persons whom he specified were present. That is another circumstance of suspicion. Now as to the execution. With regard to the first so-called execution, it is not contended that the execution was a valid one; but notwithstanding all these matters of suspicion, if the court could be satisfied that Mrs. Edwards was at Sheerness at the time stated, and that she was the person who was present when this will was executed, then, notwithstanding these circumstances of suspicion, I do not know that I should feel at liberty to disregard the oath of the master-at-arms. For aught I know he is a perfectly respectable man, and I am daily bound to believe the testimony of such persons; but there the evidence all fails. If this is a forgery, nothing would have been easier than to bring any woman from the town of Sheerness into the loft, who might represent herself as Mrs. Edwards, and to get two of his messmates to attest her signature. He is bound to show and to satisfy the court that the woman who professes to execute the will was the testatrix. At present there is no such evidence, except the oath of the plaintiff who has been contradicted as to what took place on each of the two executions. That cannot be got over. It is enough to say that the evidence fails, and that the issue is not made out. I pass by the further evidence of the defendant, that there was no such person as Charles Tubbs in the second battalion of the Coldstream Guards at that time. One cannot understand why, if there was such a person, he should represent

himself as in the second battalion of the Coldstream Guards if he was not so, and that he did so represent himself we have the oath of the plaintiff who wrote it down. It is not so much upon the circumstances of suspicion such as they are that the court refuses probate, as upon the failure of that proof which the court is bound to call for before it gives probate of a will.

Dr. Tristram.—And as to costs?

Sir J. P. WILDE.—I don't think I ought to make any order as to costs. If I were satisfied conclusively, one way or the other, upon the issue, it might be otherwise, but as it is I do not think I ought to make any order.

Probate refused.—No order as to costs.

[LORDS JUSTICES.]

Nov. 6, 1865.

Re BULLEY'S TRUST ESTATE.

13 L. T. 264; 11 Jur. N.S. 847.

Will—Construction—Vesting—Remoteness.

PERPETUITY.—*The testator gave a fund to the trustees for his daughter for life, for her husband for life, and after the deaths of both he directed that the fund should be paid to all the children of his said daughter as soon as they should arrive or come to the age of twenty-two respectively, and not to go to his, her, or their heirs or assigns, but that the share of any child dying before twenty-two should go amongst the others of them who might arrive at that age; and if any child should die under twenty-two after the deaths of his (the testator's) daughter and her husband, he directed that only the interest should be paid or applied for his benefit until he should have arrived at the age of twenty-two. Only one child survived both the parents and lived to attain twenty-two:—Held (by Knight Bruce, L. J., upon principle and authority, and by Turner, L. J., upon the expressions of the will), that the gift was void for remoteness, and that the fund was distributable amongst the next of kin.*

This was a petition of appeal, presented by George Bulley Hayward, against a decision of Stuart, V.C., upon the construction of the will of George Bulley, the testator in the matter.

By that instrument the testator gave the residue of his real and personal estate to trustees upon trust to sell, dispose of, and convert the same into money, and to invest the same in their names, and to pay the interest, dividends, and annual income thereof to his daughter Mary, the wife of Leonard Hayward, for life, and after her death to the said Leonard Hayward for his life, and the will then contained the following passage:—

And from and after the decease of my said daughter, and her said husband, my will is, and I hereby direct, that the said moneys so vested in the names of my said trustees, or the survivor of them, or the executor or administrator of such survivor, shall be by him or them paid to all and every the surviving child or children lawfully begotten on the body of my said daughter, share and share alike, as soon as they shall arrive or come to the age of twenty-two years respectively, and not to go to his, her, or their heirs or assigns, or to any other person or persons on any pretence whatever; that is to say, the share of each child which may happen to die after the death of the said Mary Hayward and Leonard Hayward, and before it shall arrive at the age of twenty-two years, shall go amongst the other child or children who may arrive at the age

of twenty-two years, share and share alike; and if any one or more of the said children so begotten as aforesaid should happen to die under the age of twenty-two years after the death of the said Mary Hayward and Leonard Hayward, then and in such case my will is, and I hereby direct, that only the interest or yearly produce of the share or shares of such child or children shall be paid to him, her, or them, or for his, her, or their use and benefit, until each shall arrive or come to the age of twenty-two years respectively.

Mary Hayward, the testator's daughter, died in April of the present year, having survived her husband. There were six children of the marriage, but of these one only, George Bulley Hayward, survived his mother and lived to attain the age of twenty-two years.

The original petition was presented by a lady named Anne Bagnell, who was one of the co-heiresses-at-law, and also one of the next of kin of the testator, and its object was to have it declared that the gift to the children of Mrs. Hayward was void for remoteness, and that the fund representing the testator's real and personal estate was undisposed of by the will, and that she was entitled to a share thereof.

The learned V.C. was of that opinion, and declared accordingly, and Mr. George Bulley Hayward now appealed against that decision.

Charles Hall and Dickins, for the applicant, referred to *Bull v. Pritchard*, 1 Russ. 213; *Vawdry v. Geddes*, 1 Russ. & My. 203; *Bland v. Williams*, 3 Myl. & K. 411; *Taylor v. Frobisher*, 5 De G. & Sm. 191; *Davies v. Fisher*, 5 Beav. 201; *Taylor v. Bacon*, 8 Sim. 100; *Hammond v. Maule*, 1 Coll. 281; *Re Hart's Trusts*, 3 De G. & J. 195; *Sturgess v. Pearson*, 4 Madd. 411; *Re Baxter's Trusts*, 10 L. T. Rep. N.S. 487; *Hardcastle v. Hardcastle*, 1 Hem. & M. 405; s.c. 7 L. T. Rep. N.S. 503; *Milroy v. Milroy*, 14 Sim. 48; *Watson v. Hayes*, 5 Myl. & Cr. 125; 1 Jarm. on Wills (3rd ed.) 813.

Malins, Q.C., Dickinson, and Rudge, for the respondent, contended that there was no gift to the children of Mrs. Hayward, except the gifts contingently on their attaining the age of twenty-two years, and this was obviously void for remoteness. They referred to—

Leake v. Robinson, 2 Mer. 363; *Taylor v. Frobisher*, 5 De G. & Sm. 191; *Russel v. Buchanan*, 7 Sim. 628; *Festing v. Allen*, 10 M. & W. 279; *Batsford v. Kebbell*, 3 Ves. 363; *Milroy v. Milroy*, 14 Sim. 48; *Hart's Trusts*, 3 De G. & J. 195; *Davies v. Fisher* (*ubi supra*), overruled in effect the case of *Vawdry v. Geddes* (*ubi supra*), but it was contrary to all the other authorities.

Bevir for the trustees of the will.

Charles Hall having been heard in reply,

Lord Justice KNIGHT BRUCE said, that in his opinion there would be no reasonable ground for argument in the present case, upon the nature of the bequest in favour of the children of the testator's daughter, but for the provision for the payment of the interest accruing after her death, so long as any of her children should continue under the age of twenty-two, of the share or shares of the child or children so circumstanced. If that provision were absent there could be no rational ground for the contention of the applicants, considering the principles of this court and the state of the authorities. Did that clause import any intention in favour of a vested interest of the capital or any part of it? In his opinion, it did not. The clause was, he thought, inserted merely for the sake of greater caution; but the only intention as to vesting that it expressed was that nothing should vest under twenty-two, and the will must for the present purpose be read and construed as if that provision were not contained in it at all. A great number of authorities had been cited upon each side; and although he did not complain of this, he thought that two of them were sufficient to decide this case, he meant the cases of *Leake v. Robinson* and *Vawdry v. Geddes*. Having regard to these, and he repeated to principle also, it must be decided that there was no vesting

of the capital at all, and that the whole of the gifts contained in the will subsequent to the life-estates to Mrs. Hayward and her husband were void. for remoteness. The decision of the V.C. was perfectly correct, and it would be confirmed by their Lordships.

Lord Justice TURNER said that he was of the same opinion. He thought that the case might well be disposed of upon its own circumstances and the expressions which the will itself contained. After considering the phraseology of the will, his Lordship added that he did not say that the case of *Batsford v. Kebbell* was absolutely decisive of the present appeal, but it had certainly a very important bearing upon it. He, however, preferred to rest his decision upon the language of the particular will.

Malins, Q.C., said that his client had not only no desire to have the appeal dismissed with costs, but he was ready to allow the costs of all parties to come out of the estate.

STUART, V.C., Nov. 9, 1865.

FEAVER v. WILLIAMS.

13 L. T. 270; 11 Jur. N.S. 902.

Production of documents by solicitor—Solicitor and client—Documents of deceased client—Draft of a proposed bill settled by counsel.

DISCOVERY.—Where a bill was filed, charging a solicitor with fraud, and where a deceased client, of whom there was no legal personal representative before the court, was also included in the charge:—Held, on a motion for the production of documents, that all those bearing on the transaction, whether belonging to the solicitor or his client, must be produced.

On a motion for the production of documents:—Held, that a draft of a proposed bill in Chancery, settled by counsel, was a privileged communication.

This was a motion for the production of a large number of documents connected with the above suit.

The suit itself was instituted for the purpose of obtaining a declaration that the will of a Mrs. Catherine Loftus had not really been executed by her, and that it was fraudulent and void as against the parties entitled on her death to the property purported to be devised by it.

The bill alleged that the solicitor in whose possession the documents now were was a party to the fraud, and also that a deceased client, many of whose papers were in the hands of the solicitor, was concerned in committing it. Among the documents which the plaintiff desired the defendant to produce was a draft copy of a proposed bill in Chancery, settled by counsel.

Everitt, in support of the motion, contended that on a charge of fraud the professional character of a solicitor could not be set up as an argument for the non-production of the documents. There was no legal personal representative of the deceased client who could be brought before the court, and he therefore asked that the solicitor on behalf of his client might be ordered to produce the documents in question. He referred to *Charlton v. Coombes* (4 Giff. 372). He also referred to—

Goodall v. Little, 1 Sim. N.S. 155. *Glynn v. Caulfield*, 3 M. & G. 474.

for the purpose of proving that communications between co-defendants were not privileged.

Eddis, for the defendant, submitted that he could not produce the

documents without neglecting the interests of his client: it was a mere professional difficulty that had to be overcome; personally he had no objection whatever to their production.

Ferrars for other parties.

The VICE CHANCELLOR.—As the bill charges the solicitor with fraud, and as, moreover, no personal representative of his deceased client has been brought before the court, there must be an order for the production of documents generally, whether those of the solicitor or of his deceased client, which may in any way be calculated to throw light on the transaction in question. But as I can see no distinction in principle between a draft copy of a proposed bill, settled by counsel, and a counsel's opinion, I shall not order that document to be produced.

STUART, V.C., Nov. 10, 1865.

CROWTHER v. EVANS.

13 L. T. 271; 11 Jur. N.S. 902.

Will—Construction—Surviving daughter.

WILL.—*Testator by his will left a gift over to "surviving daughters":—Held, that "surviving" must be read as "other daughters," upon which construction the children of two deceased daughters enjoyed the benefit of the shares of all the other daughters who died subsequently without leaving issue.*

The question in this case, which arise on the construction of a will, was as follows:

The testator directed that in the event of either of his daughters dying without leaving issue at her decease, then the share and interest of such daughter should survive and go to and be enjoyed by his "surviving daughters." The testator then went on to extend the above direction to accruing shares.

There were five daughters, two of whom died leaving issue, the other three died subsequently without leaving issue, and the question which now came before the court, on petition, was as to whether the shares of the three sisters should go to the issue of the two who had died previously to them.

Bacon, Q.C. and Graham Hastings for the petitioners, the grandchildren.

Freeling, on behalf of the representatives of those daughters who died without issue, contended that it was the intention of the testator that the share of each daughter should at her decease go to the surviving daughter absolutely.

Waller appeared for other parties.

The VICE CHANCELLOR.—I consider that the word "surviving" must be read as "other." Upon that construction the whole of the property will go to the issue in moieties; that is, one moiety to each family of grandchildren.

STUART, V.C., Nov. 10, 1865.

ST. PAUL v. HEATH.

13 L. T. 271; 11 Jur. N.S. 903.

Thellusson Act (39 & 40 Geo. 3, c. 98), s. 2.—*Accumulations.*

ACCUMULATIONS.—*Testator by his will give the income of a share to his granddaughter, and the corpus, at her decease, to her children on their respectively attaining twenty-one. By a codicil he directed, in an event which happened, that the gift to the granddaughter was to be revoked, the income to be accumulated, and the accumulations to be "considered as part of the original fund from which the same arose, and thenceforth to be added thereto":—Held, though more than twenty-one years had elapsed, that the case did not fall within the Thellusson Act, and that all the children of the granddaughter were entitled during her life to have the accumulations of income added to the corpus.*

The question in this case had reference to the *Thellusson Act*.

The facts were as follows:

John Keen by his will, dated the 12th November 1842, after certain other directions as to his property, gave to his executors a sum of 25,000*l.* upon trust, *inter alia*, to pay the interest of one-third part or share thereof to his granddaughter Sarah Hebbert during her life; and directed that if she should die leaving lawful issue, her share should then go and belong to her children, share and share alike, to be vested on their respectively attaining the age of twenty-one years. The testator afterwards made a codicil in which, after reciting that his granddaughter was likely to marry one David Richard Jones, and that he disapproved of the proposed match, continued as follows:

"If my said granddaughter shall, either during my life, or after my decease, intermarry with the said D. R. Jones, no part of the dividends, interest, and income of the fortune I have provided for her by my said will, which shall after my decease and during such coverture accrue, shall be paid or become payable to her, but the same shall from time to time be laid out by the trustees in the purchase of Bank Three per Cent. Consolidated Annuities, and be accumulated during the whole continuance of such coverture, and all the investments and accumulations which shall be so made shall be deemed and considered as part of the original fund from which the same arose, and thenceforth be added thereto and go as part thereof."

On the 9th May, 1843, and in the lifetime of the testator, Sarah Hebbert married D. R. Jones, who subsequently changed his name from Jones to St. Paul.

The testator died on the 7th October, 1843; and on the 7th October, 1864, twenty-one years from the death of the testator had expired, and it then became a matter of some doubt to the parties interested whether the accumulations directed by the above codicil ought to be continued for the benefit of the children of Mrs. St. Paul, and if not, who was entitled to the income of the legacy since that date.

This bill was consequently filed by the children of Mrs. St. Paul, praying that the trusts of the will and codicil, so far as they related to the legacy and provisions made for the benefit of Mrs. St. Paul and her children, might be carried into execution under the direction of the court; that the rights and interests of all parties might be declared, and that the costs might be provided for out of the *corpus*, and be apportioned rateably among the respective shares.

Osborne, Q.C. and *Kay*, for the plaintiffs contended that the gift, by being portions to the legatees, came within the exception in the 2nd section of the *Thellusson Act* (39 & 40 Geo. 3, c. 98); the trusts, therefore, were valid for the benefit of the plaintiffs. They cited:—

Middleton v. Losh, 1 Sm. & G. 68; and *Barrington v. Liddell*, 2 De G. M. & G. 480.

Malins, Q.C. and *G. N. Colt*, for Mrs. St. Paul and her husband, admitted that the lady could not take the dividends, and also contended that they ought to be added to the original fund for the benefit of the children.

Surrage, for the residuary legatees, submitted that the trust for accumulation ceased at the end of twenty-one years after the death of the testator; that time having now expired, and the interest of the children being suspended until the death of their mother, a lapse had taken place, and the income fell into the residue.

The VICE CHANCELLOR said he considered it a valid trust, and that there must therefore be a declaration that the dividends which had accrued under the codicil were to be added to the original fund, and that the trusts were valid, notwithstanding the Thellusson Act, for the benefit of the children of Mrs. St. Paul.

WOOD, V.C., Nov. 10, 1865.

ASIATIC BANKING COMPANY v. ANDERSON.

13 L. T. 272.

Practice—Substituted service.

PRACTICE.—A solicitor, who had merely written to the plaintiffs' solicitors for a copy of the plaintiffs' bill (the defendant living out of the jurisdiction), is not such an agent as to allow substituted service to be ordered.

Cotton applied *ex parte* that service of a copy of the bill on a solicitor in London, who had been engaged for the defendant in other matters, and had written to the plaintiffs' solicitors for a copy of the bill filed in this cause, the defendant living in Scotland, might be deemed good service on the defendant, but

The VICE CHANCELLOR declined to make any order to that effect, remarking that the solicitor had not constituted himself such a general agent for the defendant, as was required by the practice of the court.

WOOD, V.C., Nov. 11, 1865.

Re THE TRENT, AXHOLME, &c. RAILWAY COMPANY, *Ex parte*
THE VICAR OF WAWBY.

13 L. T. 273.

COMPULSORY PURCHASE.—*Lands Clauses Consolidation Act, 1845—Title to land required—Value of the land.*

This was a petition by the Vicar of Wawby, in Yorkshire, to have an offer of 45l. for the sale and purchase of an acre of land, consisting of an old gravel-pit, which was nearly surrounded by the glebe land of a parish, confirmed, and that the title to it might be considered as good.

It appeared that, so long ago as 1805, an award had been made, by which it was ascertained that the pit or land in question, about one acre in extent, had been found to belong to the glebe of the parish of Wawby, and the value of it was stated to be 45*l.*, at which price the vicar was disposed to consent to its being taken, if the court should approve.

W. Foster, for the petitioner.

Streeten, for the railway company.

The VICE-CHANCELLOR, after inspecting a plan which indicated that the land proposed to be taken consisted of a pit, and was nearly surrounded by other land of the glebe of the parish, said that, under the circumstances, he thought the title as shown was sufficient, and that the value offered, 45*l.*, was a fair value, and made the order accordingly.

[IN THE QUEEN'S BENCH.]

Nov. 10, 1865.

RUSSELL (Clerk to the Local Board of Health) v. TRICKETT.

13 L. T. 280.

Local Board—Contract by deed—Surety for contractor—Liability of.

PRINCIPAL AND SURETY.—*By an indenture made between a local board (the plaintiffs) of the first part, certain contractors of the second part, and the defendant of the third part, the contractors covenanted to do certain work upon the basis of a certain specification; and the defendant covenanted to pay any losses that might be sustained from the non-performance of the work. The indenture recited that the specification had been signed by five members of the local board as was required by the local Act. In point of fact the specification had never been signed, although it had been acted upon. In an action against the sureties:—Held, that the mere fact of the specification not having been signed did not release the sureties from their liability.*

This was a demurrer to pleas.

The declaration stated that, by an indenture between the Local Board of Health of Merthyr Tydfil of the first part, Thomas Evans and Joseph Evans of the second part, and defendant and G. Kielman of the third part, T. and J. Evans covenanted with the local board to do certain works according to the conditions and schedule of prices set forth in a certain specification. The defendant and G. Kielman covenanted that if Messrs. Evans should not fulfil their contract and keep the conditions of the said specification, they would pay to the board such sums as they should spend, not exceeding 2,500*l.* The local board covenanted with Messrs. Evans to pay them 10,773*l.* and to keep the conditions to be performed on their part. It then averred that the Messrs. Evans did not fulfil their contract, whereby the local board were obliged to expend sums of money exceeding 2,500*l.* It then assigned a breach of defendant's covenant that neither he nor G. Kielman had paid the said sum of 2,500*l.*

The defendant pleaded three pleas on equitable grounds.

The first said that it was stated in the indenture that the specification was signed by five members of the local board, and that on the faith thereof the defendant executed the indenture, whereas it was not so signed.

The second said that defendant executed the indenture on the faith of the representation made to him by the board that the specification had been signed.

The third said that the defendant executed the indenture on the faith of the representation that the specification should be signed.

These pleas were demurred to, but as this raised the same question, no further notice of it is required.

The points set down for argument on the part of the plaintiff were, that the pleas were bad, because no ground for equitable relief was disclosed in either of them; because the statements relied upon in the first plea, and the representations relied upon in the second and third pleas were not shown to be either fraudulent or material, nor that the defendant, as surety, had been in any way prejudiced, all the terms of the specification on the part of the local board having been complied with.

The points set down for argument on behalf of the defendant were, that the defendant's liability as surety for the Messrs. Evans was discharged by reason of their not having had the benefit and protection under the contracts for which the defendant had stipulated, and on the faith whereof he became surety; also by reason of the non-execution by the plaintiffs of the specification, and also by reason of the misrepresentation made that the specification had been signed.

Beresford (with him *Manisty, Q.C.*), for the plaintiffs, in support of the demurrer.—The question is, whether the fact that the specification had not been signed does away with the defendant's liability. [*COCKBURN, C.J.*—Suppose it had been signed, how would the surety have been benefited? The object of signing the specification, I take to be to bind the board to the specification, to show that it was the basis of the contract.] As to the ground of misrepresentation, *Smith's Prin. of Eq.* 165, shows that for equity to interfere, the representation must be material, fraudulent, and that the party must be damnified.

Mellish, Q.C. (with him *Macnamara*).—One question is, whether signing the specification was not a condition precedent. By the local Act, the indenture must be in writing. Now the indenture recites that specification had been signed. That specification governs the contract. As long as not signed it might be altered. [*COCKBURN, C.J.*—No, no.] A recital in a deed may often be a condition. [*COCKBURN, C.J.*—The specification was fully agreed to. Work was actually done under it. How was defendant damnified?] All the damage that I can speak to was, that if obliged to prove specification he would be put to expenses to make plaintiffs sign it.

By the COURT.¹

Judgment for the plaintiffs.

SMITH AND ANOTHER, *appellants*, v. KERSHAW, *respondents*.

(APPEAL FROM A COUNTY COURT IN *Re KERSHAW v. OLDHAM*).

13 L. T. 298.

Interpleader—Trust-deed under section 192 of the Bankruptcy Act, 1861—Validity of as against execution-creditor—Possession under—Registration—Appeal from County Court.

BANKRUPTCY.—On the 10th August the furniture of Oldham in his dwelling-house was taken in execution by the County Court bailiff to satisfy a verdict recovered against Oldham by Kershaw in the County Court on that day, and was

(1) Cockburn, C.J., Mellor, Shee, and Lush, JJ.

redeemed by payment of debt and costs, and an interpleader summons was taken out to try the rights of the parties, on the hearing of which the appellants produced a deed dated 27th July, being an assignment from Oldham to them of his property, purporting to be made under the Bankruptcy Act, 1861, and to have been registered on 12th August. On 28th July appellants, by their agent, took possession of Oldham's stock-in-trade at his place of business, distinct and apart from his dwelling-house, and on the same day went to Oldham's dwelling-house and told him that they had come to take possession, but would give him time to raise money to buy the furniture back, and then left. Subsequently, and up to the time of the seizure by the County Court bailiff on 10th August, Oldham occupied the dwelling-house and had undisturbed control and possession of the furniture without any possession or interference on the part of the appellants, who sold the stock-in-trade on 4th August.

On a case stated by the County Court judge for the opinion of the Executor, whether the money in the County Court was to be paid to the appellants under the deed, or to Kershaw the execution-creditor, it was—Held, that the appellants were entitled to judgment.

Interpleader case stated by the judge of the Lancashire County Court, at Bury, under section 118 of 9 & 10 Vict. c. 95; the attorneys on each side not being able to agree in stating it.

On the 10th August, 1864, a verdict was given in favour of the plaintiff Kershaw in the above-named County Court against the defendant Oldham for 23l. 16s. 9d., and execution issued forthwith. The high bailiff seized the furniture in Oldham's dwelling-house on the said 10th August, and it was redeemed on payment of debt and costs, and an interpleader summons was taken out to decide the rights of the parties. After various adjournments the interpleader came before me on the 19th October, 1864. The present appellants produced a deed dated the 27th July, 1864, being an assignment of the property of Oldham to them, purporting to have been made under the Bankruptcy Act, 1861, and to have been registered on the 12th August, 1864. The execution of the deed was proved. Some objections to the introduction of the deed in evidence were taken by the attorney for the execution-creditor, which I overruled.

The appellants, by Edward Hill, their agent, took possession of the stock-in-trade of Oldham at his place of business, quite distinct and apart from his dwelling-house, on the 28th July. On the same day Hill went to Oldham's dwelling-house, and told him that he was come to take possession, but would give him time to raise the money to buy the furniture; that Hill then left, and that subsequently, and up to the time of the seizure by the high bailiff, Oldham occupied the house, and had the undisturbed control and possession of the said household furniture, without any possession or interference on the part of the appellants. Hill sold the stock-in-trade on the 4th August, 1864. On the 9th November I decided that sufficient possession of the household furniture was not given on the execution of the deed, and I was also of opinion, at that time, that the date of the registration of the deed, the 12th August, was an important fact in favour of the execution-creditor.

The question is, whether the money now in the County Court is to be paid out to the appellants, or to the execution-creditor?

Appellants' points.—The judgment of the court below is erroneous: 1. Because, assuming that possession of the household furniture mentioned in the case was not given on the execution of the deed dated 27th July, 1864, such circumstances would not avoid the deed, or prevent the property in the goods thereby assigned from passing to the appellants. 2. Because, inasmuch as it does not appear, and is not found as a fact by the court below, that the said deed was fraudulent, the said furniture passed to the claimants and appellants. 3. Because non-compliance with the 7th condition of section 192 of the Bankruptcy Act, 1861, did not prevent the deed from passing the property

in the furniture to the claimants, but only disabled the debtor from using such deed as a defence to the claim of his creditors. 4. Because, for the reasons aforesaid, judgment in the court below ought to have been given in the appellants' favour.

Respondent's points.—1. That the deed of 27th July, 1864, was invalid and inoperative, because the provision of the Bankruptcy Act, 1861, requiring possession of the property comprised in such deed to be given up immediately on the execution thereof was not complied with. 2. That the judgment-debtor's property was not protected from the execution issued by respondents, because at the time of such execution the said deed of 27th July, 1864, had not been filed and registered. 3. That the said deed was executed for the purpose of delaying and hindering creditors and was therefore fraudulent and void. 4. That there was evidence that the deed was fraudulent and that the learned judge of the County Court was justified in deciding against the claim of the appellants upon such evidence. 5. That it appears, from the facts stated by the learned judge of the County Court, that the said deed was invalid and that the property in the chattels and effects comprised in it did not pass to the appellants. 6. That the decision of the judge of the County Court was a decision upon facts, or upon a mixture of law and fact, and that therefore no appeal lies against such decision. 7. That no appeal lies against the decision of a judge of a County Court in an interpleader.

Gray, Q.C., for the appellants.—The appellants, who were the claimants in the interpleader, were entitled to the money. The point was this: a deed for benefit of creditors under the Bankruptcy Act, 1861, had been executed by the plaintiff, the execution-debtor, under which it was necessary, according to the requirements of that Act, that possession of the property comprised in such deed should be given to the assignees (the appellants), and the County Court judge decided that, because possession was not given, therefore the property in the goods did not pass. The question, therefore, was, whether the plaintiff (the execution-creditor) or the appellants (the claimants) were entitled to the property. The case was decided by *Symons and another v. George and another*, in error (13 L. T. Rep. N.S. 190; 3 H. & C. 68; 34 L. J. 187 Ex.), in which the Court of Exchequer Chamber affirmed the decision of this court. [BRAMWELL, B.—What question arises here? The notion generally entertained about the operation of the 7th clause of the 192nd section of the Bankruptcy Act, 1861, is, I think, a mistake.] (He was stopped.)

Holker, for the respondent, would not contend, after *Symons v. George*, in error, that, although the statutory requirements were not complied with, therefore the deed was not good at common law; but he contended the judge was warranted in coming to the conclusion that the deed was not good. The deed here was in the form given in schedule D. to the Bankruptcy Act, 1861, for the benefit of creditors, but it did not appear that it was executed by any one but the debtor. It might be said, it was not a deed to defeat creditors, as it was for their benefit, but a man with two or three creditors only might execute such a deed, and be left in possession, and so get fresh credit from others. [PIGOTT, B.—That is for a jury.] Just so, and the County Court judge having found as a fact that the deed was void within the statute of Eliz., this court could not review his decision on a matter of fact. But there was a point behind this, namely, that there was no appeal here. Appeal in County Court cases was given by section 14 of 13 & 14 Vict. c. 61. To ascertain what cases came within that, it was necessary to refer to the original Act, 9 & 10 Vict. c. 95, by the 58th section of which the jurisdiction of the court was defined. By section 118 of the 9 & 10 Vict. interpleader was given, and no doubt the jurisdiction of the court was increased by the subsequent Act of 13 & 14 Vict. and by section 2 of the latter Act, that Act and 9 & 10 Vict. were to be read as if incorporated in one Act. In giving appeal the Legislature contemplated cases where the amount was settled, but in interpleader there was nothing to show the value of the goods; the claimant had not to state the value and the judge had not to decide

it. [PIGOTT, B. referred to Pollock's County Court Practice, where, in a marginal note referring to section 68 of 19 & 20 Vict., he says there is a power of appeal in cases of interpleader.] There was, however, ample evidence to support the judge's decision, and the reasons stated for his decision were immaterial. [BRAMWELL, B.—The goods cannot be taken by the execution-creditor unless the deed be a bad deed at common law. Now here there is no evidence to show that the deed is bad at common law.]

By the COURT (Pollock, C.B., Bramwell, Channell, and Pigott, BB.)

Judgment for the appellants with costs.

[PROBATE.]

Nov. 7, 1865.

In the goods of T. KELLY (deceased).

13 L. T. 303.

Will lost or mislaid—Neglect of executor and parties interested to obtain probate—Parol evidence of substance—Practice.

WILL.—*The Court is always reluctant to grant probate of a document not before it, and it will not, as a rule, grant probate of such document on motion.*

The testator duly executed a will, for which he had given instructions some time previously to his death, and after the funeral it was read in the presence of the parties interested. The executor neglected to prove, and no steps were taken to compel him to obtain probate. Some years afterwards, the testator having died in 1859, it was deemed advisable to obtain probate, but the will then could not be found.

Dr. Pritchard was now proceeding to move for probate on affidavits, when

Sir J. P. WILDE (interrupting).—The testator died in 1859, and because the parties did not think it worth while to prove his will, they purposely abstained from coming to probate. I have frequently refused probate under such circumstances.

Dr. Pritchard.—The party whose conduct has occasioned it is the party who will not suffer by your Lordship's order. The executor who had charge of the will is the person who should have proved.

Sir J. P. WILDE.—Those who were interested in the will had the means of making him prove it. They did not choose to do that, and it remained uncared for.

Dr. Pritchard.—There was no necessity for the will being proved at that time.

Sir J. P. WILDE.—The court is always reluctant to grant probate without the document being before it; and it certainly will not do so on motion. You must propound the will.

STUART, V.C., Nov. 17, 1865.

COOPER v. WELLS.

13 L. T. 319; 11 Jur. N.S. 923.

Will—Construction—Married woman—Separate use.

HUSBAND AND WIFE.—*Gift to a married woman with a direction that, notwithstanding coverture, her receipt shall be a sufficient discharge:—Held, to be a gift for her separate use.*

This suit was instituted for the administration of the estate of Isabella Rayner, and for ascertaining the rights of all parties interested in her residuary personal estate.

The testatrix, by her will, dated the 29th September, 1864, after bequeathing certain pecuniary and specific legacies, gave, devised, and bequeathed all her real estate and the residue of her personalty unto and equally between Elizabeth Furby and Sarah Rayner, their heirs, executors, administrators, and assigns, as tenants in common, subject to certain payments therein mentioned. And the testatrix directed that the receipt or receipts in writing of such of her legatees as should be married women should be good and sufficient discharges for so much money as in such receipt or receipts was expressed to be received by them, notwithstanding coverture.

The testatrix died in October, 1864.

The question now to be decided by the court was, whether Elizabeth Furby, a married woman, took her moiety of the residuary estate for her separate use, or whether it was affected by the trusts of her marriage-settlement.

Nalder, for the plaintiff, the executor, asked for the opinion of the court as to whether that part of the will which directed that the receipts of the legatees should be sufficient discharges, entitled Elizabeth Furby to take the property for her separate use. He referred to—

Lee v. Prieaux, 3 Bro. C.C. 381.

G. Williamson appeared for the defendant Elizabeth Furby and her husband.

Marriott for other parties interested.

The VICE-CHANCELLOR said he was of opinion that Mrs. Furby took that part of the residue of the personal estate bequeathed to her for her separate use.

Wood, V.C., Nov. 3, 4, 1865.

PICKERING v. THE CAPE TOWN RAILWAY AND DOCK COMPANY
AND OTHERS.

13 L. T. 357; L. R. 1 Eq. 84: reversed, 13 L. T. 570 (L.C.).

Award—Arbitration—Staying proceedings—Common Law Procedure Act, 1854, s. 11—Jurisdiction.

ARBITRATION, REFERENCE AND AWARD.—*Upon a proper case made, the Court will interfere to prevent an arbitrator, to whom all matters in difference have been agreed to be referred, from making his award.*

An arbitrator, as such, has no power to decide whether a particular contingency referred to by the contract between the parties has arisen or not.

Where a party has interfered with reference to some of the matters referred, by appealing to another tribunal—such as a colonial court—this court will not limit the other party to the reference to the investigation before the arbitrator, but allow him to assert his legal or equitable rights as he may think fit.

This was a motion on the part of the defendants, the Cape Town Railway and Dock Company, that all further proceedings in the suit should be stayed against all the defendants, the Cape Town Railway and Dock Company being willing and offering to submit to such terms or conditions for proceeding with the reference to the matters in difference between them and the plaintiff, as might be imposed upon them by the court.

The bill, which was of great length, consisting of 536 paragraphs, prayed (*inter alia*) to declare the rights of the parties as to five certain contracts for the construction of the Cape Town Railway and Docks, and for accounts to be taken under these contracts; to declare that the company was not entitled to determine such contracts, as they had attempted to do, by certain notices, and that such notices were null and void; a declaration that the company was liable to pay to the plaintiff the full value of such works done by the company since they had taken them out of the hands of the plaintiff; and various other special declarations and accounts upon the footing of the construction to be put upon the several contracts; that it might be declared that the duties, powers, &c., delegated to Mr. Hawkshaw as "standing referee" under these contracts had ceased and determined on a given day; and that the company might be restrained by injunction from further taking or prosecuting any proceedings to obtain the award of such standing referee.

There was also a cross-motion of the plaintiff for the injunction as prayed.

The defendants had not answered the plaintiff's bill.

The circumstances connected with the several matters in difference between the parties were fully set out in the bill, but it may be sufficient for the purpose of this report to say that all matters in difference were admittedly agreed to be referred to Mr. Hawkshaw, the celebrated civil engineer, the plaintiff however alleging that as to two questions in the cause no provision for such reference was made, viz.: first, the plaintiff's alleged right to take all contracts which the company might undertake either with their original capital of 600,000*l.* or with any additional capital; and secondly, the right of the plaintiff to have refunded to him certain large sums for calls paid by him on the transfer of 7,800 shares standing in the name of one Shield, a shareholder in the company.

These two questions the plaintiff contended the court had no power to transfer to the arbitrator, which did not constitute a case of account provided for by the Common Law Procedure Act, but a question of liability which this court alone had power to entertain.

The submission to refer contained in the contracts had been made a rule of court.

The agreement to refer is of course set out in the contracts, but the exact terms, which it will be seen are very full and ample, are referred to in the Vice Chancellor's judgment, as are also the general facts in question, and the arguments of counsel.

Sir H. Cairns, Q.C., Giffard, Q.C., and Bedwell, in support of the motion to stay proceedings. They cited—

Maunsell v. Irish Great Western Railway Company, 1 Hem. & Mill. 176. Common Law Procedure Act, 1854, s. 11. *Dimsdale v. Robertson*, 2 Jo. & Lat. 58.

Rolt, Q.C., and C. Locock Webb, for the plaintiffs.

Cairns, in reply.

Nov. 4.—The VICE CHANCELLOR said:—With regard to the motion to stay

proceedings, I am of opinion that I can make no order. It seems to me further, with reference to the powers of Mr. Hawkshaw having ceased, that what is asked on the part of the defendants cannot possibly be done, inasmuch as it appears that the seizure of the works by the company has placed the matter in an entirely different position, and I think that nothing ought to be done before the arbitrator until after the hearing of the cause. The seizure of the works having taken place, the matter is out of Mr. Hawkshaw's hands. I think the proper course would be not to make an order on the first motion, but to stay proceedings before the arbitrator until after the hearing. What struck me in the course of the case was this, that as regards Mr. Hawkshaw, it would be better to dismiss him from the suit. It seems merely nominal bringing the arbitrator here. He does not appear, and the sooner he is dismissed the better. Now, I quite agree with what has been said as to this being a totally new course of proceeding to interfere with an arbitrator on the ground that he is about to assume a jurisdiction which he has not, and to prevent him from proceeding in the case. That is, in fact, the relief asked against Mr. Hawkshaw. We have nothing here in the nature of a writ of prohibition authorising the court to proceed against the arbitrator, and the only thing that can be done in all these cases, and in the jurisdiction at all with reference to stopping proceedings before an arbitrator, must be founded upon the contract of the parties who are seeking to set in force certain rights which they conceive they are entitled to exercise under a deed of submission to reference, but which the court may be of opinion they are prevented from exercising from the course of conduct which has been adopted. And then there arises an equity against them with regard to other proceedings at law which prevents them, however they may be entitled to assert their right to proceed under a particular jurisdiction beyond the control of this court. Now, as regards the present state of circumstances, the original deed provides, no doubt, for Mr. Hawkshaw being what is called the "standing referee," and it gives him power in the largest terms to settle all differences that may arise between the parties under the original contract. It is undoubtedly true that they are of a very full and complete character, they being expressed in these words: "All matters and questions which according to this contract are to be determined by arbitration, and all questions arising between the company on the one hand and the contractor on the other hand touching the construction, intent, effect, incidents, consequences, or fulfilment of this contract, or touching any breach or alleged breach or nonfulfilment of any of the terms and conditions of this contract, or touching any damages, costs, or expenses, by reason of or any other consequences of any such breach or nonfulfilment, or alleged breach or nonfulfilment, or otherwise, touching the premises, shall be referred to and determined by the 'standing referee.'" And there is also, which it is desirable to notice, in that same original contract a special clause, giving further time to the contractor in which to complete his works, in the event of being delayed by the act of the company, or by anything in the shape of invasion or other contingencies which are pointed out, and there it is especially declared that the referee shall be the person to decide whether or not there has been a default on the part of the company (as regards the contractor) in furnishing land, or any other default on their part, or whether there has been any other reason with respect to which he would be entitled to demand an extension of time. There is not contained in the contract that which one often finds (it is, however, in the supplemental contract), any power for the company, in the event of the contractor not proceeding in the manner they desire, to seize the works themselves and proceed to complete them at the expense of the contractor. Then, after that, there comes what is called the supplemental contract. I pass over the intermediate contract with reference to the particular deviation which is contemplated in the supplemental contract. The second clause says: "This contract shall be supplemental to the said recited contract; but, so far as any of the articles

of this contract conflict with any of those of the said recited contract, or with any of the provisions agreed to by the documents set forth in the said schedule hereto, the articles in this present contract shall prevail." Now, the second contract has a recital which states that that arose from a certain correspondence which had taken place between the agents of the several parties to the original contract, and which was intended to be embodied in this contract. That correspondence is set forth in the schedule, with a proviso that, if there is any discrepancy between the correspondence and the agreement which was intended to carry it into effect, the words of the agreement shall prevail. Now, that being so, it is contended (and I am not at present going to express any opinion upon that, because that will be more correctly expressed at the hearing)—it is contended that all the powers of Mr. Hawkshaw with reference to the provisions of the original contract are imported into and embodied in the present contract, which contains a clause (the seventh) which introduces that which had not been introduced before, namely, a power for the company to seize the works and complete them at the expense of the contractor, in the contingencies that are here mentioned. The seventh clause is this: "If the contractor shall, from any cause not attributable to any improper act, or any neglect or default on the company's part, or to circumstances beyond his control, neglect or omit to complete the said railway and telegraph as far as Stettenbasch in the manner and time hereinbefore mentioned, or to complete the contract work on or before the 5th October, 1861, or to obey and conform to the written requirement, as aforesaid, of the company's engineer for the time being, either in England or the colony, the company shall be entitled, on giving fourteen days' notice, to take the railway, telegraph, and works," and to proceed with them and to compel the contractor to pay all the expenses which they may be put to. And then it finishes in these words: they are "to pay such amount in respect thereof as may be agreed on or may be reasonable, and all such payments as may be required to be made, and shall in fact be made by the company for or in relation to the further execution and completion of this contract, and the entire fulfilment of the engagements hereby undertaken by the contractor, and also the amount of any penalties payable by the company, or of any loss or damage sustained by them by reason of any delay or nonfulfilment of the contract (which last amount shall be ascertained and settled by the standing referee) shall be deducted by the company out of the money (if any) remaining in their hands unpaid, or in reserve on the contract sum." I ought, perhaps, to have noticed the fourth clause of the contract, which says that every requirement which the engineer of the colony shall make shall be in writing, respecting the manner of executing the amount of work to be done, or the materials to be supplied, or any works, operations, or things relating thereto, shall be at once complied with by the said contractor; he is at once to set to work to do it, and there is to be a reference, if desired, to Sir Charles Fox, or other the consulting engineer for the time being of the company in England, and the said Joseph Robinson, or in case of death or incapacity of the said Joseph Robinson or any other of the sureties for the time being," and only in default of their coming to a conclusion is that particular point to be determined by Mr. Hawkshaw, the arbitrator. Now the contest before me on the part of the plaintiff has been this: in the first instance, that the whole of the original contract and this contract too provides for the existence of the standing referee only until the time that the railway is completed and open for public traffic, because there is a clause which speaks of a certificate being given by an engineer as to its being completed as well as being open for public traffic. At present I am not inclined certainly to rely upon the agreement which has been adduced before me to shew that Mr. Hawkshaw's powers ceased as soon as the company seized the railway under the circumstances which I shall presently advert to, and completed it themselves and opened it for public traffic, because, as at present advised, it is not within the provisions of the

assessorial powers of Mr. Hawkshaw that the railway should be opened, whether complete or incomplete for the safety of the public. It does not to my mind appear that the powers of Mr. Hawkshaw ceased until the entire completion of the contract. What I do proceed upon is this: in the first place, I have very grave doubts indeed whether they ever extend to this particular contingency which has happened; but if they do so extend, I am clearly of opinion that they have been waived, and, having been waived, it is impossible for the defendants now to assert that jurisdiction on the part of Mr. Hawkshaw in contradistinction of the ordinary tribunals of the country, before which the plaintiff has sought to be relieved, because upon this seventh clause it appears to me that, although Mr. Hawkshaw was appointed the referee under the contract as it at first existed, there was no power for the company *brevis manu* to determine the engagement, and enter upon and complete the work. It is by no means clear that, when the supplemental agreement is made, you shall import into the second that this special clause, which is very special in its character, is to give Mr. Hawkshaw the power of determining whether or not the contingency has happened upon which the company are solely to be entitled to enter. This is a new power, and a power of a very grave and serious character. I do not at all concur in the argument which has been addressed to me on the part of the defendants, that the contractor was here seeking favours from the company, and obtaining favours from the company; it appears that the company obtained very great advantages from him. Possibly it was a mutual arrangement on both sides, but certainly it was as favourable to the company as to the contractor. But now, with regard to this new and important power, it seems to me, to say the least of it, exceedingly questionable whether there is any jurisdiction in Mr. Hawkshaw with reference to the main question, as to whether or not the contingency has arisen upon which the company is entitled to take possession of the works. That doubt is strengthened certainly by this circumstance, that when you come to the latter part of the clause, as to what payments the company are to receive, the company are to be paid for certain things, namely, the money which they shall properly expend in completing the contract; they are to be paid for any penalties that they may incur with the Government of the Cape of Good Hope in consequence of the non-completion of the contract, and they are to be paid for loss or damage sustained by any delay, which last amount shall be ascertained and settled by the standing referee. I must say I think it most extraordinary, if the parties intended that the question of whether or not the money was properly expended was to be determined by the referee, that they should specify three distinct points in which the company are to be reimbursed, one being a question of doubt and of difficulty as much as any other, namely, what was the amount properly required by the company and properly expended by them when they had completed the works which the contractor ought to have completed. Then they were to ascertain the penalties, which perhaps might be easily ascertained by the mere fact of payment, and would not require the assistance of the referee. That is the second point. The third point is, that they are to be recouped with respect to the damages, and for that the action of the referee is to be called in aid. Certainly, if there ever was one case in which the mention of one thing distinct and clear excluded the others, it is in this case, when it is stated that the last of those three things is to be ascertained and settled by the referee. Mr. Giffard has told me of some points in the original contract in which the referee is specially mentioned in respect of particular matters, although he has also a general power given to him; but it appears to me that that is a very different thing to a clause which in the same breath mentions three separate things, and out of those one single thing only is selected in which the referee is to exercise his judgment, and not a word is said about the other two. Further than that, the question of determining the consequences of the breach of contract appears to me to be a different thing from

ascertaining whether or not the company have a right to say that the referee is to determine that matter of fact which would take place in the colony; and obviously and naturally in itself it would not be desirable to be determined by Mr. Hawkshaw residing here at a great distance from it, namely, whether or not such a breach of his duty had taken place on the part of the contractor, and independently of any default on the part of the company as authorising them that they should proceed to take possession. What took place at the colony was this: in the colony the company attempt to seize the work by force, and the contractor resists, and says, "I will raise the question with you; if I have been guilty of any delay in completing the works, the delay is due to you; you have delayed giving me possession of the land, and you have caused delays in various other ways. I am not the person responsible, and therefore the seventh clause has no application." It came to be a matter of violence, it appears, between the two parties; but it was soon seen that course of things could not proceed. They therefore apply to the tribunal of Cape Town to give them possession, and the consequence is that they obtain an order from the court in Cape Town, and that is the order under which they take possession. It is stated in the bill (and there is no averment to the contrary before me) and sworn, that the court said (and it appears to me upon the face of the order to be consistent with it) that they were not prepared to determine the question as to who was in the right or who was in the wrong; but that somebody must be put in possession. Of what may be done at the hearing—when we are determining the rights as to whether or not the company were justified in the seizure—I say nothing. It is possible that some power and authority of the referee may yet remain with reference to the settlement of the disputed items; but it is quite clear that this great and main question in the cause must be decided through his medium, and until that is decided no useful reference could be proceeded with. I therefore decline to make any order on the motion to stay proceedings. I restrain the company from proceeding in the reference before Mr. Hawkshaw until the hearing or further order.

[IN THE COMMON PLEAS.]

Nov. 22, 1865.

REG. v. THE PATENT EURIKA AND SANITARY MANURE COMPANY
(LIMITED).

13 L. T. 365.

Indictment—Change of venue—For what cause alone permitted.

CRIMINAL LAW.—*The court will not permit the venue in an indictment to be changed for any other cause than the inability to obtain a fair trial in the original jurisdiction.*

Where, therefore, an indictment for a nuisance was found against the defendants at the last assizes for Cheshire, and an action for the same nuisance was brought against the defendants in the Court of Common Pleas, and an application was then made to such Court of Common Pleas for an injunction under section 82 of the Common Law Procedure Act, 1854, which was discharged upon the undertaking of the defendants to consent to the indictment being tried at the ensuing winter assizes for the city of Manchester, the Court of Queen's Bench refused to permit the trial to be had at such assizes.

This was an indictment found against the defendants at the last assizes for the county of Chester for a nuisance, and which, therefore, stands for

trial at the next spring assizes for that county. An action had also been brought, and is now pending against the said defendants, for a nuisance arising out of the same facts, and in that action the plaintiff applied to the Court of Common Pleas, in which it was brought, under the 82nd section of the Common Law Procedure Act, 1854, for an injunction against the defendants. Upon the argument of that rule it was suggested that the indictment might be tried, and so the question be settled at an earlier period than the ensuing spring assizes—namely, by the venue being altered to Manchester, for which place an assize will be held early in the coming month of December. To this the defendants assented, and the rule for an injunction was accordingly discharged upon the undertaking of the defendants not to offer any opposition to the trial of the indictment at Manchester. At the Crown Office, however, it was stated that upon an indictment no such change of venue had ever been known or permitted; the only ground of change being inability to obtain a fair trial.

McIntyre thereupon obtained a rule to enter a suggestion on record that the indictment can be more conveniently tried at Manchester than at Chester, and he now moved to make that rule absolute, and contended that, as the matter was a pressing one, involving the health of the neighbourhood, and as the manufactory, though in Cheshire, was, in fact, within seven miles of Manchester, the court should permit the change. [COCKBURN, C.J.—The master of the Crown Office informs the court that there is no instance of a change of venue in a criminal case except upon the ground of the probability of not obtaining a fair trial in the original jurisdiction.] In the case of *Clark v. the Queen* (29 L. J. 232, Q.B.) a change was permitted upon similar grounds as the present. [COCKBURN, C.J.—That was a *quo warranto* information, which in reality is to try a civil right.] The principle is the same. It may be suggested then that a fair trial cannot be had in Cheshire. [*Quain* said he was ready to assent to that if it could be done.] [COCKBURN, C.J.—We cannot sanction such a suggestion unless there is an affidavit of the fact.]

Quain appeared for the defendants, and stated that, in accordance with the undertaking he gave in the Common Pleas, he was ready to agree to any arrangement by which the indictment might be speedily tried.

COCKBURN, C.J.—This court cannot interfere upon the subject. There is no precedent whatever for changing the venue upon a suggestion of the convenience of the parties. If the court could be satisfied that by retaining the venue a fair trial could not be insured, it might be otherwise. We should, moreover, be exceedingly averse to allowing the indictment to be tried at the ensuing Manchester assizes, which are about to be held for the convenience of the inhabitants of that city alone, and the holding of which, as it is, seriously interferes with the progress of business in London.

Rule discharged.

KINDERSLEY, V.C., Nov. 15, 1866.

CARROLL v. GRAHAM.

13 L. T. 391; 11 Jur. N.S. 1012.

Demurrer—Bill by reversioner for an account—Undue exercise of power—15 & 16 Vict. c. 86, s. 50.

POWERS.—A bill by the reversioner stated that a testator by his will gave property to his wife for life with power to give to his child or children such portion as she might think proper; but if his children should die before attaining twenty-one, he gave the property to his brother; that the widow expecting

the instant death of one of the children, which shortly afterwards happened, affected to exercise by deed-poll a power of appointment in favour of this child, reserving to herself a life-interest; and that the widow claimed as next of kin of the child; the bill prayed that the deed-poll might be declared void, and also for accounts. Demurrer on the ground that it did not appear that the deed was a fraudulent or ineffectual exercise of the power, and also on the ground that no case had been stated to entitle the plaintiff to discovery or relief during the life of the tenant for life:—Demurrer overruled.

This suit was instituted to set aside a deed-poll made under the following circumstances:

The testator in the cause, W. Carroll, after directing by his will payment of his debts, and giving a sum of 1,000*l.* upon certain trusts, disposed of his residuary estate in the following manner:

“The residue of my property that I may have at this time or hereafter become possessed of, whether freehold, leasehold, or personal, I leave to my wife S. E. Carroll, for the term of her natural life, with full power to her to will or give at any time, to any child or children I may have, such portion thereof as she may think proper and wish. And in case that I shall not have any child or children, or if any that all such should die before attaining the age of twenty-one years, then and in such case I bequeath the reversion after my wife's death, and child or children's, if they should not attain the age of twenty-one years, to my brother B. H. Carroll for his own use and benefit, with as full power to let, sell or otherwise dispose of, as I have now, or may have at any time hereafter.”

The testator died in 1851, leaving the defendant, S. E. Graham, then S. E. Carroll, his widow, and three infant children, one son and two daughters, surviving him. One of these daughters died an infant and unmarried in 1853. The other daughter also died an infant and unmarried in 1863. The testator's widow married Mr. Graham in 1860.

The plaintiffs were the trustees and executors of the will of B. H. Carroll, the testator's brother and reversioner under his will, B. H. Carroll, having died in 1862.

The bill alleged that, prior to 1862, the infant son of the testator, W. Carroll, fell into a state of mental infirmity, and was placed by Mr. and Mrs. Graham in a private establishment for the care and custody of imbecile persons; that while there his bodily health declined, and he ultimately became so ill that Mrs. Graham, at the time abroad, was informed that her son's death was then imminent, and that if she wished to see him again alive, she must come over to England immediately; that she accordingly arrived at the establishment in question on the 26th July 1863, and that she then became a constant attendant on her son until his death on the 1st August, 1863. The bill further alleged that the son was so dangerously ill that, throughout the whole time Mrs. Graham was with him from the period of her arrival at the establishment, his early and instant death was expected by his medical attendants, and must also have been expected by Mrs. Graham; that notwithstanding these circumstances, Mrs. Graham, by a deed-poll dated the 28th July 1863, and expressed to be made in execution of the power given to her by the will of the testator, attempted or affected to give and appoint unto her son, his heirs, executors, or administrators (*inter alia*), all the real estate and all the personal estate of the testator, subject only to the reservation to herself of a life-interest in the same. The bill further alleged that Mr. Graham, in right of his wife Mrs. Graham, and their infant children, claimed, as sole next of kin of the testator's infant son, to be entitled to the personal estate attempted to be appointed by the deed-poll of the 28th July, 1863. The bill therefore prayed for a declaration that this deed was void and of none effect, and also for accounts.

The defendants Mr. and Mrs. Graham demurred to so much of the bill as is above stated, on the ground that it did not appear by the bill that the deed

in question was a fraudulent, undue, or ineffectual exercise of the power therein mentioned, and also on the ground that the plaintiffs had not stated such a case as entitled them to any discovery from or relief against the defendants, at all events during the life of Mrs. Graham. The defendants answered to the rest of the bill.

Glasse, Q.C. and *Bird* in support of the demurrer.—The plaintiffs ask for a decree under sect. 50 of the Improvement of Jurisdiction of Equity Act (15 & 15 Vict. c. 86), but the tendency of the decisions has been to limit the operation of this section. The result of the decisions is that, as a general rule, the court will not interfere at the instance of remaindermen to determine rights which have not come into possession. The bill does not state anything to impeach the deed. They cited

Lady Langdale v. Briggs (8 De G. M. & G. 391; 26 L. J. 27, Ch.; 2 Jur. N.S. 982). *Ferrand v. Wilson* (4 Hare, 344). *Fyfe v. Arbuthnot* (1 De G. & J. 406). *Morgan's Chancery Acts*, 3rd edit. 207.

Baily, Q.C. and *French*, for the plaintiffs, were not called upon.

The VICE CHANCELLOR.—I really do not feel any doubt about this case. The demurrer is only to part of the bill, viz., to so much as seeks relief in respect of the deed-poll of appointment of the 28th July, 1863, and also to so much as seeks a general account of the assets, in fact, the general common account. To all the rest, viz., to the claim in respect of the 1,000*l.* legacy and the claim in respect of the real estate, the defendants answer. The grounds upon which the defendants demur to these two portions are stated as three, but may be considered as two: one, that there is no ground at all for disturbing the deed of appointment, or for challenging its validity; and supposing that ground fails, then that there is at all events no ground for the plaintiff to ask assistance of the court during the life of Mrs. Graham. As, therefore, I am of opinion that the demurrer must be overruled, and as the effect of this will be that the cause must come to a hearing, of course I abstain from going into the merits of the case. I merely advert to the fact that by the will of the testator, so far as relates to the general personal estate (I only touch upon that at this moment, desiring to abstain from going into what is not necessary for the present purpose, for fear I should prejudice any question), the residue of his property, which includes the residue of his personal estate as well as real estate, is given to his wife for her life, then there is a power to her "to give or will at any time, to any child or children I may have, such portion thereof as she may think proper and wish." Then comes the clause that if the testator should have no child, or if any, that all such should die before attaining the age of twenty-one years, then he gives the property to his brother B. H. Carroll, the testator of the present plaintiff. Now merely looking at that, the demurrer says, the plaintiff has no right to have any investigation or any account taken of the personal estate, because of the existence of this deed. But this deed is an appointment under a power, and it does not appear that in the will, *quoad* the residuary estate, there is any power to the testator's wife to appoint it so as to override the gift over in the event of all the children dying under twenty-one; and then when we come to look at the facts under which the appointment is made (and I will only touch on them very lightly), we find they are these: the son a lunatic, for a considerable time confined as a lunatic, dangerous to himself and others, in a state of confinement, being then in that desperate state of illness that the medical men expected his dissolution from day to day, and sent over to Mrs. Graham, his mother, who was then at Homburg, requesting her to come over immediately if she wished to see her child alive; and she, coming on the 26th, finds him in that state that she concurs in the expectation of the medical men, who expected his immediate decease; she arrives on the 26th; two days afterwards, on the 28th, she exercises the power of appointment; that is to say, she executes this deed of appointment, and then the boy dies on the 1st

August. Now I will not do more than ask how it is possible for me to hold (merely confining myself to the account of the general personal estate) that the plaintiff will not be entitled to some relief at the hearing. Therefore, on that ground alone, without going more into the details, which I could only do in a manner which might prejudice the question, I am of opinion that the demurrer cannot be sustained. Then comes the question, can it be sustained on the ground that whatever right of relief the plaintiff has, he cannot have any as long as Mrs. Graham lives, on the ground that his interest is reversionary, and that he has no right to come here until his interest falls into possession? Now, looking at it in this way, if there were no such deed-poll made by this lady, what would be the effect? That Mr. Carroll, or his representative now that he is dead, being reversioner expectant upon the death of Mrs. Graham, would be entitled to come here and ask for the common accounts of the personal estate. It is insisted by the defendant that it is the deed-poll that takes away that right; so the contention comes really to this: "You have no right to come here to ask for what otherwise would be your right, because of this deed-poll existing; and you have no right to come here to get this deed out of the way, because Mrs. Graham is still living, and therefore your interest is reversionary." Of course I need not say that I entirely accede to the doctrine of those cases cited as to the doctrine of declaration, supposing a will is made by which an interest is given to A. for life, and a question arises whether it is not given to B. in fee, that B. cannot come to have a declaration that after A.'s death he is entitled to the property, because the declaration will not give him any immediate right; he would not be able to exercise any immediate right by reason of the declaration if he got it. But here, if the plaintiff is right that the deed-poll ought not to stand, his reversionary interest gives him a present right to come into this court to ask for an account of the personal estate. Therefore it appears to me that those cases really have no application to the present. The plaintiffs *prima facie* have a right to an account, though their interest is reversionary; the remainderman or reversioner of personal estate has a right to come here and ask for an account of personal estate, although the tenant for life is living—that right they have, unless they are deprived of it by the deed; and they say the deed is bad. But, say the other side, "You must not attack the deed till the death of Mrs. Graham." It is impossible to allow this demurrer, and it must be overruled.

STUART, V.C., Nov. 10, 11, 13, 1865.

RAMSAY v. SHELMERDINE.

13 L. T. 393; L. R. 1 Eq. 129; 14 W. R. 46; 11 Jur. N.S. 903.

Principle applied, *In re Radcliffe*, 1903, 51 W. R. 409 (Ch. D.). Not followed, *In re Dunston*, [1909] E. R. A.; 78 L. J. Ch. 138; [1909] 1 Ch. 103; 99 L. T. 921 (Ch. D.).

Will—Gift in equal shares to children—Codicil—Revocation of share by—Intestacy as to share—Heritable Scotch estate—Conveyance to trusts of will of.

WILL.—Testator by his will left all his property to trustees in trust to be divided into as many equal shares as he should have children living at his death. By his codicil he revoked every bequest and provision made by his will in favour of his daughter E.:—Held, that there was an intestacy as to the share of E., and she, in common with three other children who survived the testator, was entitled to a fourth part of the share thus undisposed of.

At the time of his death the above testator was possessed of heritable

estate in Scotland, which did not pass under his will, as framed, but went to his son as heir-at-law. The son executed a deed conveying this estate to the trusts of his father's will, and died having previously made his will:—Held, that one-fourth of the Scotch property was to be administered under the will of the son, and three-fourths under the will of the original testator.

This was an administration suit.

The facts were as follows:—

Edward Connell by his will, dated the 23rd April, 1846, devised and bequeathed all his real and personal estate to trustees, upon trust for sale, and then (*inter alia*) upon trust to divide the same into as many equal parts or shares as should be equal in number to the number of his children living at the time of his decease, or born in due time afterwards. He then gave and bequeathed one of such parts or shares unto each of his sons who should attain twenty-five years of age, and directed his trustees to retain each of the shares of his daughters who might be living at the time of his decease, in order that the same might be invested for their separate use. And after making certain provisions for the maintenance and advancement of the beneficiaries under his will, the testator proceeded to provide that in case any of his children, being sons, should die under the age of twenty-five without leaving issue, or, being daughters, should die under the age of twenty-one unmarried, then he gave the share of the one so dying, and the interest dividends, and accumulations thereof, to the survivors or survivor of his children, and the executors and administrators of such of them as might be dead leaving lawful issue living.

By a codicil dated the 28th November, 1846, the testator “annulled, revoked, and absolutely made void all and every bequest and provision in his said will contained in favour of his daughter Ellen or her issue, either in her own right, or by benefit of survivorship, or in any other manner whatsoever.”

The testator died on the 9th January, 1851, leaving four children, viz., Edward, Ellen (now Mrs. Halstead), Fanny Harriett (now Mrs. Orr), and Margaret Montgomerie (now Mrs. Shelmerdine), all of whom had attained the age entitling them respectively to the property under the will. At the time of his death the testator, besides being possessed of considerable personal property in this country, was also entitled to the moiety of a heritable estate called Park Holme, in Scotland.

Shortly after the death of the testator, his son, Edward Connell the younger, having been advised that the Scotch estate did not pass by the will, but descended to him as heir according to the Scotch law, was desirous of carrying out the wishes expressed in his father's will, and accordingly executed a deed, dated 1st October, 1852, whereby he conveyed the Scotch estate to the trustees of his father's will, and upon the trusts thereof.

In 1857 Edward Connell the younger died. By his will he gave all his interest in the personal estate, future as well as present, together with all his interest in the real estate (including Park Holme, in Scotland) of his late father, to trustees, in trust to divide the same into equal parts or shares, one of which shares he bequeathed to one Jane Evans, and the other to his sister Ellen (Mrs. Halstead). By his codicil, however, he made a fresh disposition of his property by giving Mrs. Halstead three-fourths instead of a moiety of his property.

It appeared that, according to the Scotch law, the above will and codicil were not executed so as to pass the heritable property.

These proceedings were taken for the administration of the estate of Edward Connell the elder, and the questions which arose were first, whether there was an intestacy as to the share which the testator by his codicil had taken away from his daughter Ellen; and, secondly, as to how the property about to be administered was effected by the will of Edward Connell the younger and the deed of October, 1852.

Malins, Q.C. and Bedwell, for the plaintiffs, argued that the gift was to a class. The testator directed that his property should be divided equally among his children living at his decease, and it was thus clearly his intention to apportion it into as many shares as there were children then living; hence, if only one child had survived, that one would have taken the whole benefit. The present case was exactly similar, only stronger, to that of *Shaw v. McMahon* (4 Drew. & W. 438). The gift being thus to a class could not lapse: (*Cresswell v. Cheslyn*, 2 Eden, 123.) In that case, on one of a class dying in the testator's lifetime, the share went among his survivors; there could be no intestacy:—

Humphrey v. Taylor (4 Amb. 138); and *Humble v. Shore* (7 Hare, 247). For it was clearly the intention of the testator, in revoking his gift to Mrs. Halstead, that her portion should go to her brothers and sisters. The property was now, therefore, divisible into thirds. As to the Scotch property, it had been conveyed by the deed of Oct. 1852 to the trusts of the testator's will, and now formed part of his personal estate.

Bacon, Q.C., and *E. K. Karlake*, for parties in the same interest as the plaintiff, submitted that the effect of the will and codicil, when read together, was to make the original gift to Mrs. Halstead enure to the benefit of the other children of the testator. The court, if possible, always struggled against an intestacy. They cited

Harris v. Davis (1 Col. 416); *Boulcott v. Boulcott* (2 Drew. 25).

W. M. James, Q.C., and *Prendergast*, for Mrs. Halstead, contended that the deed of 1852 must be regarded as if the testator himself had executed it at the time he made his will. The trustees, by the law of Scotland, stood seised of the estate to the uses of the will, and that was the same thing, in fact, as if it had been incorporated into the will. On the sale, therefore, of the Scotch estate, the effect of the deed had been to vest in the trustees of the testator's will a right to the proceeds of the sale so far as was necessary for the purposes of the will, and no further; there being, however, a surplus beyond the requisitions of the will, their client, by virtue of the will and the deed of 1852, was entitled to it. They cited

Ackroyd v. Smithson (1 Bro. C. C. 503).

Green, Q.C., and *Pearson, Craig, Q.C.*, and *Round*, and *Little and Bury* appeared for the several other parties interested.

THE VICE CHANCELLOR.—Upon the question raised as to the revocation by the codicil in question, a most important principle has been decided by Lord St. Leonards in the case of *Shaw v. McMahon* (4 Drew. & W. 431), pointing to the difference between a gift to persons of aliquot parts and a gift to persons as a class. It has been argued that in the present case this is not a gift of certain shares of property to individuals named, but to a class. It appears to me to be as distinct and clear as anything can be that, upon the construction of this will, the gift is not to a class, but to each of the testator's children, who take one-fourth of the real and personal estate, given in separate shares, each child taking a share of the property which is dealt with by the will. This is the effect of the will. By his codicil the testator takes away from one of his children the share he had given by his will, but does not give it to any other person, and that share, by what I conceive to be the effect of the revocation, remains undisposed of. That being so, it appears to me impossible to sustain the case maintained by the plaintiffs, with regard to the construction of the will and codicil. My opinion clearly is, that the share taken from Mrs. Halstead is undisposed of by the codicil, and therefore remains to be administered as a share, as to which there is an intestacy. No doubt, as a general rule, the court struggles against an intestacy; but when, as in the present case, it finds that a share given by a will has been revoked by a codicil, it can come to no other conclusion than that there is an intestacy as to that

share. The only difficulty which I feel in this case is as to the introductory words of the codicil; not whether they constitute the children a class or not, but whether they prevent Mrs. Halstead from taking any part of that property which has to be administered, in consequence of the intestacy. The testator in his codicil says, that he revokes the provision contained in his will in favour of his daughter (Mrs. Halstead). He might have said that Mrs. Halstead was to take no part of his estate, and if he had made use of these words, then there would have arisen a similar question to that which occurred in the case of *Lett v. Randall* (3 S. & G.). In that case I had occasion to refer to the case of *Breton v. Vachel* (5 Bro. P. C. 51) where a testator by a codicil revoked a gift made by his will, and in lieu thereof gave the legatee "a shilling and no more." If the testator had given the shilling and said nothing else, the legatee would not have been prevented from sharing with the next of kin that portion of the property as to which there was an intestacy; but having used the words "no more," the House of Lords decided that the addition of these words operated so as to deprive the legatee of his share. In the present case, however, the words used do not raise this question; they do not import that the legatee is not to take any part of the estate. If the testator had intended that Mrs. Halstead was to take no portion of his estate, it would have been easy for him definitely to have said so; but he does not do so, he simply excludes her from taking any benefit under his will. The arguments advanced by the plaintiff's counsel are altogether untenable, and my opinion is that there is an intestacy, and that Mrs. Halstead is not excluded from her distributive share under it. There must be the usual administrative decree.

As to the question of the Scotch property, some difficulty having arisen as to the adjustment of the terms in which the decree effecting it should be drawn up, his Honour directed that the point should be again mentioned.

Nov. 13.—Accordingly on this day the question was renewed, when

His Honour said that he was doubtful as to whether the whole of the Scotch property, or only three-fourths of it, ought to be administered under the will of Edward Connell, the father, and requested the counsel interested in supporting the contention that the whole should be administered under the will to argue the question, when

Greene, Q.C., argued that, as the deed of Oct. 1852, had transferred the Scotch property to the trustees of the will of Edward Connell, the father, and as there had been a conversion of the whole of it into personalty, the devisees under the will of Edward Connell the younger could not set up any possible claim to it.

The VICE CHANCELLOR.—A most difficult and important question arises as to the effect of the Scotch deed of October, 1852; but, taking all the circumstances into consideration, I think the proper declaration will be that, according to the true construction of the will and codicil of Edward Connell the elder, one-fourth of the residuary real and personal estate, including one-fourth of the Scotch estate called Park Holme, was undisposed of by his will and codicil. Declare that, having regard to the effect of the deed of the 1st October, 1852, executed by Edward Connell the younger, and according to the true construction of the will and codicil of Edward Connell the elder, and according also to the true construction of Edward Connell the younger, one-fourth of the Scotch estate called Park Holme was undisposed of by the will of Edward Connell the elder, and passed by the will of Edward Connell the younger, as part of his personal estate. With liberty to import this declaration into the suit of *Halstead v. Halstead* (instituted for the administration of the estate of E. Connell the younger). Tax and pay the costs of all parties up to the present time out of the estate as between solicitor and client. Reserve further consideration, with liberty to apply.

WOOD, V.C., Nov. 24, 1865.

JARVIS v. SHAND AND OTHERS.

13 L. T. 403.

Practice—Pro confesso—Consolidated Orders, Order xxii.

Practice as to taking bills pro confesso—Defendant out of the jurisdiction.

H. Prendergast moved for an order to take the bill *pro confesso* as against two defendants, husband and wife, who were living in Jamaica.

The bill was by a bondholder against trustees of a settlement, to take an account of principal and interest (at 6 per cent.) on the securities assigned to the plaintiffs, and for a receiver to receive the real and personal estate and dividends on certain sums of stock standing in the names of the trustees comprised in the settlement, and apply them in discharge of the securities.

He founded his application on an affidavit that the bill and the interrogatories thereon, and the order of the court directing the service of such printed bill and interrogatories, had been duly served upon the defendants in the island of Antigua, where they then resided, and a certificate that no answer had been since filed. The second rule of Order xxii. provides that, where there is no answer, the defendant shall be deemed to have absconded to avoid process.

The VICE CHANCELLOR made the order as required, subject to the usual order to be made to the same effect at the hearing.

[IN THE QUEEN'S BENCH.]

Nov. 28, 1865.

THE MIDLAND RAILWAY COMPANY v. THE COUNCIL OF THE
BOROUGH OF BIRMINGHAM.

13 L. T. 404.

Borough improvement rate—Rateable value of railway goods—Station.

RATES AND RATING.—By a borough improvement Act authorising a rate to be levied, it was enacted, "That the occupiers of any land used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament, should be rated at one-fourth part only of the net annual value.

Certain sidings and turn-tables, occupying about ten acres of land, were used for loading trucks and carriages with goods, and also as a standing place for laden and unladen carriages, and were found in the special case to be necessary for conducting the traffic of the railway:—Held, rateable at one-fourth only of their net annual value.

This was an appeal by the Midland Railway Company against a borough improvement rate, to the Birmingham Borough Sessions, and a case was stated by consent under the 12 & 13 Vict. c. 45.

The applicants are the Midland Railway Company, who are the owners and occupiers of a railway constructed under the powers of several Acts of Parliament for public conveyance, part of which railway, and of the lands,

buildings, and works occupied therewith, is situate and lies within the borough of Birmingham.

The respondents are the council of the borough of Birmingham, who, by the Birmingham Improvement Act, 1851, s. 127, are authorised and empowered to levy upon the occupiers or owners of all buildings and lands within the borough, as in the said Act provided, a borough improvement rate, subject to a proviso that such rate should not exceed in any one year the sum of 2s. in the pound on the annual value of such buildings and lands, and to a further proviso in sect. 129 of the said Act contained:—

“That the occupiers of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, should be rated in respect of the same to the rates authorised to be levied by the said Act at one-fourth part only of the net annual value.”

On the 18th February, 1862, the respondents for the purposes of the said Act made a borough improvement rate of 2s. in the pound, and thereby assessed the applicants as owners and occupiers of certain property, in the said rate described as “passengers and goods stations, offices, warehouses, stables, workshops, locomotive engine-house, cattle stalls, sheds, platforms, weighing machines, turn-tables, machines, wharves, houses, lands, and premises, in various wards within the borough,” on the annual value thereof.

The total rateable value of the property so described and assessed in the said rate is 2,905l. 10s., and it is agreed for the purposes of this case that the sum of 1,588l. 10s. part thereof shall be taken as the rateable value of the property so assessed, which consists of the lands and buildings occupied by the applicants with their said railway, and the sum of 1,317l. residue thereof at the rateable value (supposing the contention of the respondents to prevail) of the property so assessed, which consists of the lands occupied by the sidings and turn-tables necessary for the use and working of the said railway, and used therewith, which last-mentioned property the applicants contend is rateable on one-fourth of the net annual value thereof.

The land so occupied by the sidings and turn-tables of the station covers ten acres or thereabouts.

The main lines of railway and sidings, and the buildings shown upon the plans, constitute the Lawley Street and Camphill stations where goods are laden into trucks and carriages when about to be conveyed on the appellants' railway, and are unladen from them after such conveyance.

The sidings are also used for the standing of loaded and unloaded trucks and carriages belonging to the appellants, when at rest; two of such sidings, marked A. and B. on the plan of the Lawley Street station, are used for standing and unloading of such trucks and carriages as belong to coal owners or coal traders using the line of railway.

There are usually a considerable number of trucks and carriages at rest on the sidings when not wanted to travel. The appellants have required traders who use their own trucks, and leave them on the sidings and turn-tables without unloading for forty-eight hours after notice of arrival, to pay, and such traders have in some cases paid, 1s. a-day per waggon for every day's delay, but the appellants have no power to enforce this charge by their Acts of Parliament, and they make no profit by it.

The sidings, switches, and turn-tables are used for the purpose of passing trucks or carriages from one part of the station to another, and they are also used in connection with the main lines of railway. They terminate at the end next Lawley Street on the plan, and do not run into any railway at that end, but are all connected with the main lines, and with each other by switches and turn-tables. The sidings run into the buildings marked pink on the plan, which consist of goods sheds and an engine-house, except those sidings which are shown with dead ends.

The sidings and turn-tables are all necessary for conducting the traffic of the railway, and have been necessarily enlarged as the traffic increased.

The land so occupied by the sidings and turn-tables of the goods station is coloured yellow on the plan annexed to this case.

The appellants contend that the said sidings and turn-tables are rateable upon one-fourth part only of the net annual value thereof.

The question for the decision of the Court is:

Whether, under section 129 of the Birmingham Improvement Act, 1851, the appellants are rateable in respect of the lands occupied by the said sidings and turn-tables on the annual value thereof, or at one-fourth part only of the net annual value thereof.

J. Brown, Q.C. (Field, Q.C. and J. O. Griffiths with him), for the respondents. —The land in question is the Lawley Street goods station, which, it is submitted is liable to be rated at the full annual value. The 129th section comes by way of proviso on the 127th section. This station is similar to an inn-yard where the stage-coaches and waggons stand, and that could not be considered as part of the "road" on which the stage-coaches travel; so neither can this station be considered as part of the railway proper, as it was termed in *The South Wales Railway Company v. The Swansea Local Board of Health* (4 E. & B. 189). This station is also analogous to a wharf alongside a canal which would not be within the reduced rating, although the canal is:

Newport Dock Company v. Newport Board of Health, 2 B. & S. 708; *Reg. v. Eastern Counties Railway*, 4 B. & S.

Wills (J. C. Carter with him), for the appellants, was not called upon to argue.

MELLOR, J.—I am of opinion that our judgment should be for the appellants, who, upon the 129th section of the Improvement Act, are entitled to be rated in respect of these sidings and turn-tables at one-fourth part only of their net annual value, and at no higher rate. The term "railway" in the Act is not confined to the two lines of rails necessary for carrying goods and passengers from one place to another. By the *Swansea case* it was determined, on the construction of a similar section in the Public Health Act, that the word "railway" means not only the actual lines of railway, but also the turn-tables and sidings necessary for conducting the traffic of the railway. If the sidings are not necessary for conducting the traffic, but are made mainly for warehousing accommodation, they are rateable at their full annual value. There is no other limitation than what is necessary for the conduct of the business of the railway. We are relieved by the case from any difficulty, because these turn-tables and sidings are found to be necessary for the traffic of the railway. I can well understand why a distinction should be made between watching and lighting and improvement rates and the poor-rate; and that as to the poor-rate the rating should be upon the full productive value, whereas in regard to improvement and sanitary rates, which are for works necessary for the health and comfort of the inhabitants, a limitation should be upon the rating in the case of railway companies. With reference to such objects as those there seems to be no difference between the sidings and turn-tables and the main line. I agree with the *Swansea case*, confirmed as it is by the subsequent case. If there is any excess of land occupied for the sidings and turn-tables, that is a matter for the sessions, not for this court. Our judgment will be for the appellants.

SHEE, J.—I am of the same opinion. The question is, whether the sidings and turn-tables come within the meaning of the proviso as "land used only as a railway." Does the proviso mean land occupied by the rails only on which goods and passengers are carried from place to place? or does it include land used for the purpose of turning carriages from one line to another, by sidings and turn-tables? I think that it includes both descriptions of land. The *Swansea case* is an authority for the decision of this case. Mr. Brown pressed on us the consideration that there might be lines of railway in connection with the running lines for passengers, used only for the purpose of warehousing the

carriages. If such a case came before us, probably it might be right not to include such in the reduced rating. That is not the case before us, because it is found in the case that these sidings and turn-tables were necessary for the working of the railway proper.

LUSH, J.—I am of the same opinion.

Judgment for the appellants.

[DIVORCE.]

Nov. 14, 21, 1865.

GASTON v. GASTON.

13 L. T. 412.

Petition—Answer—Pleading.

DIVORCE AND MATRIMONIAL CAUSES.—*An answer to a petition for dissolution of marriage must not necessarily be in conformity with a common law plea, either by way of traverse, or confession and avoidance. It is intended to be a substantial statement of the respondent's case, but should be within a reasonable degree of brevity.*

Therefore, the Court directed an answer to be reformed, which detailed with needless particularity the history of the married life, and pleaded matters which might be given in evidence under a simple traverse.

This was a wife's petition for dissolution of marriage on the ground of cruelty, desertion, and adultery. In support of the charge of cruelty it alleged that a marriage-settlement had been extorted from her by the respondent; that having secured to himself by such settlement an income of 200*l.* and upwards, and other substantial interests in her property, he thenceforth continually treated her with neglect and indifference; that he refused to consummate the marriage, &c. The answer went with equal particularity into the history of the married life, the respondent giving his version of the settlement, the terms on which it was agreed, previous to the marriage, that they should live, the places they should reside in, &c., &c.

Dr. Spinks, on behalf of the petitioner, now moved that the answer might be reformed, and urged that most of the matter which it pleaded might be given in evidence under a traverse.

Dr. Deane, Q.C., contra, argued that the character of the answer was determined by the petition. It might be for the benefit of all parties that the pleadings should altogether be reformed, but the court ought not to direct the answer simply to be reformed, seeing that it went to the very matter pleaded, however irregular, in the petition.

Dr. Spinks having consented, on the suggestion of the Court, to strike out of the petition the paragraphs from which part of the irregularities in the answer flowed,

WILDE, J.O.—Upon the whole the respondent had better reform his answer. I do not believe that an answer must necessarily be in conformity with a common law plea, either a traverse or denial, or a confession and avoidance. It is intended to be substantially a statement of the respondent's case, but within reasonable degree of conciseness and brevity.

THOMAS v. THOMAS.

13 L. T. 412.

Dissolution on husband's petition—Post-nuptial settlement by third party—22 & 23 Vict. c. 61, s. 5—Wife's paraphernalia—Costs.

Semble, that under the provisions of section 5 of the 22 & 23 Vict. c. 61, the court has power to deal with post-nuptial settlements made on the parties to the marriage by third persons.

In allotting a certain portion of the wife's income derived under settlement for the maintenance and education of the children of the marriage, the Court refused to make it a condition in the decree that the husband should deliver up to the wife the jewels belonging to her of which he had retained possession.

This was an application to the court under section 5 of the 22 & 23 Vict. c. 61, to make an order with reference to the application of a portion of the respondent's life income derived under settlements for the benefit of the children of the marriage. The cause was tried on the 23rd March, 1865, and resulted in a verdict for the petitioner, with 1,500*l.* damages against the co-respondent; and on the 13th July, 1865, the decree *nisi* was made absolute. There were two settlements, one ante-nuptial, the other post-nuptial, made on the respondent two years after the marriage by her aunt. Under the first an income of 24*l.* a-year was secured to her for life for her sole and separate use, and on her death to the husband; and under the second or post-nuptial settlement made on her by her aunt, she has secured to her for life an income of 115*l.*—in all 356*l.* There were three children of the marriage aged respectively nine, seven and six years. The petitioner had no means of his own, and his health was such that he was incapable of doing anything to obtain means for their support. The damages awarded by the jury had not been paid, and the respondent had remarried, but not with the co-respondent.

H. Lopes, for the petitioner, now applied to the court under these circumstances, that a certain portion of his wife's income might be allotted for the maintenance and education of the children of the marriage. It might be contended that the court had no power to deal with the post-nuptial settlement, it having been made by a third party; but he submitted that no such distinction was ever intended by section 5 of the Act (22 & 23 Vict. c. 61). If, however, there were any difficulty in the matter, he would suggest, all the facts being before the court, that the allowance should be made out of the income derivable under the ante-nuptial settlement, but that it should be in proportion to the total income of the respondent. [WILDE, J.O.—Was any money settled by the husband?] No money was settled by the husband. The children were entirely unprovided for, and he suggested that 200*l.* should be allotted for their maintenance.

Dr. Swabey for the respondent.—It seems to me that a variation of the settlement is asked for as against the husband as well as the wife. Under the first settlement, if he survive her, he will take a life-interest in the income. [WILDE, J.O.—The order is asked pending the wife's life.] I do not oppose the motion as a whole. It is quite proper that some provision should be made out of this money for the children; but the court will remember that it is asked to deal with money belonging entirely to the wife, whereas what it is usually asked to do is to vary the settlement as against the wife in respect of money settled by the husband. I would also remark, that the husband is entitled to 1,500*l.* damages. [WILDE, J. O.—Have the damages been paid?]

Lopes.—No; we have obtained an attachment against the co-respondent.

Dr. Swabey.—What I would suggest is, that the respondent should

retain out of this income 200*l.* a-year, and that the balance of 155*l.* should be directed to be paid for the use of the three children of the marriage. The husband received 1000*l.* of her money to pay debts, and he is now in possession of certain jewels of hers which she is anxious to have. They are her paraphernalia, and their delivery up to her ought to be made part of the order. [WILDE, J.O.—I forget the circumstances of the case. Was it proved that she went away with the co-respondent?]

Lopes.—Yes; leaving the three children with the husband, and there was no counter-charge of any kind.

Dixon, for the trustees of the post-nuptial settlement, was prepared to accede to any order which the court might make.

WILDE, J.O.—The court is called upon to make an order under section 5 of the 22 & 23 Vict. c. 61, which enacts that, “The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the court shall seem fit.” It has been suggested that that does not apply to post-nuptial settlements of this kind. I see no reason to doubt that it does apply; I have a strong opinion that it does. It is, however, in this instance unnecessary to decide the point, and I shall pass it by. The income under the first settlement is 241*l.*, and the court has before it the admission that she receives under another settlement 115*l.* a-year. I think, under these circumstances, that the sum which the wife represents herself as ready to give for the maintenance of the children is a reasonable sum, and I shall order that sum in its integrity to be paid for their benefit. The order will be in that form—that out of the moneys received by the trustees under the first settlement, they pay over to trustees to be hereafter named the yearly sum of 155*l.*, to be applied to the maintenance and education of the children.

Lopes.—And with regard to the costs?

Dr. Swabey.—The costs must be against the co-respondent:

Gill v. Gill and Hogg, 3 Sw. & Tr. 359; 10 L. T. Rep. N.S. 137.

WILDE, J.O.—I cannot give the costs out of anybody else's pocket, because I do not think that they are in fault, nor can I charge them on the estate. I order the co-respondent to pay the costs.

Dr. Swabey.—And as respects the jewels?

WILDE, J.O.—With regard to the jewels, I am not inclined to make such order or condition in favour of a wife who has run away from her husband and children.

The Right Hon. Dr. LUSHINGTON, July 11, 1865.

THE JOHN HARLEY v. THE WILLIAM TELL.

13 L. T. 413.

Ships' moorings—Burden of proof.

SHIPPING.—Where two ships come into collision, and the main allegations

to be sustained or disproved are, that the collision occurred through one of the ships being improperly moored, or from her having an insufficient or an improper look-out; the burden of proof (or, rather, of disproving such allegations) lies upon the ship so accused.

O'Malley, Q.C., and Dr. Wambey appeared for the *John Harley*.

Deane, Q.C., and Tristram for the *William Tell*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the brig *John Harley*, 275 tons, from Cork in ballast for Newport, against the ship *William Tell*, 1,174 tons, to obtain compensation for damage sustained by reason of the ships coming into collision about 2 a.m. on the 16th January last, in the Upper Dock, Newport, Monmouthshire. The brig stated the wind as N.W., and the weather as very cloudy, with a strong gale of wind. The ship represented the former as N.N.W., and the latter as a violent gale with terrific squalls. The case for the *John Harley* was, that she was lying in the floating docks, moored securely from her bows to a buoy at the northern part of the dock in question; and that her master, expecting a gale of wind on the night of the 13th, remained on board her; that the *William Tell* which was lying a short distance ahead of her, with her stern nearly opposite to her (the brig's) bows, and moored closely to the quay-walk of the northern end of the dock by one small chain only run out from her port bow, broke away from her mooring, and drifted stern on against the starboard bow of the *John Harley*, forcing her from her moorings, and carrying away bulwarks, rails, and stanchions, and doing other serious damage; that the *William Tell* continued to drift in a southern direction, forcing the *John Harley* before her, until the port bow of the *John Harley* came into violent contact with another vessel, whereby the *John Harley* sustained still further damage. It was further pleaded, that the collision and damage consequent thereon were solely attributable to those on board and in charge of the *William Tell*, by reason of their not having properly and securely moored the said vessel; and that no blame whatever was imputable in respect thereof to the master or any of the crew of the *John Harley*. The answer on the part of the *William Tell* alleged, that she was properly moored in the floating docks at Newport, under the directions of the berth master of the docks; that on the night of the 13th of the month in question, and from thenceforward up to the time of her parting from her moorings on the morning of the 14th of the same month, the *William Tell* was lying alongside the ship *Rochester* (which was on her port side), and was moored in the manner following: forward she had a one-inch mooring chain on shore attached to the mooring ring of the dock, on the port bow, nine parts of a three and three-quarter inch line attached to the fore-castle of the *Rochester*, the end of an eight and a half-inch hawser attached to the top-gallant fore-castle of the *Rochester*. Amidships she had five parts of a three and three-quarter inch line attached to about the amidships of the *Rochester*, and two parts of the same line attached to the *Rochester's* quarter pipe as a spring, and aft she had the end of a seven-inch hawser attached to the buoy, and on the starboard quarter she had two parts of a four and a half inch hawser also attached to the buoy; and that there was a vessel called the *Jeanne Myers* fastened to the *William Tell* on her starboard side. That for some time before, and at 2.20 a.m. on the 14th, it was blowing a violent gale, accompanied by terrific squalls, the wind being N.N.W., and that at about 2.20 a.m. the *William Tell*, by reason of the violence of the gale, parted from the *Rochester* and began drifting down the dock with the *Jeanne Myers* fastened on her starboard side; that an attempt was immediately made to get the *William Tell's* hawser on board the *Rochester*, but, as none of the crew of the *Rochester* were on deck to heave a hauling-line to the *William Tell*, such attempt failed; that at this time the gale continued blowing with great violence, accompanied by terrific squalls, and that the *William Tell* in one of the squalls, parted from the mooring ring;

that one of the *William Tell's* anchors was thereupon as soon as possible let go, but that immediately afterwards the stern of the *William Tell* came into collision amidships with the barque *Gauss*, which was also in the docks and had broken from her moorings, and was then lying with her broadside facing the north end of the dock; that while the *William Tell* was drifting down the dock the brig *John Harley* drifted, quartering across the *William Tell's* stern, and that when the *William Tell* was brought to by the aforesaid collision with the *Gauss*, the *Jeanne Myers* came in collision with the brig *John Harley*, riding her down on her starboard bow, the port bow of the *John Harley* being then in contact with the *Gauss*. It was then denied that the collision was solely, or in any way, attributable to those on board the *William Tell*. It had been settled ever since the days of Lord Macclesfield, when he was impeached for misconduct, that those facts which could be proved almost exclusively by one party in the case, whether plaintiff or defendant, such person was bound to prove; and upon the question arising in this case, whether the vessel was properly moored or not, the burden of proof lay upon those who represent the interests of that vessel, and not upon those who alleged she was improperly moored; precisely in the same way as if the question had been as to whether there had been a good look-out or not upon a vessel on a dark night. One party in such a case would allege that there was not a good look-out, and certainly the burden of proof would be upon the vessel who alleged that there was a good look-out, and not upon those who could not give such evidence as the persons could who were on board the vessel. There was no question but that in such a case as the present the burden of proof was upon those who alleged the vessel was properly moored, and that they were bound to shew that she was so moored. There was some difficulty in coming to the conclusion that the piece of chain which was found fastened to the ring by the deputy dock-master was the chain which properly belonged to the *William Tell*; but there was no doubt that the chain by which she was moored was a one-inch mooring chain, because it was in their own affidavit expressly so stated. The question to be decided was, taking their own statement of the manner in which they were moored with a one-inch mooring chain attached to the wall, and with the other chains which were mentioned with regard to their moorings to the *Rocheester*, whether, upon the whole, she was properly and sufficiently moored on that night; and whether, as this storm was raging at a considerable period before the collision took place, there was not a warning to increase the moorings in case it should appear to be necessary? Supposing the *William Tell* was improperly moored, or assuming the case either way, the next question to consider was what occurred and what took place during the night? There was no doubt, from all the evidence in the case, that it was a most tempestuous night, the wind varying, but being principally from the N.W. and blowing in violent and sudden squalls. It was said for the *William Tell*, first, that she never came in contact with the *John Harley* at all, and that the *Gauss* and the *Regent*, which were alongside, or nearly alongside, the *John Harley*, broke from their moorings before the *William Tell* came up and ran into the *John Harley*, or close to her. It did not appear from the evidence that either the *George Buxton*, or the *Alabama*, or the *Gauss*, or the *Regent*, broke away from their moorings before the *John Harley* was struck, and before the *William Tell* came into immediate contact with her. Was the *William Tell* the vessel that was the cause of the damage to the *John Harley*? The court was of opinion that she was, and there must be a decree accordingly.

The Court was assisted by Captain Owen and Captain Nesbitt, of the Trinity House.

LORD ROMILLY, M.R., Nov. 7, 8, 10, 14, 1865.

BURKE v. ROGERSON.

19 L. T. 415: varied, [1866] E. R. A.; 14 L. T. 780; 12 Jur. N.S. 635 (L. JJ.).

Vessels—Suretyship—Release of sureties—Delivery of vessel.

PRINCIPAL AND SURETY. SHIPPING.—R. (trading under the name of R. and Co.) contracted with the A. D. S. Company for the sale and delivery to them of two vessels to be sent by him to the Danube; and he undertook to advance a sum not exceeding 1000l. to furnish them for the voyage. The purchase-money was paid in part, and the remainder was to be secured by a mortgage of the vessels. The plaintiffs were two of the directors of the A. D. S. Company. In order to further the objects of that company, they, on its behalf, and at the request of R., accepted, indorsed, and handed to him certain bills of exchange. R., on his part, gave them a guarantee that they should not be respectively called upon to pay more than a portion of the amount for which they had so become sureties; and not that until a time that was named in the guarantee. No transfer of the vessels from R. to the A. D. S. Company was ever completed, and no mortgage of them was executed to R. R. treated himself as the agent of his own firm of R. and Co. and of the A. D. S. Company in the matter; but instead of sending the vessels from Newcastle-on-Tyne, where they were registered, to the Danube direct, as agreed upon, dealt with them as if he had been the complete owner of them, speculated with them, mortgaged one of them, indorsed over some the bills of exchange, sent one of the vessels to a port which was far away from the Danube, after having freighted it with contraband of war for the use of the Circassians, and did all those acts without the knowledge of the plaintiffs. Upon a suit instituted by the plaintiffs to be relieved from the liabilities incurred by them on behalf of the A. D. S. Company, in respect of the two vessels it was:—Held, that the plaintiffs were entitled to be discharged from their suretyship. Held, also, that the delivery of a vessel by a vendor to a purchaser means, that the purchaser is to have the control of the vessel, and not necessarily that he is to be put into the manual possession of it. To complete the delivery he must be able to direct where the vessel shall go, what it shall do, what performances it shall be required to undertake; in fact, to have exactly the same power over it as exists with respect to any other chattel which is sold and delivered to a purchaser.

The pleadings in this suit were of a most voluminous character; the bill alone covering 44 pages, and extending to 139 paragraphs; and the answer of the defendant Rogerson occupying 62 pages, and containing 186 paragraphs.

For the purpose, however, of this report, it will be necessary to state only the following facts:

The plaintiffs, Edmund Burke and John Kearns, were two of the directors of the Anglo-Danubian Steam Navigation and Colliery Company (Limited). The defendants, John Rogerson and William Scott, were ship-owners, carrying on business in the city of London and also at Newcastle-upon-Tyne, under the style of John Rogerson and Co. The defendant John William Couchman was also a director of the Anglo-Danubian Company, and that company were themselves defendants to the suit.

In 1862, Rogerson made a tender to the company for the supply to them of ships for the furtherance of their undertakings. After much negotiation between the parties, it was, on the 2nd June, 1863, agreed between Rogerson and the company that the latter should purchase, and that Rogerson, trading as John Rogerson and Co., should sell two steamers, called the *Louise Craushay* and the *Chesapeake*, free from incumbrances, upon the following conditions, viz.:

"The company will be justified in purchasing two boats and accepting a loan of 5,500*l.* on the following terms: namely, to purchase (subject to inspection) the boat called the *Louise Crawshay* for 5,500*l.*, and the *Chesapeake* for 2,000*l.*, making together 7,500*l.*, to be paid for as follows:—2,000*l.* to be paid by Mr. Rogerson on his taking 200*l.* shares in the company, which are to be deemed as fully paid-up shares, and by the company's acceptances for 1,000*l.* and 1,000*l.* and 750*l.*—in all 2,750*l.*—payable at four months after date; and also the company's acceptances for 2,000*l.* and 334*l.* and 416*l.*, making in all 2,750*l.*, at six months after date; but the payment of all such acceptances to be deemed satisfied, if the board shall so desire, by half the amount of such acceptances being paid in cash when due, and the other half by further acceptances of the company, payable at four and six months, as the case may be, according to the tenor of the original acceptances; the due payment of those acceptances to be collaterally secured by a mortgage of the two boats above mentioned, with power of sale not to be exercisable until after default, and after fourteen days' written notice to the company; and also to be secured by a mortgage of the calls already made and unpaid, and hereafter to be made on the shareholders whose names are stated in a list to be furnished to Mr. Rogerson or his solicitors; with liberty, however, for the directors to apply a sum not exceeding 1,500*l.* out of such arrears or calls towards the debts and liabilities of the company. Mr. Rogerson also to provide funds as and when required, to the extent of 1,000*l.*, for the purpose of dispatching and working the two boats above mentioned; and also for working two other boats, called the *Papin* and the *Bellot*, and for working certain coal-fields at a place called Dobra, under arrangements to be made to the mutual satisfaction of Mr. Rogerson and the directors. The directors defer the consideration of the purchase of the boat called the *Harry Claeser*. That the purchase of the two boats called the *Chesapeake* and the *Louise Crawshay* be carried out, and the payment for the same effected in the manner and upon the terms above mentioned, but subject to legal approval.

"That simultaneously with the above arrangements being carried out to the satisfaction of the legal advisers of the company and of Mr. Rogerson, the latter should be empowered, subject to the limit of expense after mentioned, to get ready, and insure, and dispatch to the Danube, for and on behalf of the company, the two boats called the *Louise Crawshay* and the *Chesapeake*, and also to provide and send out by these boats proper materials for working the colliery, and that he also be empowered to send out for the company, and maintain seven men for working the collieries; he also for the company to pay their wages.

"That the company may reimburse Mr. Rogerson for any necessary expenses that he may incur to the satisfaction of the directors for the above purpose to the extent of 1,000*l.*, Mr. Rogerson on his part undertaking to provide the necessary funds to that extent, as and when required, it being understood that such reimbursements may be made, if the directors shall so desire, by acceptances of the company, to be given from time to time according to the outlay actually made, and approved, and to be paid respectively at four months after date."

A Mr. Lankaski was appointed manager of the boats and collieries mentioned in the agreement. Rogerson then accepted 200 shares in the company, for which he paid them 2,000*l.*, and the company paid him a like sum on account of the two ships, the *Louise Crawshay* and the *Chesapeake*. Neither Rogerson nor his firm advanced the 5,500*l.* The transfers of the steamers were not completed.

On the 5th June, 1863, Rogerson tendered to the company for acceptance seven bills of exchange, drawn by him, in his own name, on the company, of different amounts, but making together the sum of 5,500*l.* Those bills he urgently requested the directors of the company to indorse; and the plaintiffs, in reliance upon his assertion that without such acceptance and

indorsement the ships could not be sent to the Danube, and confiding in his promise to perform the agreement on his part, accepted, indorsed and handed over the bills to him.

• The defendant Rogerson then also wrote to the plaintiffs as follows:

“ June 5, 1863.

“ Gentlemen,—In consideration of your agreeing to guarantee the payment of the acceptances of the Anglo-Danubian Steam Navigation Company, drawn for the purpose of paying for the boats, to the extent of two-thirds of the 5,500*l.*, that is 3,667*l.*, I engage that you shall not be called upon to pay under that guarantee, except upon the following dates, viz.:

12 months from the dates of the bills, 1,833*l.* 10*s.* 0*d.*

18 months from the dates of the bills, 1,833*l.* 10*s.* 0*d.*

you agreeing to indorse new bills to take up those first drawn until you will come to the dates named, that is, twelve and eighteen months respectively, at which date you become owners of two-thirds of the property mortgaged to John Rogerson and Co.

“ It is further understood that you will accept bills to raise the funds to work the boats and colliery—you being liable in the event of the company not paying to the extent of two-thirds of the amount which is not to exceed 1,000*l.*

—Yours truly,

JOHN ROGERSON.”

No mortgage of the ships or either of them was ever executed by or on behalf of the company. It was alleged that the two vessels had never been sent by Rogerson to the Danube; that he had made use of them for his own purposes; that, in fact, he had mortgaged them unknown to the plaintiffs, and had also indorsed some of the bills of exchange to Messrs. Lambton and Co., who had commenced proceedings at law thereon.

The bill in the suit contained the following charge:

“ That the defendant Rogerson, without the authority or privity of the company and the plaintiffs, or either of them, after the date of the said contract of the 2nd June, 1863, caused the *Chesapeake* or *Louise Crawshay*, or one of them, to be laden with rifles, muskets, munitions of war, and other freight, for conveyance to some port or ports in the Black Sea or elsewhere; that such freight was taken on board at Newcastle-upon-Tyne, or Falmouth, or some other port in this country, and conveyed by the said steamers or one of them to some port or ports in the Black Sea or elsewhere, other than the Danube. Since the arrival of the *Chesapeake* and the *Louise Crawshay* at the port of Constantinople, the said steamers have in like manner, without the authority or privity of the company and the plaintiffs, or either of them, been used and employed by the said John Rogerson in the conveyance of passengers and goods to and from the port of Constantinople and Trebizond, or elsewhere in the Black Sea other than the Danube, and, instead of dispatching the said steamers to the Danube, as the said John Rogerson had undertaken to do, the said John Rogerson has, in fact, used and employed the said steamers for his own purposes. The plaintiffs charge that a considerable quantity of the arms and munitions of war and other freight was sent by the said John Rogerson as aforesaid as an adventure or speculation on his own account, and that the residue of the said freight was taken by the said John Rogerson for divers other persons. The plaintiffs charge that the whole of such freight was contraband of war, and was shipped by the said John Rogerson with the full knowledge that the same was contraband, and that it was intended for, and that it was in fact supplied to, the Circassians, who were then at war with the Emperor of Russia; and that the said John Rogerson wilfully placed the *Chesapeake* in peril of being seized and confiscated to the use of his Imperial Majesty. The said John Rogerson concealed from the plaintiffs and the company that the *Chesapeake* was laden with such or any freight. The said John Rogerson pretends that he was entitled to take such freight under a stipulation in a tender made by him on the 28th May, 1862; but the plaintiffs

charge the contrary, and that such stipulation formed no part of the said contract."

The bill then prayed a declaration that the plaintiffs were respectively altogether discharged from liability on the said bills of exchange so indorsed by them as aforesaid; and that the defendants, John Rogerson and William Scott, were severally bound, and ought to indemnify the plaintiffs against the said actions at law brought by Messrs. Lambton and Co. against the plaintiffs; and that the said defendants might be decreed to do so, or that they might be decreed specifically to perform the said agreements of the 2nd and 5th June, 1863, the plaintiffs being ready and willing, and thereby offering specifically to perform such agreements on their part; for an account of what was due to the plaintiffs from the defendants under the said agreements; for the proper application and payment of the amount found due; and for an injunction to restrain the negotiation of the said bills of exchange, and the further prosecution of the said actions.

The further details of the case will sufficiently appear from the judgment of the Master of the Rolls (*infra*).

Southgate, Q.C., and *Locock Webb* appeared for the plaintiffs, and contended that, under all the circumstances of the case, from the non-delivery of the ships to the company, from their not having been duly sent to the Danube as they might and ought to have been, and from the peculiar dealings with them by the defendant Rogerson, unknown to the plaintiffs, they were discharged from their liability under the agreements of the 2nd and 5th June, 1863, and entitled to the relief they sought by their bill.

Selwyn, Q.C., and *A. Marten*, for the defendant Rogerson, contended that he had acted as the agent of the plaintiffs and the A. D. S. Company in the transaction. The company was not unaware of his proceedings, and the knowledge of the company must therefore bind the plaintiffs. Further, they insisted that when once the ships were dispatched as they were by him from Newcastle, they were duly delivered to the plaintiffs and their company, subject to his shewing that he had expended the 1,000*l.* agreed upon. No time was fixed within which the vessels were to be delivered. The real question in the case was, what was the construction of the agreement? They insisted that Rogerson had not forfeited his right under it by transmitting the cargo of arms, &c., or by his other acts. What he did he did at his peril, but that did not affect his position as regarded the plaintiffs. Their remedy was at law, for a breach (if any) of the agreements.

Ffooks appeared for the defendants, the Anglo-Danubian Company and Couchman.

Southgate, Q.C., was not called on to reply.

Nov. 14.—THE MASTER OF THE ROLLS.—I have read the evidence in this case, and I think that the plaintiffs are entitled to a decree. The first question to be considered is, what is the contract between the parties? There was a great deal of preliminary discussion with respect to the Anglo-Danubian Company purchasing the steamers from Mr. Rogerson; but I am of opinion that that did not form the contract. I think the contract is to be found in the resolutions of the 2nd June, 1863, which were entered in the books of the company when Mr. Rogerson was present. It is necessary for me to refer to those resolutions in order to explain what I have to say on the subject. [The Master of the Rolls then read the whole of the contract as above set forth, and continued:] Now, the first thing to be observed upon that contract is, the nature of the proposed mortgage, and that is a material question in the case. The mortgage was to be a mortgage on the ships of the company; but the mortgage was not to be enforced, and no sale was to take place until after default. By that was meant default in the payment of the acceptances, and therefore the mortgage could not have been exercised strictly until the four

months had expired, when the first acceptance became due, and then there would have to be paid one half at least, and fresh acceptances given for the remaining half, if the Anglo-Danubian Company so thought fit. Besides, it was not to be exercisable until after default, and after fourteen days' written notice to the company. Those were the conditions upon which alone the mortgage was to be enforced. There was also to be a mortgage of the unpaid calls of the shareholders, of which a list was to be furnished, subject to the company being entitled, in the first instance, to take out 1,500*l.* for the payment of any sums of money which they might consider it desirable should be applied towards the affairs of the company. There was a subsequent resolution that a Mr. Lankaski, who appears as a partner in the firm of Rogerson and Co., in Servia (at least so I infer from the fact of their calling him "our Mr. Lankaski"), was to be manager of the business at Dobra, near Belgrade, at the weekly salary of 3*l.*, in addition to his reasonable and necessary expenses. Mr. Lankaski was to act in accordance with written instructions, to be furnished to him by the secretary of the company. Now, that was the original contract. The only variation that was made in it was this, that the 1,000*l.* to be laid out was not to be "to the satisfaction of the directors," but at the mere absolute control of Mr. Rogerson—that he was to employ it as he thought fit. That was ultimately, and in fact, the contract which was entered into. Now, in the first place, it is quite clear, in my opinion, that that was a contract with the Anglo-Danubian Steam Navigation Company; and that it was not a contract with any individuals whatever. It is true that Mr. Burke and Mr. Kearns were, so to say, substantially that company, and could make it do as they pleased. But the contract was made with the company, and not with those gentlemen individually. It is observable also with respect to the 1,000*l.* which was to be laid out, that it was not like a trust which Mr. Rogerson was obliged to perform; it was optional on his part, and he was not to lay it out unless he thought fit. The next thing to consider is, the transaction which has given rise to this suit; in fact, by which the plaintiffs, Mr. Burke and Mr. Kearns—became liable for the due performance of the contract by the company; that is to say, that to the extent of two-thirds, the acceptances of the company should be duly honoured. That took place upon the 11th June, 1863. It took place nine days after the resolutions were come to, and on the same day (which is very material) a letter of instructions was given to Mr. Rogerson, directing him to send the steamers to the Danube at once. It is important to observe that Mr. Rogerson told the plaintiffs that he could not send out the ships unless they would give their guarantee that the bills should be paid, at all events to the extent of the two-thirds. I think that was reasonable enough on the part of the defendant. He thought that the company had no very large amount of funds. It was a limited company, and it was perfectly intelligible that he did not like to send the ships out without some reasonable certainty that the bills of the company would be duly honoured; and accordingly the guarantee which he required, and they consented to give, was as follows: [The Master of the Rolls read the guarantee as above stated, and continued thus:] That sum of 1,000*l.* was the money to be expended in sending the ships out. I am not sure that this is a very remarkable circumstance, although it was a great deal relied upon in the course of the arguments, viz., that no note was made at the time on the register of the ships, of the ownership of them. I am clearly of opinion that the plaintiffs expected it to be made; I am also quite satisfied that a bill of sale, executed by a Mr. Wraith, was produced to the office at the time, and that they believed it to be effectual to enable them to get a transfer duly made. In point of fact, however, Mr. Wraith at that time had no ownership in the ships at all. It is quite true that Mr. Rogerson was the real owner, though they were not registered in his name. They were registered in the name of the Tyne Ferry Company, and though Mr. Rogerson probably was the principal manager of the Tyne Ferry Company, and could have got the

ships transferred whenever he pleased, he did not think fit to do so. I do not ground my judgment upon this, that the plaintiffs were induced, either by misrepresentation on the part of Mr. Rogerson, or any expectation on their own part, that the transfer of the ships would take place immediately, to indorse the bills of exchange. It is, however, important to observe, that what then took place was this: upon the plain construction of the contract, the vessels were, in my opinion, to be delivered immediately to the Anglo-Danubian Steam Navigation Company; and the mortgage was to be enforced, only provided the bills were not paid. Accordingly the first and really important question is this, whether the ships were in fact delivered to the company at all? I omit for the present all consideration of the question, whether the ships were to be delivered in the Danube or in the Tyne. I am of opinion, upon the evidence, that they were never delivered to the company anywhere; that no delivery of any sort took place at any place whatever; but that they remained constantly in the possession of Mr. Rogerson, the vendor. The way in which it was put by Mr. Rogerson, or by his counsel in their arguments, was this: He contended that he represents two characters. He says, it is true that he was the vendor, but he was also the agent of the company, and after the contract was entered into no transfer took place on the registry; for that his position was only that of an agent of the company, and he was thereupon entitled to consider the ships duly delivered to him as such agent. It was urged very strongly before me, that if A. B., a stranger, had been the agent of the company, and Mr. Rogerson had transferred the ships to him, that would have been a delivery of them to the company, because it was a delivery to the agent of the company. It was also strongly urged, and with great truth, that those two characters might be filled by the same person. But the question whether there was such a delivery, is the question to be determined by the evidence in the case. In the first place, it is to be considered what is meant by delivering a vessel to the purchaser? It means that he must have the control over the vessel, and not necessarily that he is to be put into the manual possession of it. To complete the delivery, he must be able to direct where the vessel shall go, what it shall do, what performances it shall be required to undertake; in fact, to have exactly the same control over it as exists with respect to any other chattel which is sold and delivered to a purchaser. If, for instance, I buy a carriage, the delivery of that takes place when it is sent to my stables, or to the care of any other person whom I may authorise to take it, and who may use it as he pleases. But the important thing to consider in this case is this. Undoubtedly these vessels might have been so delivered to Mr. Rogerson, and if Mr. Rogerson had treated himself as the mere agent of the company from that time, and had in fact treated the company solely as the owners, then I think it might have been justly said that there was a delivery to the company at that time. I am of opinion, however, upon the evidence, that Mr. Rogerson had the sole and unquestionable control of the vessels. He did exactly what he pleased with them, and not as the agent of the company, from the time when the resolutions were entered into down to the time when the vessels were ultimately sold at Constantinople. But what is the duty of an agent? The duty of an agent is to take the instructions of his principal, and the instructions of the principal in this case were to send the ships to the Danube. Consider first the case of the *Chesapeake*, and see what took place as to that vessel. The voyage to the Danube would have been one of less expense and of less duration than vessels usually incur in performing it. The vessels were sent to Trebizond. The distance from the Bosphorus to Trebizond is nearly double that from the Bosphorus to the mouth of the Danube. I do not know whether it is proved in the case or not, but that is a geographical fact which the court is bound to know, and one as to which anybody may satisfy himself by inspecting an ordinary map of the Black Sea. The fact is, Trebizond is at least 400 miles (and therefore 800 there and back) out of the way of the direct passage to the Bosphorus from the mouth of

the Danube. How is his conduct in this respect explained, and how does Mr. Rogerson justify it? He alleges that he told the plaintiffs that he intended to send out certain goods in their vessel upon freight at 4l. per ton for his own profit, as a speculation, and that this was assented to by them. I will assume for the present that that was so, and then consider the result of it. It is proper to observe that, with respect to sending out any goods, the plaintiffs ought to have had the express assent of the owners of the vessels for such an use of them, and to have had explained to them exactly what it was that was intended to be done. Assuming, however, that that was so, according to the evidence part of the goods was actually shipped on board the *Chesapeake* before the contract was entered into. The papers in the suit are very voluminous, but I think from my perusal of them that this is plain: that the only communication or conversation which refers to the taking of the goods mentioned is with respect to the discharge of those goods in their way to the Danube, and that they were not to go out of their way. That it would have been justifiable, under the contract, to have discharged goods at Vigo, Gibraltar, or Malta, or possibly at Athens, where the vessels might touch, or at Constantinople; but it would not have been right to have gone to Trebizond to deliver any goods there. That, in short, it would not have been justifiable to have gone out of the regular course to deliver the goods at another place; and, as I have observed, Trebizond is 400 miles out of the way, and to make that deviation would have required the express assent and sanction of the company. But that sanction is nowhere alleged to have been given; which is the more striking because it is wholly inconsistent with that which is the great object of the Anglo-Danubian Company; that object was, that the vessels should arrive at the Danube at the very earliest time at which they could get there. It was a very serious injury to them that there was any delay in the arrival of the vessels. Besides that, there is another consideration in this case, which is a matter of very considerable importance—the character of the goods which were sent out was of a very dangerous description; amongst them was a ton of gunpowder, and all the rest were munitions of war. They were intended for the purpose of being supplied to the Circassians in their struggle against the Russian empire. That, in my opinion, is clearly established. They were, in fact, contraband of war. The whole of the goods that were sent out were—it does not matter whether they were six or eight tons, or what the amount of the tonnage was; but it is quite clear that they were a cargo of great value to the Circassians, and that there was considerable difficulty in getting them in Circassia. This, too, is quite clear, that the vessel incurred very serious risks; because, if any Russian vessel of war had found it, it would have been taken, without a doubt, and condemned. I am of opinion, upon the evidence, that not only was this known to all the persons, but that it was known at Constantinople. When they got to Trebizond they could not get any fuel, and it was only by some of the boats of the country (which they call *caïques*) coming out, that the ship was unloaded into one of them. Thereupon, being discharged of her cargo, she goes back to Trebizond by means of the interposition of the English consul. It was only upon the master of the ship giving his positive undertaking that the fuel would merely be used to take him back to Constantinople, that he was able to move from Trebizond at all. It is true he did not strictly perform his contract with the English consul, because, no sooner was he supplied with coal, which he purchased, than he went out to sea, taking the *caïque* in tow, and, after towing her for nine or ten hours, he left her in the middle of the night, as near the coast of Circassia as he could, where, it is to be inferred, the goods arrived. The vessel itself arrived safely; that is to say, though it incurred risk, it met with no accident. But I am of opinion that this part of the transaction alone is sufficient to discharge the sureties, and that it is not necessary to go a step beyond this for the purpose of releasing them. They wanted the vessel to be sent out immediately to the Danube. The *Chesapeake* arrived at Constantinople on the 23rd August, 1863.

She spent a month, all but four days, in her excursion to Trebizond, and she returned on the 18th September to Constantinople; and in much less time she might easily have gone to the mouth of the Danube. As to this transaction, independently of the risk incurred by the vessel being likely to be seized, the mere delay in going out of her route and employing herself for a totally different purpose is, in my opinion, sufficient to discharge the sureties from their contract. But the case does not rest there. This is to be seen throughout: that Mr. Rogerson disregarded the directions and instructions of the company, whose agent he professed himself to have been, and says that he now is. He says now that he would have taken the *Chesapeake* to the Danube if the plaintiffs or the Anglo-Danubian Company had provided him with the necessary funds for that purpose. But there is this manifest observation which occurs upon that, that a much smaller sum would have taken this vessel to the Danube than was spent in taking her to Trebizond, and much less than was spent in taking her there and back again. As I understand from his account, what he seeks to be entitled to have paid to him is that which he contends the company must pay, namely, all the extra expense that was occasioned by the voyage from Constantinople to Trebizond and back again, solely occasioned on account of his own speculation, which was not communicated to them. He alleges it was merely because this was not paid and further funds supplied, that the *Chesapeake* did not go to the Danube at all. The evidence shows me clearly not only that Mr. Rogerson did not act as the agent of the company, but that he did not consider himself such agent, and that he never intended it to be thought that he was the agent of the company, or to relinquish his own control over the vessels until the bills which he received had been duly proved. No doubt he treated the company as the purchasers of the vessels, and he treated himself as the mortgagee of them; but he determined not to quit possession of the vessels until he was fully paid, although the delivery of the vessels to the company so as to put them under the control of the company was, in my opinion, an essential part of the contract, and was so considered on both sides. I have already stated that I am not at all clear that the transfer in the registry was necessary for the purpose of completing the contract. It was stated with some truth that this could have been done at any time, and that the contract was sufficient; but assuming this to be so, exactly the same thing might be said of the mortgagee of the vessels, viz., that Rogerson was just as much a mortgagee of the vessels under the contract as the company were owners of the vessels under it. His mortgage, however, was to be this, that he was not to exercise the power of sale until after default in payment of the bills. How then does he act? He acts as the owner of the vessels, and whether as mortgagee in possession, or as any other owner, is not material, if he never acted as agent of the Anglo-Danubian Company, or as if they had anything to do with the vessels except to give him money for the purpose of working them. The truth of this is shown from various letters which have been proved in the suit, and which were written to Mr. Lankaski. I will refer to one or two of them. First, there is a letter written from Newcastle, and subscribed, "Yours faithfully, John Rogerson and Company, signed F. Cann" (who is, I assume, a confidential person entitled to use the name of Rogerson and Co.). The letter is dated the 27th June, 1863, therefore it was twenty-five days after the contract was entered into; and very little more than a fortnight (sixteen days) after the arrangement with the plaintiffs as to their giving the guarantee. It is written to Lankaski, or Messrs. Heald, Mathurn and Co., Constantinople (they being the correspondents there of Rogerson and Co.). This is the letter: "We are in receipt of your letters of the 4th, 10th, and 16th June. That to Mr. Holmes we did not send to him, as it was not encouraging." I omit reading the whole of the considerations mentioned in the letter, because it would be interminable for me to go through the detail of all the circumstances of the case. I do not think Mr. Rogerson's withholding the letter of Mr. Holmes respecting the prospects

of the company in Servia can have anything at all to do with the question I am now considering. I think he ought to have communicated it to them; but, whether he did so or not, I do not think that can affect the question, which is, whether, in point of fact, there was any delivery of the vessels at all. Then the letter goes on thus: "And indeed you could satisfactorily judge of the undertaking from a mere stay of forty-two hours on the spot. The *Chesapeake* left Falmouth in order. Mr. Crawshay says the Circassians are wanting such a boat. If so, you can sell at 1,500*l.*; but you must get the cash. Mr. Rogerson has gone to London, and will write you from there as to any other business." Here is, by an authorised agent (after the delivery according to his own statement of the vessel to himself as agent), an express direction by him to sell the vessel. Now, it is to be observed that he was the vendor; the vessel was standing in his own name at the time of the registry on the customs. He, according to his own statement, was mortgagee of the vessel. His mortgage only entitled him to sell after default in payment of the acceptances, and the acceptances were not due for three months, and yet he directs the vessels to be sold, and authorises them to be sold, providing they can get 1,500*l.* for them. It is to be observed that the price that was paid to him for the vessel was 2,000*l.* I was told that he said he should have asked 2,500*l.*; but I confess I do not look upon the 2,500*l.* paid in paid-up shares of the company as very much. I consider the 5,500*l.* as the price of the ships; so that, in fact, it might well be said that if the 2,000*l.* was the price of one ship, 3,500*l.* was the price of the other; or it might have been divided in any way that might have been thought fit. It is also to be observed that the word is "Circs," which I read as meaning Circassians. I think no one can doubt, considering what took place with the ships, that that is the real meaning of the term. But I think all that is wholly inconsistent with any delivery of the ships to the Anglo-Danubian Company, or to the plaintiffs; for here is an express authority to sell the ships without any reference to the plaintiffs at all. Again, you have a similar thing on the 6th August, 1863, when a letter was written from London to Mr. Lankaski, addressed to the care of Messrs. Heald, Mathurn and Co., at Constantinople, signed "Pro John Rogerson and Co.: W. R. Shakell," who was also authorised to write for them. The letter states this: "The present is to advise you of the *Chesapeake* having touched at Malta on the 28th ult.; and we trust, if she has not already arrived at Constantinople, she will very shortly do so, and you will get her safely discharged, and her cargo sent to its destination. You will then make arrangements to get the steamer to the Danube; but if you find the water too low to get to Belgrade, you will then make the best arrangements you can for working the vessel profitably lower down the river. The vessel must not be sold under 1,500*l.*, and in the event of your obtaining a purchaser you must be careful either to obtain cash or good bills on London. The *Louise Crawshay*, left Newcastle last week, and was at Southampton on the 3rd inst. You are also at liberty to sell this boat for 4,000*l.*, same payment as for the *Chesapeake*; and should you sell either or both, you must not mention the sale to the Danubian people, but telegraph to us immediately, and we shall then replace them, by sending the *Harry Clasper* and *Wansbeck*." Now, that letter is distinct. Mr. Rogerson had not only not delivered them, but he considers himself entitled to substitute two other vessels for them. It is not pretended that the company ever agreed to buy two other vessels. Those were the only two they had bought; but he considered himself, at all events, entitled to do as he did, and on the 8th October he writes to a similar effect. In my opinion the probability was, that Mr. Rogerson thought his security was very bad, and he was proposing to sell the ships before the bills had become due, or any default had been made, in order to pay himself; that he claimed to be, and acted as, mortgagee in possession and not as owner of the ships; and that it was not in that character that he intended to do what he did. But after reading the evidence it is impossible to say that he ever gave the plaintiffs or the company the slightest

control over these vessels, at any place whatever, either in the Tyne or at Constantinople, or on their way to it. But assuming the defendant Rogerson to be in the right (I will take his own case as he states it), I will then see what the result would be. Here is a contract entered into with the defendant Rogerson and Co. and the Anglo-Danubian Company. The Anglo-Danubian Company wanted boats for the Danube; they buy two boats, and they desire the vendor, who professes his willingness to act as their agent, to take the two boats to the Danube for them. The vendor still professes to act as their agent, and saying he takes possession of them as their agent, withholds from his principal all control over the vessels, and keeps them entirely to himself at Constantinople. What he would have, if I simply dismiss the bill, and give him what he claims he is entitled to, is this: He has received 1,000*l.* in one action; he would receive 3,000*l.* from the plaintiffs, which is due upon three bills, and which has been paid into court with interest, and he would receive the 1,500*l.* for the sale of the ship at Constantinople, being a sum of upwards of 6,000*l.* The whole of that would not meet the amount which he claims to be due to him, because what he claims to be due to him is not merely the amount of the acceptances, but also the money he has laid out on the vessels, which he says amounts to 3,000*l.* He would receive upwards of 6,000*l.*, and the Anglo-Danubian Company would literally get nothing at all. The only thing would be this, that they would not have even the appearance of the vessels in the Danube for their benefit; they would merely have this, that in consideration of their being the equitable owners of the vessels, without having any control or any power over them, they would have an opportunity, of which they might avail themselves, of declaring to their shareholders that they had bought these two vessels and that they were the owners of the vessels. But, in the meantime, Mr. Rogerson would have received the sum of 6,000*l.* and upwards from either the Anglo-Danubian Company or the plaintiffs, as their guarantors, in order to enable the plaintiffs simply to do and the defendant to carry on a speculative voyage, for the delivery of munitions of war upon the coast of Circassia. It is thought that I can, upon that, hold this case to be one in which the plaintiffs are bound by their suretyship to allow that to be done; although it is plain, in my opinion, that upon the contract the vessels were to be delivered to the company, and they were to have the benefit of the contract being duly performed. I am of opinion, with respect to that, that they are distinctly discharged from the suretyship for the company. Accordingly, I make a declaration to that effect, and order the amount to be repaid to them, with costs.

KINDERSLEY, V.C., Nov. 4, 6, 1865.

Nov. 4, 6, 1865.

TALBOT v. MARSHFIELD.

13 L. T. 424; 11 Jur. N.S. 901.

Practice—Production of documents—Sealing up letter-book—Place of inspection—Costs.

DISCOVERY.—Upon an order made in the usual form for production of documents by the defendant, amongst other documents set forth in the defendant's affidavit was "a copy of a letter contained in a certain letter-book." The defendant subsequently, upon an affidavit stating that the letter-book was in constant use, and contained many other letters relating to

other business, applied in chambers that the letter-book should be open for inspection at his office in the country, where the book was kept, and that he should be entitled to seal up all the book excepting the letter specified in the affidavit:

Order made, that the book be open for inspection at the office of the defendant's London agent, and that the defendant be allowed to seal up any part of the book which, upon his oath, was not relative to the matters in question in the suit. Costs of the summons adjourned into court on the question to be costs in the cause.

An order had been made in this case for the production of documents by the defendants (see 12 L. T. Rep. N.S. 761; 2 Da. & Sm. 549). Amongst the documents so ordered to be produced, was one described in the defendant's affidavit as a "copy of a letter contained in a certain letter-book." The case now came on upon an adjourned summons on the question whether the defendant was at liberty to seal up the rest of the letter-book showing only the copy letter ordered to be produced; the book being an ordinary solicitor's letter-book. There was also another question as to whether the book might not remain at the solicitor's office at Wareham, in Dorset, instead of being deposited, as was the usual practice, at the Record and Writ Clerks' office.

The defendant's application in chambers was upon an affidavit of his solicitor's clerk, stating that the letter-book was in constant use, and contained many other letters relating to other matters, and the defendant asked that this book should be retained at Wareham for inspection there, and that he should be entitled to seal up the rest of the book, showing only the letter specified in the affidavit.

The plaintiff, on the other hand, contended that the book should be deposited at the Record and Writ Clerks' office, and that he ought to be at liberty to inspect the whole of it, or, at all events, that the defendant should make an affidavit to the effect that the letter in question was the only one in the book relating to the matter in the suit.

Hinde Palmer, Q.C., and Higgins, for the defendant, cited

Draper v. Manchester, Sheffield, and Lincolnshire Railway Company, 3 De G. F. & J. 23; 3 L. T. Rep. N.S. 402. *Grane v. Cooper*, 2 Myl. & Cr. 263. *Sheffield Canal v. Sheffield and Rotherham Railway*, 1 Ph. 484.

Glasse, Q.C. and Dixon for the plaintiff.

Hinde Palmer, Q.C. in reply.

The VICE-CHANCELLOR reserved judgment, in order that he might inquire into the practice at chambers, as affecting the question of the costs of the application.

Nov. 6.—The VICE-CHANCELLOR.—I abstained from expressing an opinion, not as being in any doubt as to the sort of order which ought to be made, but for the purpose of ascertaining whether there was any settled practice in chambers as affecting the question of costs. The order here made in chambers, upon the summons for the production of documents, is quite in the common form. It is the form given in 2 Seton on Decrees, 1040, requiring the defendant within seven days to file his affidavit of documents, and within seven days after filing to deposit such documents, excepting those he shall decline to produce, at the office of Records and Writs; and the applicant is to be at liberty to inspect and take copies of such documents. Upon this the defendant makes his affidavit setting forth the documents in his possession, and dividing them into two schedules, the first of which contained the list of documents to be produced, among which was that which is described as a "copy of a letter contained in a certain letter-book." The defendant then applies by summons to have this book neither deposited in the Record and

Writs Clerks' office, nor at the office of the defendant's London agent, but kept at Wareham, and that all except this one letter should be sealed up. Now, it is quite clear what ought to be done; though the letters in this book only come down to 1858, yet it is evidently in frequent, if not in daily, use, with a view to the general business of the defendant; and, if so, the practice is plain that, instead of being deposited in the office of Records and Writs, or kept at Wareham, which would occasion great inconvenience to those who were entitled to consult it, it should be open to inspection at some third place, and no place would be more proper than the office of the defendant's London agent. So also the practice as to sealing up is quite clear that a defendant should be allowed to seal up a part of any document which is, upon his oath, not relative to the matters in question in the suit. With respect, however, to costs, the general principle is, that when an application is made necessary by default or miscarriage of a party, that party shall pay the costs. Now, there are several forms of order made on an application for production of documents, and if a defendant is able to show on that occasion that the deposit would be inconvenient as to some of the documents, or that parts of some of them ought to be protected, the court will frame its order so as to give the protection. And where the documents are numerous, and the defendant is for the first time called on by the summons to examine into their character, it is quite possible that he may not be sufficiently acquainted with them to state at once what course he requires to follow in respect of them. The case is different where a defendant has appended a schedule of documents to his answer: there he has had time to consider their contents, and is able and bound to state at once, in chambers, as to what he requires protection. Here the order was made in the simplest form. The defendant was then, for the first time, called on to examine these documents, and, in accordance with the usual practice in chambers, is entitled to have this application for protection considered as a part of the original summons. The costs of it will, therefore, be treated as the costs of that application, and be costs in the cause.

STUART, V.C., Dec. 8, 1865.

ELWES v. BARNARD.

13 L. T. 426; 11 Jur. N.S. 1035.

Practice—Trustees—Bill for an account against—Deceased trustee—Liability of, though not charged.

TRUST AND TRUSTEE.—*On a bill for an account against trustees, and where one of the trustees was dead, and no allegation made against him and no relief prayed against his estate by the plaintiffs; but the defendants in their answer alleged that he had taken an active part with them in the execution of the trusts:—Held, that his representatives were properly before the court, and must, on a reference to chambers, be included in the inquiry.*

This suit was instituted for the administration, under the direction of the court, of the trusts of a certain deed of settlement, and also for the appointment of new trustees to the above deed in the place of George Carry Elwes, deceased, and the defendants Barnard and Rackham.

The settlement in question was dated the 25th April, 1842, and the plaintiffs were the *cestuis que trust*, and the defendants the trustees of the property thereby settled. The bill prayed for an account against the defendants Barnard and Rackham, but the estate of the deceased trustee G. C. Elwes was not included in the prayer of the bill.

At the commencement of the proceedings his Honour decided that before entering into any discussion as to the conduct of the trustees it would be better at once to refer the matter to chambers for an inquiry, whereupon

W. M. James, Q.C. and Cracknell, on behalf of the representatives of *G. C. Elwes*, submitted that they were unnecessarily before the court, and asked that they might be dismissed and their costs allowed them. The plaintiffs admitted in their bill that *Elwes* had taken but little part in the management of the trust, and in fact there was nothing to prove that he had acted at all; as nothing had been alleged against him and no relief claimed against his estate, they had consequently put in no answer.

Kay (Malins, Q.C. with him), for the defendants *Barnard and Rackham*, contended that the evidence would fully substantiate the fact of *Elwes* having acted. He was clearly a trustee under the deed, and ought to be represented. It would be a useless and unheard-of thing to enter into the accounts without all the trustees being before the court.

Bacon, Q.C. and Bristowe for the plaintiffs; and

Greene, Q.C. and Tucker for other parties.

The VICE-CHANCELLOR.—I consider that it is evident that the plaintiffs (probably on account of some relationship existing between them and *Elwes*) do not wish to make his estate accountable under the present proceedings; but by the trust-deed he is constituted a trustee, and though the plaintiffs may desire to limit the decree to two trustees only, yet, as the defendants the other trustees, have sworn that he took an active part with them in the execution of the trust, it would be impossible (on principle) to refuse to make all the trustees responsible for the due performance of the trust in question. This decree ought not to be considered as a hardship upon the representatives of *Elwes*, for under it they will be enabled (if necessary) to make every defence that the occasion requires. If *Elwes* has received no money, the certificate will show that such was the case, and the certificate cannot be acted upon until all parties have had an opportunity of being heard. It has been said that all the accounts between *Elwes* and the other trustees have been long ago settled; but again, if this be the fact, the inquiry will substantiate it. Under these circumstances I consider that it is impossible that complete justice can be done either to the *cestuis que trust*, the other trustees, or the estate of *Elwes* himself, without including him within the inquiry about to be instituted. The order must therefore be drawn up to that effect.

[BAIL COURT.]

Nov. 25, 1885.

HARVEY v. FEATHERSTONAUGH.

13 L. T. 442.

Inclosure—Award—Appeal.

COMMON.—If one person interested in an inclosure award gives notice of appeal from valuer to commissioner, general in its terms, the court must hear and determine on objections made by any other person interested, even though the original objector withdraw his objection, and no notice of dissatisfaction has been given by any other person.

It is not a condition precedent in such a case that the after-coming objector should have given notice of objection to the valuer's award.

Manisty, Q.C. and *Kemplay*, for the defendant, showed cause against a rule obtained by *Temple, Q.C.*, to review a decision of an assistant commissioner under the Inclosure Act, 8 & 9 Vict. c. 118.

Manisty, Q.C. for defendant.—Procedure under the Act is as follows: The valuer selected in the manner prescribed by sect. 33 and 37 lodges a schedule of claims by parties entitled to allotments under the Act, so that all others may come in and make their objections. Defendant made his claim, and no one objected to it. Still, when the valuation is made, the person claiming is bound to establish his right. Defendant satisfied the valuer as to part of his claim, which was allowed; but the remainder was disallowed. By the 47th section all claims must be in writing; by the 48th, the valuer must deliver a schedule of all such claims for examination. Then (by section 55) another schedule of claims allowed by the valuer is deposited for inspection, and any person dissatisfied with the valuer's determination has thirty days during which he may deliver to the commissioners notice of objection. The commissioners may then appoint a meeting to hear and determine the claim by themselves, or by any assistant commissioner specially appointed for that purpose. By section 48, the party dissatisfied must give notice of his desire to have the claim heard and reported on by the commissioners; therefore section 48 is the groundwork of section 55. The order of the valuer is final unless notice is given, and so is the order of the assistant commissioner.

BLACKBURN, J.—You say sections 48 and 55 are to be read together.

Kemplay.—The meaning of the 55th section is, that after the valuer shall have heard all matters and objections, he shall cause the schedule of claim and objections and his determinations thereon to be deposited and to remain for thirty days at least in some public place for examination, and within those thirty days the commissioners shall have notice of all claims which shall be so desired to be reheard.

Manisty, Q.C.—What defendant did was this. Being dissatisfied with a part of the award, he gave notice within the thirty days. An assistant commissioner was appointed, but when he came Featherstonaugh withdrew his objection and said he would not have it reheard. The matter was thought to be at an end, when Harvey, who had never objected before, starts up. The commissioner refuses to hear him, thinking he has no *locus standi*, and after hearing some other cases, makes his final award simply confirming what the valuer had done. The commissioner says there is no ground for letting Harvey in. The parties then go before Crompton, J., who says, "There should be no order, but I refer the case to the court, so that the defendant may be in the same position he is now, and may not be prejudiced by the delay." [Section 56 of the Act read.] The plaintiff is not within the Act. There was no determination on this claim. The only objection (that of Featherstonaugh) was withdrawn, and if Harvey had meant to object he should have done it within thirty days after the valuer's award.

Kemplay on the same side.—Unless the party lays a foundation for his appearance by giving notice, he cannot appeal. This Harvey failed to do, and there would be no end to the matter if he could now come in, after having failed to raise the issue in the manner prescribed.

Temple, Q.C. for plaintiff.—The whole turns on sections 55 and 56 of the Act. No antecedent step is necessary; it is sufficient if notice of dissatisfaction is given to the assistant commissioner. Harvey says, in his affidavit, that Featherstonaugh and other persons being dissatisfied with the valuer's estimate and determination, they appealed to the assistant commissioner respecting the whole matter. The 56th section does not expressly require that the objection should have been made before that person's sitting. And by section 55 it is not imperatively necessary, as a condition precedent, for the commissioner hearing the objections, that there should have been thirty

days' notice. [BLACKBURN, J.—Either notice or private information.] As a matter of right there must be thirty days' notice before he hears or determines. But he may act without such notice on the information of any persons present at the meeting. [BLACKBURN, J.—No. Look at the words which follow: "Then the commissioner shall forthwith give notice of such meeting." He never gave notice of such a meeting in this case.] There was an objection, though not from us. Notice given on the valuer's award is not an absolute condition precedent. Section 56 provides that any person dissatisfied with the determination of the commissioner or assistant commissioner, shall, within thirty days of such determination, give notice, &c. There is no proviso that he shall previously have given notice to the valuer. It stands wholly independent of section 55. When Featherstonough withdraws his notice, Harvey says, "I am interested, and I wish the matter gone into."

BLACKBURN, J. asked for the notice of defendant's intention to appeal. It was in general terms, and expresses dissatisfaction with the whole matter.

Manisty, Q.C. contended that, though in general terms, as it was given by a party who had made a claim, it must mean because you have not given me enough; therefore I object to your decision, because you have not given what you disallowed. Had Featherstonough gone on, the matter would have been tried between him and the assistant commissioner, not between him and Harvey.

BLACKBURN, J.—The real point is, whether the assistant commissioner had any jurisdiction over the part of the valuer's award in favour of the objecting party.

Temple, Q.C.—I do not conceive that Featherstonough would not be dissatisfied with what was given him. He might say, "You have given me an inclosure in respect of field A, which belongs to my neighbour, and is a small one; but you have not given me anything in respect of field B, which belongs to me, and is a large one." Therefore, it is not by any means clear that Featherstonough might not have been dissatisfied with the decision come to in his favour. If the commissioner had heard our objection and decided that we had no ground for complaint, there might have been some reason for saying that we had no right. But he hears nothing from us, and publishes his decision, and our notice with it, within the thirty days which we have to complain. We come certainly within the letter, and I think within the spirit, of the 56th section.

BLACKBURN, J. took the notice of the meeting and the award, and the next day, having considered their effect, said:—On looking over the form of the notice, I think that, after the valuer had made his award, Featherstonough gave a notice absolute in its terms, saying that he was dissatisfied with the whole. Very likely he meant that he was dissatisfied only with what was against him. The commissioner having given notice of a meeting at which he would consider the whole claim, Featherstonough's withdrawal could not take away the commissioner's jurisdiction over the whole of the claim. Within the thirty days Harvey had a right to say, "I did not think it necessary to give notice of my complaint, because I knew that the whole matter would come before the commissioner." The rule for a rehearing must, therefore, be made absolute; but the costs of the application must be costs in the issue.

Rule absolute accordingly.

[BAIL COURT.]

Nov. 25, 1865.

Ex parte JOHN AUSTIN.

13 L. T. 443.

Mandamus—Order of sessions—Costs.

MANDAMUS.—*The Court will not, in the first instance, grant a rule for a mandamus calling on a public body to make a rate for payment of costs due to a successful appellant against a rate which has been quashed at quarter sessions. The proper course is to bring the sessions order for payment of costs into the Q.B., where its validity may be determined. If it is found to be good, and is nevertheless disobeyed, the motion for mandamus may then be made.*

Barrow moved for a rule to show cause why a *mandamus* should not issue to the commissioners of the town of Milton-next-Sittingbourne, calling on them to make a rate for the purpose of paying the applicant certain costs. The affidavits showed an appeal to the quarter sessions of the county of Kent against a rate made by these commissioners. The appeal was successful and the court ordered the costs to be paid. The costs were not taxed during the sessions, but there was an express agreement that they might be taxed out of sessions. They were ultimately taxed at 46*l.* odd, and an order for their payment was served on the commissioners. The clerk to the commissioners said that they had no funds, and begged that no proceedings might be taken. A letter was afterwards written saying that the commissioners could not pay the costs, even if they had the willingness to do so. Now, as the commissioners were a public body, the court would hardly hold them personally liable, and ever since *Rex v. Essex* (4 T. R. 591, 594, 595), it had been held that bodies having the superintendence of the public purse must have the power of appearing as defendants in support of their own rate, and as such defendants they were liable to costs. The authority to levy rates was given to these commissioners by 1 Vict. c. ii. s. 84; Baines's Act (12 & 13 Vict. c. 45), s. 5, gives power to the sessions to order costs in all cases of appeal; Jervis's Act (11 & 12 Vict. c. 43), s. 27, prescribes the mode of enforcing the payment of such costs. But the power of enforcing the order is in Baines's Act (12 & 13 Vict. c. 45), s. 18, where it is enacted that where any order shall be made by any court of quarter sessions, on the application of any person entitled to enforce the same, and on proof of neglect or refusal to obey such order, the Court of Queen's Bench, or any judge thereof, may direct such order to be removed into the Court of Queen's Bench, whereupon such order shall be of the same force and effect, and may be enforced in the same manner, as a rule made by the said court.

BLACKBURN, J.—Then our course is plain. You must make an express demand upon the commissioners for payment of your costs in obedience to the order of the sessions. If they refuse you must bring the order into the Queen's Bench, when the question of its validity may be determined. Should they then disobey, your present motion may be made, but at present you are too soon.

Rule refused.

[BAIL COURT.]

Nov. 25, 1865.

REG. v. METROPOLITAN RAILWAY COMPANY.

14 L. T. 444.

Lands Clauses Act—ss. 23, 68, 85, and 110.

COMPULSORY PURCHASE.—*The owner of property required for railway purposes does not lose his right to have the value assessed by a jury under 8 & 9 Vict. c. 18, s. 23, because he has made no claim, and because the company has proceeded under section 85. They must have actually paid or tendered the money, or the owner may claim to go on under section 23 or 68. And if the assignee of a bankrupt mortgagor will not concur, that is ground for proceeding under section 110.*

Beasley had obtained a rule calling on the company to show cause against a *mandamus* commanding them to require the sheriff of Middlesex to issue his precept to assess the compensation payable to the trustees of the Independent Building Benefit Society, No. 6, for their interest in certain premises required for the purposes of the railway.

Keane, Q.C. showed cause against the rule.—He became owner of these premises by the aid of the society. The lease had sixty years to run. He afterwards mortgaged to the society for the whole term, less two days, and in the instrument of mortgage he covenanted to assign to them. He afterwards became insolvent. The company had previously given him notice to treat. The trustees then gave notice of their interest, and the interests of the mortgagee and the company became known. By the aid of the Court of Chancery the company obtained an assignment under which they entered. The trustees say they have a claim on the property of 40*l.* 1*s.* 2*d.*; but they do not say that is all they claim as compensation. We have a survey and then enter into bond according to the statute. We have given notice to treat, and the parties interested might then, had they chosen, have gone for compensation. Under 8 & 9 Vict. c. 18, s. 68, the owner of lands taken or injuriously affected by any railway works may insist on arbitration if his claim exceeds 50*l.*; or he may have the amount settled by a jury. By section 85, promoters may enter before award made, on paying money into the Bank of England and giving bond. We have given them notice, and they simply say that the amount ascertained by the surveyor is inordinately low (20*l.*).

BLACKBURN, J.—But, if the company acted under section 85, they would not be within section 68. You say the trustees should tell you what they want before they get compensation. The *mandamus* must not be granted simply because the party will neither take the money nor ask for the money. The claim is not necessarily for the amount of the mortgage-money, for the premises may not be worth so much.

Beasley relied on section 23. If the owner does nothing at all, that becomes matter of disputed compensation “to be settled by the verdict of a jury as thereafter provided.” The mortgagor has let the company know what he wants, and it appears from the affidavits that his demand has been followed up, both before and after the company had taken the land. Sections 110 and 111 provide what is to be done when the mortgage exceeds the value of the lands, or when the money is refused. The company say, “You are not entitled as mortgagees to come under these sections unless the mortgagor comes with you.” Now *M.*, the mortgagor, sent in his particulars in 1860, and there has been correspondence on that basis, down to May 15, 1865. The mortgagor having become bankrupt before 1861, his rights passed to his provisional assignee, who has no successor under the 24 & 25 Vict. c. 134.

And the official assignee refuses to take any steps towards claiming the equity of redemption.

Keane, Q.C. urged that the applicants ought not to have a *mandamus*, when they had a remedy by simply writing a letter. We have taken possession, and say we have not made compensation under section 68, because the surveyor fixed the value under 50*l.* If that estimate is right, you get compensation under section 23; if it is wrong, you go before a jury, and get it under section 68, but do not go to the court and get it at the expense of the company. We say, if we are ever so wrong in our estimate, since you may get at the amount you want by simply writing a letter, why should you go to the court and cast the whole of the expense of the inquiry upon us? [*BLACKBURN, J.*—If you had been ready to pay the money, your case against the *mandamus* would have been made out. But if they go under section 68, and you have gone under the previous demand for compensation, you are all wrong.] He urged that all the terms to entitle the company to proceed under section 68 have been complied with. In *Adams v. London and Blackwall Railway Company* (2 M. & G. 118), Cottenham, C. held that section 85 applied to every case where, by right or by wrong, the company had got into possession of the property. The plaintiff's course is oppressive towards the company, as they will lose all costs, and the plaintiff's costs as well, unless they happen to offer an amount which overtops the value of the property. [*BLACKBURN, J.* did not see that the mortgagee was bound to tell the company the amount of equity of redemption.] He relied on section 110.

BLACKBURN, J.—Neither party seems to have done anything. The company has made no offer, the trustees have made no demand. If the provisional assignee in bankruptcy does nothing, you come under section 110. Let the rule be enlarged till next term, the plaintiff to write to the official assignee (who succeeds to the rights of the provisional assignee). If he will do nothing, you will have failed to agree. The company then to make an offer before warrant issued under section 110. All parties *bona fide* to endeavour to agree, but, if any unforeseen difficulty should arise, application to be renewed. Rule to be enlarged in the meantime.

Rule enlarged accordingly.

Wood, V.C., June 7, 8, 1865.

PENNY v. PENNY.

13 L. T. 496.

Legacy—Ademption—Capital in co-partnership business—Original and reduced capital in testator's lifetime.

WILL.—A testator, by his will, bequeathed to his two sons, who had been in partnership with him as traders, a sum of 3,000*l.* equally to be divided between them, such legacy to be paid out of a portion of his capital in the co-partnership business, which had been subsequently reduced, but which at the time of his death remained to his credit in the firm.

On the dissolution of the partnership, a short time before the date of the testator's will, and the commencement of a new partnership with an added member to it (the father not being one), it was arranged that the sum of

12,000*l.* which represented the father's capital, should remain in the new firm during his life, the sons paying him the interest on that sum during such period, and to give bond as security for the repayment after his death of the principal, with interest to his executors, administrators, or assigns, by certain instalments of 2,000*l.* annually:—Held, that the legacy of 3,000*l.* to the sons had not been adeemed by the circumstances which had, subsequently to the dissolution of the partnership, taken place.

This was a bill filed by the executor to the will of a Mr. Charles Penny, formerly a wholesale stationer in the city of London, against certain legatees, for the general administration of the estate of the testator.

At the hearing, the usual accounts and inquiries had been directed, and the cause now came on for further consideration on the chief clerk's certificate, and the principal question was, as to the character to be given to a legacy of 3,000*l.* under the circumstances aftermentioned.

The testator by his will, dated 5th August, 1859, *inter alia*, bequeathed the legacy as follows:

And whereas in and by the deed of co-partnership between me and my sons Charles Elias Penny and John Simon Penny it is provided and declared that in case I shall happen to die before the expiration of the term of four years thereby agreed to be the term of our co-partnership, and in the lifetime of my said partners or of the survivor of them, then the share of 26,423*l.* 15*s.* 5*d.*, my therein-mentioned capital in the co-partnership business, shall be secured to my executors or administrators by the joint bond of my said partners or, as the case may be, by the bond of the survivor of them; to be paid by such annual instalments and with interest as in the said deed mentioned. And whereas the said partnership is still continued between me and my said sons notwithstanding the lapse of the said term of four years; now I do hereby give and bequeath to my said partners Charles Elias Penny and John Simon Penny, the sum of 3,000*l.* equally between them, part of my aforesaid capital of 26,423*l.* 15*s.* 5*d.* in the said co-partnership business; and do direct my executors to accept the balance of my said capital, after deducting the last-mentioned legacies, by such bond as aforesaid, for the said balance, only payable by the like annual instalments of the like annual amount with interest as is provided by the said co-partnership deed for the payment to my executors of my aforesaid capital in the said co-partnership. And I direct my executors to invest the said balance and interest, together with all the other moneys provided by the said co-partnership deed, to be paid to my executors or administrators as and when the same balance and moneys shall be received by them, in some or one of the parliamentary stocks or public funds of Great Britain, in the names of my executors and trustees herein named, or other the trustee or trustees for the time being, under this my will, as part of the residue of my estate and effects. And as to all the rest, residue, and remainder of my estate and effects, &c. [in various proportions].

The testator died on the 31st May, 1862. The facts and circumstances existing at the time of his decease were found by the chief clerk's certificate, and were in substance as follows: The testator was not engaged in any partnership, but had been previously with his two sons, as before mentioned, and the terms of the partnership were, that by articles of agreement of the 1st July, 1848, they agreed to carry on the business of wholesale stationers at the place and firm therein mentioned for four years from the date of the agreement. The capital was to consist of 28,191*l.* 9*s.* 7*d.*, and to belong to the partners in the following shares—the testator's 26,423*l.* 15*s.* 5*d.*; Charles Elias Penny's share, 348*l.* 7*s.* 11*d.*; and John Simon Penny's share, 1,419*l.* 6*s.* 3*d.* Interest at 5 per cent. to be charged on the respective amounts of capital, but on testator's capital only to the extent of 20,000*l.* The leases of the business premises were to continue to be the sole property of the testator; the partnership to pay the rent and taxes in respect thereof. The

net profits, after setting apart 2 per cent. for bad debts, were to be apportioned in four-ninths to the testator, three-ninths to Chas. E. Penny, and two-ninths to J. S. Penny; and in case of the death of testator before his partners, or the survivor of them, his capital was to remain in the business for the better enabling the same to be carried on, but on condition that his two sons, or the survivor of them, should, after the decease of the testator, execute a bond to his representatives for securing repayment of such capital by thirteen equal yearly payments of 2,000*l.*, except the last, which was to be for 2,423*l.* 15*s.* 5*d.*, with interest thereon from the death of testator.

The termination of the partnership was thus stated. Up to the middle of the year 1859 no account of stock had been taken, nor any balance-sheet made out, or balance struck. In the year 1859 failing health and the infirmities of old age rendered the testator unfit for business, and negotiations were then entered upon with a view to his retirement from the business. These lasted a considerable time. The members of the testator's family were privy to them. He subsequently agreed to retire if a Mr. A. H. Penny (a defendant) was admitted as a partner in his stead. Whilst these negotiations were in progress, an account of the stock was taken and a balance-sheet made out, and balance struck. It was then found that the testator's share of capital, instead of being 26,421*l.* 15*s.* 5*d.*, was only 17,000*l.*, having been reduced by bad debts and depreciation in the value of the stock-in-trade, and by the withdrawal by the testator in the previous May of 3,000*l.* in cash; and it was then arranged between them that of this sum of 17,000*l.* the sum of 5,000*l.* should be paid to the testator upon the completion of the new partnership, and that the sum of 12,000*l.*, being the residue, should remain in the business during his life, security being given to him for payment of interest on this latter sum, and for payment after his decease to his executors, administrators, or assigns, by annual instalments of 2,000*l.* These arrangements were carried out and completed in July, 1859, before the date of testator's will, and the necessary deeds and bond were subsequently executed by all parties, and the dissolution of the old firm duly announced by advertisement. The reduced capital of the testator, *minus* 1,000*l.*, which had been paid to him on account, remained on the footing of these arrangements, until the time of testator's death.

One of the questions now raised was, whether the two sons were to be allowed to retain to their own use out of the 12,000*l.* capital the legacy of 3,000*l.*, or whether, under the circumstances, that legacy had not been ademed?

Willcock, Q.C. and *Hardy*, for the plaintiff, the executor, submitted the points to the court.

Rolt, Q.C., and *Stiffe Everitt*, for the two sons, the legatees.

Sir H. Cairns, Q.C., and *F. Harrison*, for infants, members of the testator's family who had had liberty to attend before the chief clerk, in taking the accounts and inquiries directed by the decree.

The VICE CHANCELLOR said:—I think upon the whole construction of this will, the conclusion to be come to is pretty clear. The case has been argued very fully and very well. If the capital of the partnership itself had disappeared, there would have been an ademption. What the testator says, referring to the deed of co-partnership between him and his sons, is this: "It is provided and declared that in case I shall happen to die before the expiration of the term of four years therein agreed to be the term of our co-partnership, and in the lifetime of my said partners or of the survivor of them, then the sum of 26,423*l.*, my therein-mentioned capital in the co-partnership business, shall be secured to my executors or administrators by the joint bond of my said partners, as the case may be by the bond of the survivor of them;" which is a true recital. The partnership articles having conceived,

apparently, that the business would be a prosperous one, that the sum of 26,000*l.* and odd would remain payable, the articles would only require that to be payable which would be payable, but he recites the articles of partnership correctly, and then says: "And whereas the said partnership is still continued between me and my said sons, notwithstanding the lapse of the said term of four years"—I will refer to that presently, as to how the things really stood—"now I do hereby give and bequeath to my said partners, Charles Elias Penny and John Simon Penny, the sum of 3,000*l.* equally between them, part of my aforesaid capital of 26,423*l.* in the said co-partnership business." He had a capital of 26,423*l.* in the business at the date of the articles, which was covenanted to be repaid and secured by bond in the manner mentioned; this by accidents in business had become reduced, partly by payments to himself, and he had drawn out about 5,000*l.* It had been 17,000*l.* However, some of the money had been drawn out; still what remained was capital in the business. Supposing the business to have been continued, it would be his capital. It is no less his capital in the business till it is disposed of, or dealt with in some way, though it may be secured differently to what it may have been in the original partnership articles. If the partnership had actually determined, still it was his capital in the business, and not yet paid off, although it was intended to be secured in one way, yet really secured in another. Supposing there were a bond of two, some question might have arisen if the nature of the security had changed. What he does is this: there is a sum due as his capital in the business; he contemplates the case of death, and he contemplates the event of the business being at an end; it could not then be his continuing capital, and what he contemplates is, the money owing to me at my death in respect of my original capital in the business; that is the thing out of which he makes the disposition. He says, "Here is the money owing to me." There was 12,000*l.* owing to him at the time of his death, then he gives the 3,000*l.*; and it did occur to me as possible to be suggested that there might be a doctrine similar to that in the case of *Page v. Leapingwell* (18 Ves. 463), that he had estimated the sum, and would have an aliquot ratio. That is not the true view, because the circumstances of his speaking of it as capital in the business must be taken to be indicative that he is aware of the possibility before his decease of the amount fluctuating, and the primary object is to give a sum of 3,000*l.* to the sons—he points out the fund—had the fund fallen short they would suffer. They have lost 5,000*l.*, but there is the identical fund out of which he has given, reduced to 12,000*l.*, instead of its being 26,000*l.*; but the legacy is payable out of that as long as there is a fund to pay it. There is no ademption. It is given in that way, and the circumstance that that fund has got an additional security to what was provided in the will (the security of the additional brother) does not alter the fund itself as being that which is called capital in his business.

The following were the minutes of the order relating to this legacy:

Declare that the legacy of three thousand pounds by the testator's will bequeathed to the defendants Charles Elias Penny and John Simon Penny equally between them, was properly payable to them from and out of the sum of twelve thousand pounds due from the three defendants on bond, being the amount of the said testator's capital in his former partnership with the defendants, Charles Elias Penny and John Simon Penny, and remaining unpaid at the time of his death, and that the same sum of three thousand pounds, less legacy duty, was properly retained by the said defendants out of the first instalments of the said sum of twelve thousand pounds.

Wood, V.C., Dec. 8. 1865.

WILLIAMS v. OSBORNE.

13 L. T. 498.

Injunction—Use of name of another trader.

TRADE AND TRADE NAME.—*Before the court will interfere to prevent one trader from making fraudulent use of the name of another, it requires to be satisfied not only that the course taken by the defendant is calculated to deceive the public, but that representation has been made to him by the plaintiff that it will have that effect.*

This was a suit to restrain the defendants from selling any goods manufactured by them as goods manufactured by the late Robert Hendrie, perfumer, or by the plaintiffs, who had bought his business, or from selling goods made up in cases, or having labels affixed resembling the cases and labels of Hendrie or the plaintiffs, or from representing themselves to the public as the true and legitimate representatives of the business carried on by the late Robert Hendrie.

The late Robert Hendrie carried on an extensive trade as a wholesale perfumer, at Nos. 12 and 13, Tichborne Street, and Regent's Quadrant.

In order to enable the public to distinguish his goods, Hendrie used certain labels or stamps upon which his name was printed or stamped, and many of the articles manufactured and sold by him were made up in cases or boxes of a peculiar shape and colour, and were labelled with labels of different colours.

Robert Hendrie died on the 27th April, 1862, and in November, 1862, the plaintiff Terrick Jones Williams purchased from the executors of Hendrie the goodwill of the business, and all the recipes then in the possession of the executors belonging or relating to the business, and all the stock-in-trade of the business.

The executors, by an agreement in writing, agreed to demise the premises Nos. 12 and 13, Tichborne Street, to the plaintiff Williams, for a term of forty-two years from the 1st December, 1862, and with an option to buy the reversion in fee-simple within three years.

A valuation of the stock-in-trade, tenants' and trade fixtures was made, and included numerous trade bills, cards, and placards, having the name of Robert Hendrie printed or engraved thereon, cases and boxes, the engraved plates from which the labels and cards were printed, and two framed plates of glass fixed in positions to be seen from the roadway, upon which the name of "Hendrie" was written, and the gilt wooden letters, forming the name of "Hendrie," which were affixed over the shop front of Hendrie's place of business.

The plaintiff Williams, with the plaintiff Usherwood, since the month of December, 1862, carried on the business as partners under the name of Robert Hendrie.

The defendants, W. T. Osborne, H. Bauer, and E. Cheeseman, had been all employed by Robert Hendrie in his business in different capacities.

The defendants, after the death of Hendrie, bid for the business, but failed to obtain it, and when the plaintiffs took the premises, the defendants left Tichborne Street, and shortly after commenced business as manufacturing wholesale and retail perfumers, at No. 19, Golden Square, in partnership, under the style of "Osborne, Bauer, and Cheeseman."

The bill, as amended, alleged that the defendants had sold and made up in boxes and cases similar in size, shape, colour, and general appearance to those used by Hendrie in his lifetime, and the plaintiffs after his death for the like, goods with labels similar in appearance to those used by

Robert Hendrie, and that on such labels so used by the defendants the name of Robert Hendrie was printed in large and conspicuous letters, and was immediately followed by the defendants' address, No. 19, Golden Square, as if it were the address of the said Robert Hendrie, and although Golden Square, as the bill alleged, was never described by other persons as Golden Square, Regent's Quadrant, and could not with any propriety be so described; yet, because the shop and premises of the late Robert Hendrie were always known and described as situate in Tichborne Street, Regent's Quadrant, the defendants in their labels always added the words "Regent's Quadrant" in conspicuous letters to their address, No. 19, Golden Square, and so caused the public and the trade to suppose that the goods so sold and manufactured by the said defendants were goods manufactured and sold by the said Robert Hendrie, or by the plaintiffs in their business.

The bill also alleged that the defendants caused to be painted in large letters over the window of the shop at No. 19, Golden Square, the words "Osborne, Bauer, and Cheeseman," and "R. Hendrie," with the words "from the late" in very small letters between the name Cheeseman and the name R. Hendrie. It appeared, however, in the evidence that at the side of their shop the defendants had a similar inscription, but that the words "from the late" were as large as the rest of the other words.

It appeared that in some of their placards the defendants had described themselves as follows: "Osborne, Bauer, and Cheeseman, managers and manufacturers to the late Robert Hendrie, 19, Golden Square, Regent's Quadrant, London;" and the plaintiffs alleged that, in consequence of such use by the defendants of the name of Robert Hendrie in connection with the said address, several persons had been led to believe that the business carried on by the defendants was the business of the late Robert Hendrie, and that a Mr. Thompson, of Reading, was so deceived, and that on the 10th October, 1864, he wrote and sent a letter intended for the plaintiffs, which he addressed as follows: "Mr. Hendrie, perfumer, 19, Golden Square, Regent's Quadrant, London." The letter was delivered at the shop of the defendants and was taken in and opened by the defendants, who, finding from the contents of the letter that it was not for them but for the plaintiffs, returned the letter to the postman, stating that no Mr. Hendrie resided at No. 19, Golden Square, and it was subsequently delivered to the plaintiffs at their place of business. The letter was as follows:

90, Broad Street, Reading,
October 10, 1864.

Sir,—Does Mr. Lovewell travel for you? If so, I ordered some tooth brushes and petroline soap to be sent to me from your house. It is about five weeks back, and as I want them you will oblige by sending them immediately by Pickford.

Yours respectfully,

Mr. Hendrie.

A. THOMPSON.

Mr. Lovewell was a traveller for the plaintiffs.

The plaintiffs also alleged that Hendrie made a particular kind of pomade, called "moëlline," which he sold in glass bottles inside a pasteboard pull-off case, and the defendants had sold an inferior article under the same name, and in bottles and cases very nearly resembling those used by Hendrie and the plaintiffs, and also with labels almost exactly similar in appearance to those of Hendrie's, with the words "from the late Robt. Hendrie's."

Another of the articles sold by the said Robert Hendrie in his lifetime, and by the plaintiffs since his death, was a soap called "petroleum soap," which was prepared according to the specification referred to in a patent, which had now expired, obtained by one W. L. Caldecot, who sold and assigned his patent to Hendrie, whose rights and interest therein were purchased by the plaintiffs of his executors. This was sold in a wrapper of a particular colour.

The plaintiffs alleged that the defendants also sold soap very similar to the plaintiffs, and that to induce the public to believe that it was the same as the plaintiffs', they called it petroleum, or dispensary soap, and sold it in wrappers similar to those of the plaintiffs.

It appeared from the evidence that the name "petroleum" was used as an appellative for soap by other perfumers, and petroleum soap had been manufactured by one John Tyler before the date of Caldecot's patent.

Robert Hendrie, in his lifetime, also sold a soap called "petroline cosmetic soap," which was prepared by Caldecot's process. The bill charged that the defendants sold soap similar in appearance to the plaintiffs' petroline cosmetic soap, that they stamped it on one side with the words "Cosmetic petroline soap, Osborne and Co., from R. Hendrie's." On the other with the words "Osborne and Co., from R. Hendrie's, Golden Square;" the name R. Hendrie being conspicuously placed by itself in the centre, so as to attract attention to that name, but at the same time in immediate connection with the defendants' address, 19, Golden Square, and that they sold it in wrappers similar to those of the plaintiffs.

The bill alleged that the words "Petroline cosmetic soap" were never used by any person except the said Robert Hendrie, deceased, and by the plaintiffs, to designate any particular soap, until they were used by the defendants as aforesaid, and they were formerly the said Robert Hendrie's, and are now the plaintiffs' trade-mark.

The bill also alleged that the defendants had sold and offered for sale other articles similar to those sold by the plaintiffs in the said business, and that they made up, labelled, and described them in a manner clearly resembling the way in which those sold by the plaintiffs were made up, labelled, and described, and in imitation thereof; and that they used the name of the said Robert Hendrie in such a manner as to represent such goods to the public as of the manufacture of the plaintiffs; and that the defendants used their address, 19, Golden Square, in connection with the name of the said Robert Hendrie, in such a manner as to make it appear to be the address or place of business of the said Robert Hendrie; and that in consequence thereof various goods of the defendants' manufacture had been sold as Hendrie's goods.

On the 1st September, 1864, the plaintiffs' solicitor wrote to the defendants complaining of their selling goods in cases with the name of Hendrie, and made in imitation of the plaintiffs'. A correspondence then ensued between the solicitors of the parties. On the 5th November, 1864, the solicitor for the defendants wrote to the solicitors of the plaintiffs asking on whose behalf he had applied to the defendants, and how they claimed to use the name of Hendrie exclusively? The letter then went on:

"One or two facts I may be forgiven bringing before your notice. Mr. Osborne was with the late Mr. Hendrie about twenty-eight years, Mr. Cheeseman about eight years and a half, and Mr. Bauer about twenty-three years; during these several periods one acted as manager of the soap department, and afterwards in addition as general manager; the second had the management of the counting-house and books; and the third for many years manufactured all the perfumes and acted as buyer and salesman in the retail department. The services of the three were continued by the executors of the late Mr. Hendrie. Under these circumstances I submit my clients are only stating the truth when they say 'manufacturers and managers to the late R. Hendrie.' . . . Perhaps in your reply, giving me the names of your clients and informing me upon what they ground their application, you will be kind enough to point out in what particulars the label proposed by me is objectionable."

No answer was sent to this letter, and on the 23rd November, 1864, the plaintiffs filed their bill to restrain the defendants from selling any goods manufactured by them as goods of the manufacture of Robert Hendrie, or

of the plaintiffs, or of selling any pomade or other articles made up in cases resembling the plaintiffs', or having affixed thereto labels containing the name of Hendrie or Robert Hendrie, so contrived or expressed as, by colourable imitation or otherwise, to represent the goods sold by the defendants to be the same as goods sold by the plaintiff, particularly with reference to the articles sold by the plaintiff as "moëlline petroleum soap," &c.; and from placing over their shop-windows any inscription so contrived or expressed as to represent that the business carried on by the defendants was the business of Robert Hendrie, deceased, or that the goods sold by the defendants were the same as those sold by Robert Hendrie or the plaintiffs.

The motion for an injunction came on before his Honour, Wood, V.C., on the 15th December, 1864, when the defendants gave an undertaking not "to sell, after the 1st day of January next, any goods having affixed thereto any labels now in use by them, or other labels having the words 'Regent's Quadrant' thereon added to 'Golden Square,' or having the name 'R. Hendrie' or 'Hendrie' thereon, without the words 'the late' prefixed thereto; or any labels having the words 'from the late R. Hendrie,' or the name 'R. Hendrie,' immediately preceding or in connection with the defendants' address;" and also undertaking, "until the hearing of this cause, to keep an account of the sales of all goods which shall be sold and labelled with their labels now in use, distinguishing the goods sold under each particular label;" and the hearing of the motion was ordered to stand over until the hearing of the cause, with liberty for the plaintiffs to amend their bill. The plaintiffs filed their amended bill on the 30th December, 1864.

On the 5th May, 1865, the solicitors for the plaintiffs wrote to offer to stay proceedings if the defendants would submit to an injunction in the terms of the undertaking, and to pay costs.

On the 6th May the solicitor for the defendants wrote declining to accept this proposal.

The cause now came on on motion for decree.

It appeared from an affidavit of a chemist at Bath, of the name of King, that in March, 1864, he ordered from a London patent medicine house a number of cakes of R. Hendrie's petroleum patent soap, prepared for the use of the dispensary. Some of the defendants' soap was sent to him and he declared that he was so mistaken by the labels that he thought it the genuine manufactured soap of the late Robert Hendrie, and that the defendants were his successors.

Several affidavits of letter carriers were filed on behalf of the plaintiffs, in which they all stated that they had never known letters to be addressed Golden Square, Regent's Quadrant.

The defendants in their answer submitted that the plaintiffs were not entitled to use the name of Robert Hendrie, his son never having authorised, but objected to their doing so. That no alteration had been made by them (the defendants) in their way of carrying on business since February, 1863, and that whatever was objectionable to the plaintiffs at the time of filing the bill was equally so then; and that until they received a letter from the plaintiffs' solicitor on the 1st September, 1864, the plaintiffs had never intimated to the defendants that they were doing anything which the plaintiffs considered objectionable.

Giffard, Q.C., and *Speed* (with them *Sir H. Cairns, Q.C.*), for the plaintiffs, submitted that they were entitled to the interference of the court to protect the rights of the plaintiffs, who were properly entitled to use the name of Hendrie. The defendants had palmed off their goods as those of the plaintiffs, and by their placards and advertisements had induced the public to believe that they were successors to Hendrie. They cited—

Leather Cloth Company v. The American Leather Cloth Company, 1 H. &

M. 271; 9 L. T. Rep. N.S. 558. *Edlesden v. Vick*, 11 Hare, 37, 78. *Glennie v. Smith*, 2 Dr. & Sm. 476. *Harrison v. Taylor*, 12 L. T. Rep. N.S. 540.

Rolt, Q.C., and *W. C. Fooks*, for the defendants, were not called on.

The VICE CHANCELLOR said that cases like the present were never free from difficulty. It would be impossible to lay down any general rule as to when persons in business were entitled to use the name of others in the same business. The court had always purposely avoided doing so, that they might not thereby open a door to fraud. But the general principle was, that the court would always interfere where there had been a fraudulent use of the name. But the court must not only be satisfied that the course which had been taken by the defendants had been calculated to deceive the public, but that it had been represented to them by the plaintiffs as having that effect; and that, if after such representation the defendants persisted in continuing the use of the name in the same manner, then, on the plaintiffs bringing the case before the court, the court would be justified in saying that that which was not fraudulent at first became so by the defendants persisting in the same course, and that therefore the plaintiffs would be entitled to the relief they asked. In the present case he was quite satisfied that there had been no intention in these persons at first to deceive the public. He thought that all they meant to represent was, that they had been employed as manufacturers by Hendrie in his business, and this was quite true; there was no doubt that Osborne had manufactured for and superintended the business of the plaintiff, and so might be called manufacturer and manager, and though the other two defendants were not strictly manufacturers and managers in the same sense, yet one had managed the accounts for Hendrie and the other was employed in selling retail goods in the shop for a considerable time. So these persons had all taken a very important part in Hendrie's business. The court had always conceded to persons who had taken an important part in any business the full benefit of this, and the right of informing the whole world that they came from such business. So in this case he thought the defendants were quite justified in stating in their placards, &c. that they came from Hendrie's. As to the instances of intentional fraud on the part of the defendants, it had been urged that the defendants had employed the same maker of boxes, &c.; that they had sold moëlline, petroleum soap, and other articles to which Hendrie had given particular names, in packages of the same colour and appearance as those used by him and the plaintiffs, and had put on the labels "Managers and manufacturers to the late Robert Hendrie;" that all these things put together were sufficient evidence of a fraudulent intent on their part. The plaintiffs had said, "If there was no fraudulent intent in it, what was the object of it all?" and he thought they were fairly justified in asking the question. As to putting Hendrie's name on the labels, &c., he thought they were entitled to do so. That being so, the only remaining question would be, whether they had used Hendrie's name so as to occupy a greater space than their own on the bills, labels, &c. At their house of business, it was clear, from the evidence, that at the side of their shop the name Hendrie was not in larger letters than their own, though it would seem that in the inscription over the door the words "from the late" were in very small letters. But then this was seen by the plaintiffs in April, 1863, and he could not have a better opinion than that of the plaintiffs on the subject. They did not think there was anything fraudulent in the way the defendants had put up Hendrie's name, and they did not make any representation to him about it. As to the names of the different articles, "moëlline," "petroleum soap," &c., which it had been said were adopted specially by Hendrie, it turned out that they were also used by other perfumers. As to the kind of boxes in which they had been sold by the defendants, it had been shown that those used by the defendants were like the plaintiffs', but it had also been shown that the boxes used by other perfumers resembled the plaintiffs', if

anything, more nearly than those of the defendants. It could not be reasonably supposed that the defendants ought to sell the articles under less fanciful names, or in less fanciful packages than those used by other perfumers. He thought that these different acts by the defendants in using names and packages for these articles similar to those of the plaintiffs could not safely be relied upon as *indicia* of fraud. For assuming, for the reasons he had given, that the defendants were entitled to use the name of Hendrie, it only came to this, that they had sold articles under the same names and in similar packages to those used by other perfumers. The plaintiffs had alleged a case of direct fraud, but he thought it had not been proved. Then there was another question as to the address, "Golden Square, Regent's Quadrant," used by the defendants. At first he thought this was a very suspicious circumstance against the defendants; but he did not then know that Golden Square was only 150 yards from Regent's Quadrant. But all the sting had been taken out of this by the fact, that in the Post Office Directory "72, Regent's Quadrant," had for years been inserted as an addition to Golden Square, for the purpose of indicating the route to it. Still, if Tichborne Street, Regent's Quadrant, had been the only address used by Hendrie, it might have been different. But it had been shown that Hendrie had sometimes placed Tichborne Street, Golden Square, on his labels, and sometimes Tichborne Street, London. With regard to that part of the case as to the advertisements of the defendants in which the name of Robert Hendrie was immediately followed by the address, No. 19, Golden Square, Regent's Quadrant, the question for him to consider was, was there anything calculated to mislead the public, which if properly pointed out to the defendants would entitle the court to interfere? The advertisement seemed to have misled Thompson to this extent, that he thought Hendrie lived at the address of the defendants. But it only came to this, that the plaintiffs had been put to the inconvenience of having their letters sent to the wrong place. With regard to the case in which a chemist had been led by the labels to suppose that the defendants were successors to Hendrie, he thought that was a kind of mistake which it would be out of his power to prevent. For the reasons he had given, he thought the defendants were entitled to use Hendrie's name, and also to state that they were manufacturers and managers to him; and if a person saw them so described on their labels and chose to think that they were successors to him, it would be impossible for him to prevent it. As to the position of the plaintiffs in the suit, he thought that they were not justified in representing themselves as perfumers to Her Majesty; and it was a question whether they had a right to place the name of Hendrie on entirely new articles made by themselves, though it might be said the name was only used *quâ* firm. Still, he should have been disposed to dismiss the bill without costs if the bill had not been filed so hastily. He thought the letter sent by the defendants should have been answered before filing the bill. The undertaking too, given by the defendants, was more than he could have compelled. Under these circumstances he must dismiss the bill with costs.

[BAIL COURT.]

BLACKBURN, J., Nov. 23, 1865.

ILDERTON v. CASTRIQUE.

18 L. T. 506.

Composition-deed—Number of creditors—Creditors holding security—Out-standing bills of exchange—Tender dispensed with.

BANKRUPTCY.—*In an action by an attorney on his bill of costs the defendant*

in his plea set out a composition-deed which was not executed by the plaintiff, in which the creditors who signed the deed, in consideration of, and on payment of, the composition covenanted with the defendant to execute a good and sufficient release, and the defendant covenanted with all his creditors to pay them the composition. The plea then averred that the defendant had always been ready and willing to pay the said composition according to the said deed, but the plaintiff would not receive the same:—Held, on a rule to set aside a judgment on demurrer in the Mayor's Court, that the averment in the plea amounted to an averment that the plaintiff had dispensed with a tender of the composition, and that the plea was good. It appeared at the trial that some of the creditors who executed the deed, the amounts of whose debts were necessary to make up the required statutory majority in value, held outstanding bills indorsed by the defendant:—Held, on the authority of Ex parte Godden (32 L. J. 37, Bank.), that their debts were properly included in considering whether three-fourths in value of the defendant's creditors had executed the deed.

This was an action in the Mayor's Court, London, for work done by an attorney.

The defendant pleaded, first, as to 1l. 3s. (the amount of the composition) never indebted; and for a second plea for a defence on equitable grounds, except as to the said sum of 1l. 3s., that after the accruing of the plaintiff's claim in the declaration mentioned, and after the 11th October, 1861, the defendant was indebted to the plaintiff and divers other persons, and thereupon a deed bearing date the 19th August, 1864, was made and entered into by and between the defendant of the one part, and all the creditors of the said defendant of the other part relating to the debts and liabilities of the defendant and his release therefrom, which said deed, without the schedule, was in the words following (that is to say):

This indenture, made the 19th day of August, 1864, between Louis Castrique of No. 3, Philpot Lane, in the city of London, trading under the style or firm of "L. Castrique and Co.," of the one part, and all the creditors of the said Louis Castrique of the other part: Whereas the said Louis Castrique, from divers causes, is unable to pay his creditors full 20s. in the pound, and whereas the said Louis Castrique hath applied to his said creditors to receive and take a composition of 2s. 6d. in the pound in full satisfaction and discharge of their several and respective debts, claims, and demands on him, such composition to be payable on the 31st day of December next, which the several creditors executing these presents, or in writing assenting thereto, have agreed to do, and being a majority in number representing three-fourths in value of the creditors of the said Louis Castrique whose debts respectively amount to 10l. and upwards, have agreed to accept such composition in full satisfaction as aforesaid, and in consideration and on payment thereof, or whenever thereafter called upon for that purpose, hereby severally, for themselves and their partners, and for their several executors, administrators and assigns, covenanted with the said Louis Castrique, his executors and administrators, to execute to him, the said Louis Castrique, his executors and administrators, a good and sufficient release in the law of their several and respective debts, claims, and demands on him; and, in consideration of the covenant hereinbefore contained, the said Louis Castrique doth hereby, for himself, his executors and administrators, covenant with all his creditors to pay them the said composition of 2s. 6d. in the pound on their said several debts, on the said 31st day of December next.—

In witness, &c.

LOUIS CASTRIQUE.

Signed, sealed and delivered by the within-named Louis Castrique, in the presence of T. J. Horwood, solicitor, 3, Philpot Lane, London.

And a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10l. and upwards, did, in writing, assent to and approve of the said deed, and the execution of the said deed by the defendant was attested by an attorney, and within twenty-

eight days from the day of the execution of the said deed by the defendant the same was produced and left (having been first duly stamped) at the office of the chief registrar of the Court of Bankruptcy for the purpose of being registered, and together with such deed there was delivered to the said chief registrar an affidavit by the defendant that a majority in number representing three-fourths in value of the creditors of the defendant whose debts amounted to 10*l.* and upwards had, in writing, assented to and approved of the said deed; and also stating the amount in value of the property of the defendant comprised in the said deed. And the said deed did, before the registration thereof, bear such ordinary and *ad valorem* stamp duties as were provided by the B. A. 1861 in that behalf, and at the time of the execution of the said deed the plaintiff was a creditor of the defendant in respect of the claims herein pleaded to within the meaning of the B. A. 1861, and all conditions having been performed, and all things having happened necessary in that behalf, the plaintiff became, and was, and is bound by the said deed as if he had been a party thereto, and had duly executed the same. And the defendant says that he has always been ready and willing to pay the said composition, and that he offered to pay the same according to the said deed, but the plaintiff would not receive the same, and he now brings into court under the next plea herein pleaded, the sum of 1*l.* 3*s.* as and being the said composition on the plaintiff's debt, and all things have been done and happened to entitle the defendant to have the plaintiff release him from the said claims herein pleaded to according to the true intent and meaning of the said deed.

Third plea, payment into court of 1*l.* 3*s.*

The plaintiff joined issue on the first and second pleas, and demurred to the second plea, on the ground that the said deed therein mentioned did not operate to release the defendant from the said claim of the plaintiff.

Judgment was given for the plaintiff on the demurrer, the parties agreeing that the defendant should have leave to move to set it aside, and on the trial of the issues of fact it appeared that a requisite number of creditors had executed the deed, but some of them held outstanding bills of exchange, and if the amounts of their debts secured by those bills were deducted, the creditors executing the deed would not represent three-fourths in value of the defendant's creditors as required by the B. A. 1861. A verdict was entered for the plaintiff for 8*l.* 18*s.* 8*d.*, leave being reserved to the defendant to move to enter it for him if the court should be of opinion that the persons holding bills not due at the time of the execution of the deed ought not to have been reckoned amongst the defendant's creditors.

Philbrick, in this term, obtained a rule calling on the plaintiff to show cause why the verdict obtained herein before the judge of the Mayor's Court, London, and the judgments on the demurrer, should not respectively be set aside and a verdict entered for the defendant on the ground that persons holding bills on which the defendant was liable, and current at the date of the registering of the deed, were properly reckoned among the defendant's creditors in number and value, though such bills never ranked on the defendant's estate; and that the plea is sufficient in law, and no tender of the composition need be averred or proved.

Atkinson now showed cause.—The point on the demurrer is, if the plea can be good without an averment of tender; and I submit that, as it only contains a conditional release on payment or tender of the composition, payment and tender must be alleged and proved to enable the defendant to take advantage of the deed. My friend will rely on *Clapham v. Atkinson* (4 B. & S. 722); but I submit that the plea must contain an averment of tender. [BLACKBURN, J.—Is it not sufficient if it says that he would not receive the money? Does not that dispense with a tender? It is no good going through the form of pulling out the money and showing it to him. You are right that, as a general rule, there must be a tender; but did he not here dispense with it?] No offer was made till after the money was due: and there is no evidence that

the tender was made till about a month before the trial, and then not of the proper amount:—

Hazard v. Mare (6 H. & N. 434; 3 L. T. Rep. N.S. 743). *Rosling v. Muggeridge* (16 M. & W. 181).

The other point is, that there were a sufficient number of creditors if those were to be counted whose bills were outstanding, but were afterwards paid; and I submit that those would only have a right to prove in bankruptcy where the acceptors did not pay at maturity:—

Turquand v. Moss (17 C. B., N.S., 15; 10 L. T. Rep. N.S. 574). *Ex parte Cockburn* (32 L. J. 17, Bank.; 10 L. T. Rep. N.S. 252). *Adkins v. Farrington* (29 L. J. 345, Ex.; 2 L. T. N.S. 287).

Day in support of the rule.—It is laid down that the holder of a bill of exchange not yet due is a creditor, and may prove in bankruptcy, and that is the common practice: (Arch. Bank. 9th edit. 109.) The reason would appear to be, that if he did not prove the bankrupt would not be discharged. At common law tender was necessary, but might be dispensed with, and this is an equitable plea, and it is questionable if the same strictness is necessary as in ordinary pleas. The words here are the same as in *Clapham v. Atkinson*, except that the words “offered to pay the said composition” are left out: *Read v. Golding* (2 M. & S. 86). The words “would not receive the same” must mean that he refused to receive it. He was stopped on that point, and contended that the other point was decided by

Ex parte Godden (32 L. J. 37, Bank.; 7 L. T. Rep. N.S. 628); see also *Whittaker v. Lowe*, 13 L. T. 469.

BLACKBURN, J.—I am of opinion that this rule should be made absolute. The question which arises on the evidence is, if a proper number of creditors assented to the deed, and that depends on whether the persons who held bills of exchange indorsed by the bankrupt, and which at the time of the execution of the deed were not due, were entitled to prove. I take it the question is, if the holder of a bill of exchange can prove in bankruptcy before the bill is due. In Archbold's Bankruptcy it is laid down that a person may prove, though he holds security. Then comes the question, is a person so entitled who afterwards turns out to be paid in full? It might have been very politic in the Legislature that the difference only should be allowed; but, on the other hand, it might be very difficult to ascertain the amount of it. Therefore there are reasons on both sides, and it is hard to say what was the meaning of the Legislature, but that has been decided by the Lords Justices in *Ex parte Godden*, who decided that the statute did extend to such debts, and I follow their decision, and do not pretend to say if it is right or wrong. The other question arises on the plea which says, “The defendant has always been ready and willing to pay the said composition according to the said deed, but the plaintiff would not receive the same;” and the question is, whether that means to say that the defendant would have paid if the plaintiff had come for the money?—If it means that it would amount to nothing—or if it means that the defendant was willing to pay the composition, but the plaintiff refused to accept it; that would amount to a dispensation with tender, and that I think is the reasonable meaning of the words. I think, therefore, that the rule should be absolute to enter the verdict for the defendant.

Rule absolute.

[ADMIRALTY.]

DR. LUSHINGTON, July 5, 1865.

THE MONSOON v. THE NEPTUNE.

13 L. T. 510.

Steamers and sailing ships—Collision—Admiralty regulations—Construction of articles 15, 18, and 19.

SHIPPING.—15th regulation.—*If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.*

18th regulation.—*Where by the above rule one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article, viz.:*

19th regulation.—*In obeying and construing the above rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from such rules necessary, in order to avoid immediate danger.*

Case 1: Steamer in default.

Brett, Q.C. and E. C. Clarkson for the Monsoon.

Vernon Lushington for the Neptune.

DR. LUSHINGTON gave judgment in this case, which was an action brought by the barque *Monsoon*, 296 tons register, from Port Natal, with a general cargo and passengers for London, against the General Steam Navigation Company's steamship *Neptune*, 364 tons register, from Havre, with passengers and cargo for London, to obtain compensation in damages for injuries sustained by reason of a collision between them in the vicinity of the North Foreland, about ten p.m. on the 25th March last. The barque stated the wind as W. by S., and the weather as fine, clear, and starlight; the steamer represented the former as about W., and the latter as very dark, but clear. The case for the *Monsoon* was, that she was under double-reefed foretopsail, maintopsail, jib, and mizen, in Margate Roads, proceeding close-hauled on the port track, heading N.W. by N., the tide being about three-quarters flood, and making about two knots, carrying the Admiralty regulation lights, and in charge of a duly licensed Trinity Cinque Port pilot to take her to Gravesend; that the pilot having determined not to proceed further with the barque on that night, an attempt was made to stay her, in order to bring her to anchor; that she, however, refused stays, and thereupon her mizen was brailed up, her maintopsail was taken in, and her helm was put hard hard a-port, and she was wore round with a view to bringing her head on tide, and letting her anchor go; that whilst the barque was so wearing round, and a part of her crew were engaged in taking in the foretopsail, and when her head was about E.S.E., the look-out from on board her made out the three lights of the *Neptune*, bearing about one point on her starboard bow, and at the distance of about one mile; that the lights were watched from the barque, and it being seen that the *Neptune* was approaching the barque, and rendering a collision immediate, the *Neptune* was loudly hailed to port her helm, and then to stop her engines, but no notice was apparently taken of such hailing, and the *Neptune*, under a starboard helm, ran into and with her starboard bow struck the barque on her port bow, and did her very considerable damage. The defence on the part of the steamer set forth, that the tide was flood, running about three knots; that the *Neptune* was steering north by west, going about three knots an hour, and was carrying the regulation lights brightly burning, when the green light of the barque was observed about two points

on her port bow, distant about a mile; that the *Neptune's* helm was thereupon immediately put hard a-starboard; that shortly after, on both her lights coming into view, her engines were eased; that in a few seconds afterwards, on her green light disappearing and her red light only being visible, the *Neptune's* engines were stopped, but the *Monsoon* not keeping her course, came on under a port helm, and with her stern struck the *Neptune* a violent blow on the starboard. The court had to decide two questions on this case: first, whether the *Neptune* was to blame, and secondly, whether any fault was to be imputed to the *Monsoon*. The 15th article of the steering and sailing rules appeared to be applicable to this case: "If two ships, one of which is a sailing ship, and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." It was clear both these vessels were proceeding up channel, and that at the time when they descried each other, whether the distance was a mile, more or less, if it involved a risk of collision, it was the duty of the steamer to keep out of the way. If the steamer did not keep out of the way, the burden of proof was upon her to shew there were sufficient causes and reasons why she did not obey the statute. On the other hand, there was also an obligation imposed on the *Monsoon*, because the words of the 18th article were these: "That where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course," subject, of course, to certain contingencies. The question was, whether the steamer took proper measures and means to keep out of the way of the *Monsoon*, and whether the *Monsoon* did keep her course; or whether, if she did not keep her course, there was any sufficient justification by the facts and circumstances of the case? The case of the *Monsoon* was, that after the *Neptune* was seen in the manner stated, the lights were watched from the barque, and it being seen that the *Neptune* was approaching the barque and rendering a collision imminent, the *Neptune* was loudly hailed to port her helm, and then to stop her engines; but no notice was apparently taken of such hailing, and the *Neptune*, under a starboard helm, ran into and with her starboard bow struck the barque on her port bow and did the damage. It did not appear whether it was intended to impute any particular blame to the *Neptune* for coming under a starboard helm, nor did it appear to be of great importance to consider what was the intention of the pleader here, for the substance of the pleading was, that she did not comply with the 15th article and keep out of the way. On the other side, on behalf of the *Neptune*, the statement was, in substance, that the *Neptune* did that which was right under the circumstances; that she did do all that she could do to avoid the collision, that it was right to put her helm hard a-starboard, and right afterwards to ease her engines in the manner they were eased; and the blame was thrown upon the *Monsoon* in not keeping her course. As to the weather, it seemed to be pretty nearly agreed on that the night was dark but clear, and the wind was about half a gale, certainly not stronger. The questions then to be determined were, whether the *Neptune* was right in immediately starboarding, and whether her engines were eased in due time; because there was another regulation, that if there is the least danger of collision the engines are to be immediately eased to prevent the consequences of a violent collision. Under all the circumstances of the case, the court felt bound to hold that the *Neptune* was solely to blame for the collision.

The Court was assisted by Captain Shuttleworth and Captain Webb.

[IN THE COURT OF EXCHEQUER.]

Nov. 15 and 25, 1865.

GORDON AND ANOTHER v. THE VESTRY OF ST. JAMES'S,
WESTMINSTER.

13 L. T. 511.

Action for damage by leakage of water from a drain—Metropolis Local Management Act, 1855—18 & 19 Vict. c. 120—Liability of vestry for the state of parochial drains—Negligence—Evidence of.

LONDON. WATER.—Defendants, in whom, under the Metropolis Local Management Act, 1855, were vested, and who had the control and management of, all the drains and sewers in the parish (except the main sewers), gave leave to the Drinking Fountains Association to erect a drinking-fountain in Argyll-place, near to plaintiff's premises, and undertook to pay for the supply of water thereto at the rate of fifteen gallons per hour day and night. The supply was in a stream of a quarter of an inch in diameter, and the surplus or waste water was carried off by a waste-pipe, which also, by leave of defendants and under the superintendence of their surveyor, was connected with a gully drain or sewer which ran close to plaintiffs' wine-cellars and descended into the main sewer underneath such cellars. The fountain commenced working in April, 1862, and in September, 1863, a quantity of water, which had escaped from the gully drain and accumulated at the back of the wall of the cellars, forced its way into plaintiffs' cellars and damaged their stock of wine there. Thereupon, by order of defendants, the gully drain was opened, and it was found that the earth on which it had originally rested had sunk, and so the bottom of the drain had cracked and become leaky, and caused the damage. A new pipe-barrel drain was then substituted by defendants for the old gully drain, since which no leakage had occurred. The gully drain, which was an ordinary brick drain, was made before plaintiffs' cellars, which were about forty years old, were built. The walls of the cellars were in good condition, and until the erection of the fountain had been dry and free from damp. Plaintiffs were ignorant of the condition of the gully drain or of the water outside their cellar wall until this occurrence, and defendants had no means of ascertaining its state unless they had opened it, which they did not do till September, 1863, after the water had escaped into plaintiffs' cellars, as they had no previous notice that it was out of repair. Conflicting evidence was given before the arbitrator as to the cause of the sinking of the soil of the drain, and he stated that it was impossible at this distance of time to form a satisfactory opinion upon the point.

In an action to recover damages from defendants for the injury sustained by the leakage of water from the drain into plaintiffs' cellars, through the alleged neglect of duty on the part of the defendants in not properly examining the drain, at the time the waste-pipe from the fountain was, by their permission, introduced into it, and ascertaining that it was in a fit condition to perform the additional duty thereby imposed on it; it was:—Held, that, under the circumstances stated, there was no evidence of negligence on the part of the defendants, and therefore, following the decision of the Ex. in *Fletcher v. Rylands* and another (13 L. T. 121; 34 L. J. 177 Ex.), the plaintiffs were not entitled to recover.

SPECIAL CASE.

This was an action by plaintiffs, wine merchants in Argyll-place and King-street, Regent-street, in the parish of St. James, Westminster, against defendants, to recover damages for injury sustained by water coming into their wine-cellars and damaging their wine in manner hereinafter stated.

At the trial in Trinity Term, 1864, at the Middlesex sittings, before Martin B.

and a special jury, a verdict was found by consent for plaintiffs, subject to a special case to be stated by a barrister for the opinion of the court, as to the defendants' liability, the question of damages being referred to an assessor named by the Judge, who subsequently assessed them at 800*l*.

The pleadings which accompanied and formed part of the special case were as follows:

The first count of the declaration stated

That before and at the time, &c. plaintiffs carried on business as wine merchants at No. 1, Argyll-place, Regent-street, and at King-street, &c., and were possessed of certain wine-cellars there, in which they kept large quantities of wine for use in their said business, the said cellars being situate in and running underneath the roads of Argyll-place aforesaid and King-street aforesaid, in front of and adjoining to the house of plaintiffs; and that after the passing of the Metropolis Local Management Act, 1855, and before the committing, &c., defendants were a vestry duly constituted for the said parish of St. James, Westminster, under the said Act, and being so constituted, had thereby vested in them, and had under their care, custody, and control, as such vestry as aforesaid, all the drains and sewers (except the main sewers) of the said parish, and the gullies connected therewith; and were, as such vestry as aforesaid, bound to repair, maintain, and keep the same in good and proper order and repair, and that afterwards, and before the committing, &c., defendants, as such vestry as aforesaid, permitted and suffered a certain association of persons, called "The Metropolitan Drinking Fountains Association," to erect a drinking-fountain in Argyll-place aforesaid, upon land under the control of the said vestry as such vestry as aforesaid, and to lead and place the overflow pipes of the said fountain which were used for carrying away the surplus water from the same, to and into, and to be connected with, a certain drain or sewer, not being a main sewer, in Argyll-place aforesaid, which said drain or sewer is near to the said cellars of plaintiffs, such drain or sewer being then vested in, and being under the care and control of, defendants as such vestry as aforesaid, and which said drain or sewer defendants, as such vestry as aforesaid, were liable and bound to repair, maintain, and keep in proper state and condition, together with the other drains and sewers so vested in them as aforesaid; and that afterwards, and after the said overflow pipes of the said fountain had been connected with the said drain or sewer as aforesaid, and whilst the said sewer or drain continued under the care and control of defendants as aforesaid; and whilst they were so liable and bound to repair and maintain the same as aforesaid, defendants neglected their duty as such vestry as aforesaid in this, that they unlawfully, wrongfully, and negligently permitted and suffered the said drain or sewer into which the said overflow pipes of the said fountain had been led and placed as aforesaid, to become ruinous, leaky, insufficient and out of repair, so that on divers days and times continuously between 1st and 30th September, 1863, large quantities of the surplus water, refuse, and other water necessarily running and flowing from the said fountain, and from the overflow pipes of the same, and also from a gully connected with the said drain or sewer into the said drain or sewer, in order to be thereby carried and conveyed away to and into a certain main sewer, flowed, leaked, and percolated through and out of the walls and sides of the said drain or sewer into the soil and earth surrounding the same, and then and without any default of plaintiffs necessarily and unavoidably percolated and flowed through the said soil to and into the said wine-cellars of plaintiffs and into the bins thereof, and in and upon the wine stored therein, to wit [stating the quantity], thereby causing the temperature of the said cellars to be reduced by the entrance of the said water into the said cellars and the said bins, and chilled and injured the said wine, &c. Allegation of damage to the wine, &c., and special damage in plaintiffs thereby losing the supplying of certain orders for wine, &c.

The second count charged

That defendants being such vestry, &c., and while plaintiffs were such

wine merchants, &c., as in the said first count mentioned, unlawfully, wrongfully, and negligently permitted and suffered a certain gully, and a certain sewer or drain, in Argyll-place aforesaid, situated respectively near to the said cellars of plaintiffs, which said gully and the said drain or sewer were then vested in and under the care and control of defendants, as such vestry as aforesaid, and which they were, as such vestry as in first count mentioned, bound to maintain and repair, to become insufficient, ruinous, and out of repair, whereby, and through no default of plaintiffs, on the said day and times in first count mentioned, large quantities of water, which were necessarily running and passing into the said gully and into and through the said drain or sewer, through the insufficiency of the same and not otherwise, ran and percolated through and out of the said gully and also through and out of the walls and sides of the said drain or sewer into the earth and soil surrounding the same, and from the same to and into the said cellars of plaintiffs, and thereby caused the damage to plaintiffs as in first count alleged.

Plea, not guilty (by stat. 25 & 26 Vict. c. 102, sects. 106, 112, 116, 70, 69, 68; 18 & 19 Vict. c. 120, sects. 68, 69, 70, 71, 72, 250, 251).

Notice of action was duly served on the vestry, pursuant to 25 & 26 Vict. c. 102, s. 106, more than one month before action brought. Defendants are a vestry duly constituted for the parish of St. James's, Westminster, under the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), under which Act and the Amendment Acts (19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104; 24 & 25 Vict. c. 61; and 25 & 26 Vict. c. 102) they act. Sects. 68 and 69 of the first-mentioned Act vest the drains and sewers, except the main sewers, in them, and contain provisions as to their reparation and maintenance.

In August, 1861, the vestry gave permission to the Metropolitan Free Drinking Fountains Association to erect a drinking-fountain on the north side of Argyll-place, nearly opposite to plaintiffs' premises.

In September, 1861, the association accordingly erected the fountain, and carried off the surplus water by a waste-pipe, which they connected with a gully drain, which ran from a gully in Argyll-place, opposite plaintiffs' house and close to their wine-cellars, and then descended into a main sewer underneath the said cellars. *This connection of the pipe with the gully drain was made under the superintendence of the surveyor of the vestry.*

The fountain commenced working in April, 1862, the water supplied to it, *for which the vestry have undertaken to pay*, was at the rate of fifteen gallons per hour day and night. More water is wasted than used, and the waste water passes into the waste-pipe, and from thence into the gully drain; the stream of waste water so flowing into the waste-pipe being about a quarter of an inch in diameter.

Early in September, 1863, a considerable quantity of water found its way into plaintiffs' cellars, and it was ascertained that this water came through the mortar of the wall of the cellars next to the gully drain at a part of the wall between seven and eight feet from the floor of the cellars behind bin 19. The water remained in the cellars several days and caused damage to some of the wine there, which, as has been stated, has been assessed at 800*l*. The stock of wine at the time in the cellars was worth 11,000*l*.

Shortly after this influx of water the gully drain was opened by order of the vestry, and was found to be very much out of repair. The earth beneath the drain on which it had originally rested had sunk, and left the bottom of the drain unsupported, and so caused it to crack and become leaky. In consequence of this state of the drain the water which flowed from the waste-pipe of the fountain had escaped from the drain, accumulated at the back of the wall of plaintiffs' cellars, and eventually forced its way into the cellars and caused the damage before described. There was no leakage in the waste-pipe of the fountain.

The vestry substituted a new pipe barrel drain for the old gully drain, the bottom of which gully drain was so out of repair that it fell in when their servant

was examining it, and since the pipe barrel drain was substituted for the gully drain there has been no escape of water into plaintiffs' cellars.

The gully drain was made before plaintiffs' cellars were built. It was a brick drain, built in the manner, and of the materials, in and of which such drains were built about forty or fifty years ago, when such drains were seldom made perfectly water-tight. The wall of plaintiffs' cellars, through which the water percolated, was built against the gully drain, and was on an average sixteen inches thick, faced on the inside with brick, and rough and jagged on the outside. It has not bulged or cracked, and was built of sufficient strength to resist any pressure to which cellars in such a position are usually exposed. But for the escape of water from the drain no damage would have been sustained by plaintiffs. The cellars have been occupied as wine-cellars by plaintiffs, and their predecessors for forty years. Until the water found its way into them in September, 1863, they had always been perfectly dry and free from damp, and fit for use as wine-cellars.

The soil beneath the gully drain was composed of made ground, old bricks, bits of stone, and coals. The sinking of this soil from the bottom of the gully drain had caused it to crack and become leaky.

On behalf of plaintiffs evidence was given before the arbitrator that the sinking of their soil probably arose from its not having been well and sufficiently rammed when the drain was made. On behalf of defendants evidence was given that the probability was that the persons who built the wall of plaintiffs' cellar, while building it, removed part of the soil beneath the drain, or loosened it and so caused it to sink.

At this distance of time the arbitrators stated it was impossible to form a satisfactory opinion as to the cause of the sinking of the soil.

When plaintiffs became tenants of the cellars in 1855, they found them internally perfectly dry and in good repair, and they did not know, and had no means of knowing, the condition or state of repair of the gully drain, or of the outside of their wall, or its position with reference to the drain.

When in 1855 the sewers and drains vested under 18 & 19 Vict. c. 120, in the vestry, no plans or other materials came into their possession from which they could ascertain the position and state of repair of this gully drain and of the wall of plaintiffs' cellars, unless they had opened the pavement and examined it. It is not usual so to examine drains and sewers unless there is reason for supposing they require repairs. The opening of such drains causes inconvenience to the public traffic in the streets.

The vestry had not repaired or examined this gully drain until September, 1863, after the water escaped into plaintiffs' cellars, and they had no notice before that time that it was out of repair.

They have always employed competent surveyors, officers, and workmen.

The question for the court is, whether defendants, as the duly constituted vestry of the parish within which the gully drain is situate are under the circumstances liable to plaintiffs for the damage sustained by them. If the court are of opinion defendants are liable, the verdict is to stand and be entered for 800*l.*; but if the court should be of opinion the defendants are not liable, the verdict is to be entered for them.

Plaintiffs' points:—1. Under the circumstances stated defendants are liable to plaintiffs in damages for the injury done to the wine in their cellar by the entry of the water thereto in manner and from the causes stated. 2. That defendants were guilty of negligence in permitting the Metropolitan Free Drinking Fountain Association to erect their fountain so near to plaintiffs' cellars, and in allowing them to carry their surplus water into the gully drain as stated in the case, without first taking proper measures to ascertain whether or not the said gully drain was a sufficient and proper gully and in a proper state of repair to carry off such surplus water, and that they were liable in damages to plaintiffs for the damage done to their stock resulting from such negligence.

Defendants' points:—1. There is no such duty imposed on defendants

as that stated in the several counts of the declaration, nor any facts stated in the case sufficient to raise such duty. 2. There is not any, or at all events any sufficient, evidence of any neglect of any duty on the part of defendants. 3. Assuming the duty and breach of duty relied on, plaintiffs contributed to the injury sustained by them by their own imprudence and neglect, and that the injury being only partially, if at all, caused by the neglect of defendants, they are not liable. 4. Assuming neglect or misfeasance on the part of the officers of defendants, defendants are not liable, inasmuch as it is found that the officers were proper and competent officers. 5. Assuming that defendants by their neglect caused the injury complained of, still they are not liable, inasmuch as they are a corporation, acting in trust for the public, and having no funds which they could lawfully apply to compensate plaintiffs. 6. It would have been an illegal act on the part of the defendants to apply their funds to indemnify plaintiffs. 7. Assuming the permission given by defendants to erect the drinking-fountain to be an act beyond the authority given to them by the statute constituting them a vestry, it is not an act capable of being done by the vestry as such, nor for which the corporation funds can in any way be touched.

Temple, Q.C., and *H. T. Cole*, for plaintiffs, contended that defendants were liable. By sections 68 and 69 of 18 & 19 Vict. c. 120 (the Metropolis Local Management Act, 1855), all drains and sewers (excepting main sewers) were vested in the vestry and put under their control and management, and a duty was thereby imposed upon them. All the authorities were collected in *Ruck v. Williams*, in this Court (3 H. & N. 308; 27 L. J. 337, Ex.). [PIGOTT, B.—The question there was whether they were a public body. [POLLOCK, C.B.—The question here is, which is the party that has been guilty of negligence, whether or not the building of plaintiffs' cellar wall was the cause of the drain giving way. The arbitrator finds it impossible to decide that fact at this distance of time, and so he leaves it open. Are then we to decide it?] Whatever may have been the condition of the gully drain at the time of this alteration, it was, and had been always, sufficient. [CHANNELL, B.—Defendants will say they are protected as a public body. It is for you to shew negligence.] The pipe from the drinking-fountain was put in by the defendants' surveyor, and the gully was then opened, giving them full opportunity of seeing if it was of sufficient strength and constitution to perform the fresh duty imposed upon it. Had they *not* superintended the work they would have been guilty of negligence, *à fortiori* then, when they had superintended it, it was their duty carefully to examine the gully, which they did not do. The turning a continuous stream, however small, into a gully which had before only carried off occasional surplus water, was a very probable source of damage. Since the present complaint, a new and sufficient barrel drain had been put in, which answered well, and that should have been done at first. [BRAMWELL, B.—Might not defendants say to the Drinking Fountain Association, "You may pour your water down our gully if you like, but you must take the consequences of doing so; it is sufficient for our purposes, but whether capable of carrying off your fountain water or not we neither know nor care?"] The case of a private person digging at his own risk under another's wall by the owner's leave was different from a public body in whom there was a duty which they could not waive or exonerate themselves from. [POLLOCK, C.B.—Then you say that if the drain had given way without this additional water, the vestry would have been liable.] No, because it was stated in the case that the drain had been covered and out of sight for forty years, and there was no reason to suppose that it was out of order. The vestry paid for the water supplied to the fountain. [BRAMWELL, B.—Then they caused it to flow.] That was undoubtedly so. It was their duty to have examined the drain before subjecting it to the additional duty. [CHANNELL, B. refers to *Fletcher v. Ryland* (13 L. T. Rep. N.S. 121; 34 L. J. 177, Ex.), and the judgment of Bramwell, B. therein.]

The COURT, without calling on *Keane, Q.C.*, and *R. W. Harrison*, who

appeared to argue the case for the defendants, were about to give judgment for the defendants, leaving plaintiffs to bring error if so inclined, but having suggested that a nonsuit should be entered, so that plaintiffs might, if they pleased, bring a fresh action, and if they could do so, bring forward more conclusive evidence of negligence, they postponed giving judgment, and would, if necessary, hear defendants' counsel before doing so.

Cur. adv. vult.

Nov. 25.—POLLOCK, C.B.—In the course of the argument in this case, a few days ago, the Court intimated their opinion, and, indeed, their reasons for it; but they suggested that, instead of their giving judgment for the defendants, the plaintiffs should be nonsuited, and bring a fresh action; and certainly the Court thought that they had disposed of the case. It turned out, however, that that arrangement would confer no benefit upon the plaintiffs, for, there being in the present case a more special limitation than in the ordinary statute with reference to the commencement of actions, the plaintiffs would be too late to bring another action, and therefore Mr. Temple, on the part of the plaintiffs, declined, after having made this discovery, to be nonsuited, and wished rather that the Court should give judgment, when, if it were against him, he might take the case to error. We think that our judgment should be for the defendants. I do not think it necessary now to give any elaborate judgment beyond saying that, in this court, we have decided already that, if there be no evidence of negligence, the defendant is entitled to judgment. We think that there was, in the present case, no evidence of negligence on the part of the defendants, and therefore we think the plaintiffs are not entitled to recover. Mr. Temple may take the case to a court of error if he thinks fit.

CHANNEL, B.—I consider, if I were in a situation to draw the inference of negligence in the present case, that it would be concluded by a decision, though not a unanimous one, of this court in the case of *Fletcher v. Rylands* (*ubi sup.*) during the last term. I am not sure that, if I were at liberty to reconsider the matter, whether I should agree with the view of my brother Bramwell, who was the dissentient Judge in that case; but I feel bound by the opinion of the majority of the court, and that governs the present case, unless we could draw the inference of negligence, which I am unable to do.

PIGOTT, B.—I am of the same opinion. I thought at the time of the argument that there was some slight evidence of negligence; but, having since carefully read through the case, I cannot discover that there was any negligence; and therefore I agree in the judgment of the Court.

Judgment for defendants.

[IN THE QUEEN'S BENCH.]

Nov. 28, 1865.

13 L. T. 526; 12 Jur. N.S. 389.

GILES AND ANOTHER (*appellants*) v. GLUBB (*respondent*).

Highway district—Ancient borough—Charter with non-intromittant clause—Jurisdiction of county justices.

HIGHWAYS.—*E. is an ancient borough, having liberties and franchises,*

with charters containing non-intromittant clauses, but it is not a borough within the exception in section 2 of the Highways Amendment Act (25 & 26 Vict. c. 61). It is wholly surrounded by the county of C., and maintains its own poor and highways:—Held, that the justices of the county of C., might take the proper proceedings in quarter sessions for making it a part of a highway district, under the 25 & 26 Vict. c. 61, s. 5: and, further, that they had jurisdiction to hear a complaint by the waywarden against the overseers of the poor of the borough of E., for not paying over to the treasurer of the highway board the sum ordered by the precept of the board to be levied in the borough:—Held, that the following description of the borough of E., “The several parishes, townships, tithings, hamlets, or places of Liskeard parish, &c., &c., E., &c., &c., shall be united, &c.,” in the order constituting the highway district, was not such an imperfect description as to vitiate it.

Case stated under 20 & 21 Vict. c. 43.

At a petty sessions holden at Trecaan Gate, in and for the division of the Hundred of West in the county of Cornwall, on the 1st February, 1865, and by adjournment on the 1st March, 1865, a complaint preferred by Albert Charles Lyne Glubb in this case called the respondent, as clerk to the Liskeard District Highway Board, against Richard Giles and Henry Davey, in this case called the appellants, as surveyors of the poor of the borough of East Looe, in the county of Cornwall, was brought before us to be heard.

The complaint was to the effect, that the appellants the overseers of the poor-law parish, highway parish or place of East Looe, in the said county, and which formed part of the Liskeard Highway District, had not paid to the treasurer of the board a sum of 30*l.* ordered to be paid by virtue of a precept duly issued by such board.

At the hearing the respondent appeared in person and the appellants by their attorney. On the case being called on, and before any evidence was taken, the attorney for the appellants raised an objection to our proceeding with the case, and urged that we being justices acting for the county of Cornwall, and not being justices of the borough of East Looe, had not any jurisdiction to hear and determine the complaint against the appellants, both of whom it was admitted resided within the borough of East Looe, and were overseers of the poor of such borough only; and he further contended that the justices of the borough of East Looe were the only persons who possessed jurisdiction, if any existed, over the subject-matter of the complaint, and in support of his arguments the appellants’ attorney produced several royal charters which had been granted to the inhabitants of the said borough of East Looe, in the reigns of Elizabeth, James I., and James II., containing among other things the clauses hereinafter set forth. It was admitted as a fact that the mayor and burgesses of East Looe have been an ancient corporation from time immemorial, and in the year 1588 received a charter from Queen Elizabeth confirming their ancient rights and privileges and granting others. By the charter they were, amongst other things, to have a common gaol, to appoint a mayor, to elect a recorder, and have and hold a court of record for civil causes.

* (Further charters were referred to as conferring exclusive jurisdiction.)

It was also admitted that, under the provisions of the last-mentioned charter, now known as the governing charter, justices of the peace have from time to time been appointed, and have acted in and for the borough of East Looe, and that there have been and still are justices of the peace in and for that borough qualified to act, and acting, as such justices.

The appellants’ attorney also cited in support of his argument the following cases which had been submitted for the opinion of this court, and in which he contended that the construction put by the court on the language of the charter was in favour of establishing an exclusive jurisdiction in the justices of the borough of East Looe over all matters and complaints arising within

the borough except such as are specially extended by the charter, viz., *Reg. v. Inhabitants of East Looe and Ware* (appellants) v. *Clerk of the Peace for the County of Devon* (respondent).

In answer to the objection raised by the appellants the respondent contended that by section 2 of the Highway Act, 1862, the subject-matter of the complaint was, notwithstanding the language of the charters, expressly brought within our jurisdiction as justices of the county of Cornwall, the words of that section being as follows: "And for the purpose of this Act all liberties and franchises except the liberty of St. Albans, and except boroughs as herein-after defined, shall be considered as forming part of that county by which they are surrounded, or if partly surrounded by two or more counties, then as forming part of that county with which they have the longest common boundary."

It was admitted by both parties, as the fact is, that the borough of East Looe did not come within the definition or class of borough so expressly excepted, and which were by the same section (section 2) defined to mean boroughs as defined by the act 5 & 6 Will. 4, c. 76, for the regulation of municipal corporations in England and Wales, or any place to which the provisions of the said Act have been, or shall hereafter have been extended.

It was also admitted, as the fact is, that the borough of East Looe is surrounded by the county of Cornwall, in and for which county, we, the undersigned, are, and act as, justices of the peace. After hearing the argument we considered that the foregoing section of the Highway Act, 1862, conferred on us as such justices of the county of Cornwall jurisdiction to hear and determine the said complaint, and we decided accordingly, and overruled the appellants' objection.

The respondent then produced in evidence a certified copy of a final order which had been made under the provisions of the Highway Act, 1862, at the General Quarter Sessions of the peace, held at Bodmin, in and for the said county of Cornwall, on the 5th January, 1864, under which said order the county was divided into highway districts, and a copy of which order is set forth in the appendix to this case. Those parts of the order most material to the present case are in these words:

The several parishes, townships, tithings, hamlets, or places, of Liskeard parish, St. Cleer, Duloe, St. Neot, St. Martin's, Morval Talland, St. Pinnock, St. Keyne, East Looe, and West Looe, shall be united and form and constitute the Liskeard district. And this court doth further order, that should any of the parishes, townships, tithings, hamlets, and places hereinbefore mentioned, or any part or parts thereof respectively, be comprehended in the terms of the restrictions imposed with respect to the formation of highway districts by section 7 of the said Act, 25 & 26 Vict. c. 61, such parishes, townships, tithings, hamlets, and places, or any part or parts thereof respectively, shall not be included in the said highway districts. And this order, so far only as regards the said parishes, townships, tithings, hamlets, and places, or part or parts thereof, comprehended in the terms of the said restrictions, shall be of no effect.

We find as a fact, and it was also admitted, that the borough of East Looe is not comprehended in the terms of the restrictions imposed with respect to the formation of highway districts by section 7 of the last-mentioned Act.

We also find that, under the provisions of the Highway Act, 1862, the highway board in the highway district called in the said final order the Liskeard district, has been formed, and that the first and subsequent meetings in that district of the board have from time to time been duly held under that Act and the Highway Act, 1864, and the treasurer and several officers and persons referred to in this case have been appointed by the said highway board, and have acted accordingly under the provisions of the Highway Acts

as defined in the Highway Act, 1864, before the issue of the precept mentioned in the case.

We also find that the appellants before and at the time of the service on them of the precept hereinafter mentioned were the overseers of the poor of the borough of East Looe, and that the said borough separately maintains its own poor and its own highways, and has done so from time immemorial.

We also find that the highway board of the Liskeard district on the 17th December, 1864, ordered a precept to be issued, and that the same was accordingly well and duly served upon the appellants, so being and as such overseers of the poor-law parish, highway parish, or place of East Looe, in the county of Cornwall, directing them to pay the sum of 30*l.* from the poor-rates towards the maintenance and repairs of the highways thereof, pursuant to 25 & 26 Vict. c. 61, and 27 & 28 Vict. c. 101.

It was also proved before us, and we find as a fact, that the appellants have not paid to the treasurer of the said highway board the money directed by the precept to be paid to him, or any part of such money, either at the time appointed by the precept for payment thereof, or any other time, although payment thereof has been duly demanded.

The foregoing facts being either proved or admitted before us, we were asked to make an order under section 35 of the Highway Act, 1864, directing the amount named in the precept to be levied and recovered from the appellants in the manner pointed out by the said section.

The appellants' attorney thereupon made the following objections to our making the said order, viz. :

First, that, by reason of the non-intromittant clause in the before-mentioned charter of James II., we had not as county justices jurisdiction to hear and determine the complaint.

Secondly, that the justices acting in and for the county of Cornwall had not jurisdiction to include the borough of East Looe within a highway district under their said order of sessions, by reason of the before-mentioned non-intromittant clause, and the said order was of no effect so far as the borough of East Looe was concerned.

Thirdly, that, whatever the intention of the justices in quarter sessions might have been, they had not in legal construction and effect included the borough of East Looe within the terms of their order of sessions; that the name East Looe there mentioned could not be said legally to include the borough of East Looe; that the borough of East Looe is a place having a known legal boundary, nor had any wardens and overseers been appointed otherwise than for the borough of East Looe; that the town of East Looe is wholly within the borough, but that there are lands within the borough which form no part of the town: that for these reasons the borough of East Looe was not included in the said order of sessions.

Fourthly, that the said precept issued by the highway board and addressed to the appellants in the manner herein appearing, was not sufficiently or rightly addressed to them, and was inoperative for the purposes of the said complaint.

As to the first objection, we were of opinion, as before stated by us, that we had jurisdiction to hear and determine the said complaint.

As to the second objection, we were of opinion that the justices acting in and for the county of Cornwall had jurisdiction, notwithstanding the non-intromittant clause in the charter, to include the borough of East Looe within a highway district, by virtue of the provisions contained in the Highway Act, 1862, having reference especially to the terms of section 2 of that Act as herein-before set forth.

As to the third objection we were of opinion that the said justices had both in intendment and in legal effect included the borough of East Looe in their said order of sessions constituting highway districts, and that the said borough thereby became, and formed part of, Liskeard Highway District;

that the name East Looe, mentioned in the order of sessions, was a sufficient designation of the borough of East Looe, so as to bring it within the terms of that order, and indicated a place maintaining its own highways, which the borough of East Looe was known and admitted to be, and capable of being included in a highway district.

As to the fourth objection, we were of opinion that the precept issued by the highway board, and addressed to them, was addressed to them with sufficient clearness and certainty to prevent their being misled by the descriptive words therein used, and that the same was therefore valid and binding in law on the appellants as overseers of the borough of East Looe.

On the whole, therefore, we considered that the objections raised by the appellants' attorney were untenable, and we accordingly made an order on the appellants for payment of the money mentioned in the precept, and ordered the same to be levied, and recovered in default of payment in the manner pointed out by section 35 of the Highway Act, 1864, whereupon the appellants' attorney asked us to state a case pursuant to the statute 20 & 21 Vict. c. 43, which we hereby state and sign.

The questions for the opinion of the court are:

1. Whether, as such county justices as aforesaid, we had jurisdiction to hear and determine the said complaint.

2. Whether the justices acting in and for the said county of Cornwall had jurisdiction to include the borough of East Looe in a highway district under their said order of sessions.

3. Whether in legal construction the borough of East Looe was included in the said order of sessions.

4. Whether the said precept issued by the highway board, and addressed to the appellants, was sufficient to legally bind them as overseers of the poor of the borough of East Looe, and operative for the purposes of the said complaint.

Should the court return an affirmative answer to all the foregoing questions, then, the said order for payment made by us on the appellants is to stand; but if the court should answer all or any of the said questions in the negative, then the said complaint is to be dismissed.

The Solicitor-General (J. F. Collier with him) for the respondent.

Karslake, Q.C., (Bullar with him) for the appellants.

Reg. v. Mayor, &c., East Looe, 31 L. J. 45, M. C.; 25 & 26 Vict. c. 61, ss. 2, 3, 5, 7, 8, 9, 18, 32, 35, 47.

MELLOR, J.—I am of opinion that this order is a good order. The objections relied on—the substantial objections made by Mr. Karslake—are three, because the fourth objection turns entirely upon the third. The first is, that the justices had no power to include East Looe, it being an old borough constituted with certain privileges, and a charter conferring certain rights. He says that the justices have, therefore, no power to include it in a highway district which was formed out of the county of Cornwall. Now, the 2nd section of the Highway Act defines a county, that "the word county in this Act, shall not include a county of a city, or a county of a town; but where a county as hereinbefore defined is divided into ridings or other divisions having a separate court of quarter sessions of the peace, it shall mean each of such divisions or ridings, and not the entire county"—that is, for the purposes of this Act, and for the purpose of administration of the law as regards highways—"and for the purposes of this Act, all liberties and franchises except the liberty of St. Albans (which shall be considered a county), and except boroughs as hereinafter defined, shall be considered as forming part of that county by which they are surrounded, or, if partly surrounded by two or more counties, then as forming part of that county with which they have the largest common boundary." Then it says, "The word borough shall mean a borough as defined by the Act of the session of

5 & 6 Will. 4, c. 76—the Act for the regulation of municipal corporations, or any place to which the provisions of the said Act may be extended.” Now, it is conceded that this is not one of those boroughs, and therefore it seems to follow necessarily, by the operation of this section, that the non-intromittant clauses shall be disregarded, and that franchises and liberties therein mentioned shall be part of the county. Very well, then, if they are part of the county, the 5th section immediately applies, and any five or more justices may, by a writing under their hands, set the whole machinery in motion. Mr. Karslake says, how monstrous it is to suppose that the Legislature could have intended that the justices would have that authority in East Looe, and because of the operation of the Act of Parliament they would become the parties to set the law in motion to determine whether or not East Looe should form part of a highway district. It may or may not be hard: I do not pretend to give an opinion as to whether it would have been better of wiser in the Legislature to have made a special provision for the purpose, circumstanced as East Looe is; but they have not done so. It appears, by the operation of the Highway Act, that East Looe would become part of the county of Cornwall; and I see nothing, therefore, to prevent the justices of the county from acting in this matter; and on their calling together a sessions, and giving the notices to the sessions, they have power to make the order first a provisional one, and then a final one. The next objection that Mr. Karslake makes is, that at all events, when the highway board requires funds for the expenses of maintaining the highways, they are empowered to send their precept to the overseers of the poor of the various parishes which form part of the highway district, and if the parish officers refuse to comply with the order, he then says the complaint can only be determined before the justices residing in the borough of East Looe. That is a construction entirely inconsistent with this Act of Parliament. I am not at all called upon to determine, and I forbear to determine, whether or not the justices of East Looe may not have jurisdiction under the Highway Act. They may possibly have jurisdiction in this very matter, but what I desire to be considered as determining is, that in my opinion any of the justices of the county may entertain a complaint of the waywardens when they are seeking to recover by compulsory process the money the overseers are required to pay. That is the second objection. The third objection is, that this order is bad because it misdescribed one of the places, or part of one of the places, included in the general order. Now the order itself purports to be made by the justices acting or intending to act under the 25 & 26 Vict. c. 61, and entitled “An Act for the better management of highways in England.” And the whole purview of the order shews that it had the object and design to make provision for carrying into effect the enactments of that Act of Parliament. What it does is this, with reference to the particular district, the “Tregony district:” “The several parishes, townships, tithings, hamlets, or places of Liskeard”—among them “East Looe” and “West Looe”—“shall be united and form and constitute the Liskeard district.” By the Highway Act, the interpretation clause, the word “parish” is to include any place maintaining its own highways, and the expressions “highway district” and “highway board” have a common meaning. Now it is admitted that the borough of East Looe, which is not a municipal borough within the exception, is a borough maintaining its own poor and its own highways, and therefore is a parish within the definition of this 3rd section of the Act 25 & 26 Vict. Well then, if it is a parish, that is to say, a highway parish—because, when considering all these details of the highway law, it would be unreasonable to entertain suggestions that go to shew the possibility of there being some other place that may answer the description in an order of that sort found in the case—we have before us that the borough of East Looe is a place maintaining its own poor and its own highways, and we have the order desiring and intending to operate on the parish of East Looe, for the purposes of the Highway Act. I can see

no difficulty whatever myself. It would be unreasonable to make objections, for the purpose of making an order invalid, which do not appear to have any foundation in fact; and therefore, reading this reasonably, with a desire to uphold the order and give effect to what the justices have done, which it is our duty to do, unless we can see they have manifestly misconceived or gone beyond their authority, or have made a mistake in the mode of exercising it, I am far from saying that that vitiates the order in the description so given. That being the case, the fourth objection follows it, because Mr. Karlake does not deny that, if the order did not constitute East Looe part of the highway district, then the precept is informal. He says that they endeavoured by the precept to cure what he calls a defect in the order, which he says it does not do. They have given a full description in the precept and in the order, and they really do mean the same thing. On these grounds I am of opinion that the order is valid and that the respondent is entitled to judgment.

LUSH, J.—I am of the same opinion, and I add nothing to the reasons given by my learned brother.

Judgment for the respondent.

[PROBATE.]

Dec. 5, 1865.

TAILBY v. BROWN.

13 L. T. 566.

Pleading—Practice.

WILL.—*To a declaration on a will the defendant pleaded, in addition to pleas of undue execution, want of testamentary capacity, and undue influence, that a will of an earlier date brought in with the scripts was the last will and testament of the deceased:—Held, that the plea might stand, as it occasioned no inconvenience to the plaintiff.*

Declaration by an executor on a will, bearing date 25th May, 1863, in the usual form. The defendant pleaded that it was not the will of the deceased; undue execution; want of testamentary capacity; undue influence; and that one of the scripts brought into court of an earlier date was in truth and fact the last will and testament of the deceased.

Dr. Swabey, for the plaintiff, moved that the last plea should be struck out. It seemed to him that the plea of a will of an earlier date was not a good plea to a declaration which set up a subsequent will.

Sir J. P. WILDE said that the rules on the point were very defective; but, unless they were to have as many suits as testamentary instruments, it was necessary that the defendant should have the opportunity of propounding any paper writing that he relied on. He hoped very shortly to have some rules on the subject; but, as he did not think that the plea in question put the plaintiff to any inconvenience, he should allow it to stand. The plaintiff's case would be wholly independent of it, and the only effect would be that the court would have the whole matter before it at the same time.

Dec. 8, 9, 14, 18, 1885.

Before the LORD CHANCELLOR (Cranworth.)

PICKERING v. THE CAPETOWN RAILWAY.

13 L. T. 570: reversing, [1866] E. R. A. 3165; 13 L. T. 357; L. R. 1 Eq. 84 (V.C.).

Award—Arbitration—Staying proceedings—C.L.P.A. 1854, s. 11—Injunction.

ARBITRATION, REFERENCE AND AWARD.—*The provisions of the C.L.P.A. with regard to staying proceedings, do not interfere with the power of the Court of Chancery to stay proceedings in the suit in a case where a reference and a suit are going on together.*

This was an appeal from a decision of Wood, V.C., which will be found fully reported 13 L. T. 357.

Sir H. Cairns, Q.C., G. M. Giffard, Q.C., and Bedwell supported the appeal on behalf of the defendants.

Rolt, Q.C., and Locock Webb were for the plaintiff.

Dec. 18.—Giffard, Q.C., was about to reply, when he was stopped by the Lord Chancellor, who asked him whether the company would undertake, if the order were discharged, not to act upon any award which might be made, except under the sanction of the court. If so the Lord Chancellor would not make any order to restrain the arbitration from proceeding, this being an interlocutory motion and not tending to the final disposal of the cause.

Giffard, Q.C., on behalf of the company, was willing to give the undertaking.

The LORD CHANCELLOR.—I have no doubt that there is jurisdiction in the court to take this account, notwithstanding there has been an agreement to refer. The parties cannot oust the jurisdiction of the Superior Courts by any contract to refer, and had it not been for the doubt raised by the case of *Dimsdale v. Robertson* (2 Jo. & L. 508), I should have thought that that did not make any difference at all. At the same time the C. L. P. A. has introduced a very wholesome provision, that, where there is a reference going on it shall be competent for the court to stay the proceedings pending the reference. The Vice Chancellor may have come to a correct conclusion as to the parties having, by their conduct, excluded themselves from the benefit of their contract to arbitrate; but I cannot see any way to that conclusion until the cause is heard. Some matters do appear to be excluded from the arbitration, but some remain. It is, however, quite clear that the Legislature never intended that where a reference and a suit were going on together the court should not have power to stay proceedings. The order must be to discharge the order of the Vice Chancellor. Let both motions stand over with liberty to apply; the defendants undertaking not to take any proceedings upon any award without the leave of the court.

Dec. 12, 13, 1865.

(Before the Full Court—CRANWORTH, L.C., and the LORDS JUSTICES.)

ORMEROD v. RILEY.

13 L. T. 571; 12 Jur. N.S. 112.

Special case—Will—Clauses of forfeiture—Gift over—Condition precedent.

CONDITION.—G. O., the devisee for life of certain freehold and copyhold estates, with remainder to his children, gave his residuary real and personal estate equally to his four children, and directed that each of his three younger children should sell and convey his share of a certain part of the estates to which he was entitled for life as aforesaid to his eldest son; and in case any of the three should refuse so to do, he directed that his or her share in his own real and personal property should go over to his said eldest son, and that the child so refusing should take no benefit under his will. And he declared that the share of his daughter Ann (one of the three younger children under his will) should be settled for her separate use for life, and after her death for her children equally; and he willed and desired that his said daughter and her husband should settle and assure the real property to which he himself was entitled for life, upon trusts corresponding with those already declared concerning her share of his own estate; and in case she and her husband should refuse to make such settlement, then that the property given by his will to her and her issue should go over to his other three children in equal shares. After G. O.'s death, Ann and her husband signed a letter wherein they positively refused both to sell the aforesaid share, and to make the settlement directed. Upon special case for the opinion of the Court it was,—Held, that provisions of forfeiture are to be construed strictly, and that both of the provisions in this case were nugatory and void; for G. O., though he had clearly defined his intention upon the happening of either of two events, had given no indication of his intention upon the simultaneous occurrence of both.

This case came for its original hearing before the court of the Lords Justices, on which occasion their Lordships differed as to the construction of the will of Peter Ormerod, and the case was consequently set down for hearing before the full court.

Several questions arose in the case, but the only one which calls for a report was, whether in the events which had happened, a forfeiture of the interests of Ann Riley (deceased), and her only child, the defendant Thomas Edmondson Riley, had or had not taken place, and the question of construction alluded to above is not referred to in the present report.

The questions were raised by a special case under Sir George Turner's Act (13 & 14 Vict. c. 35), which stated the will of Peter Ormerod, dated the 31st December, 1831, who thereby gave and devised all his freehold and copyhold estates to trustees upon certain trusts, and subject thereto the testator gave and devised to his son George Ormerod (the elder), his heirs and assigns for ever, certain freehold and copyhold estates and farms, including a copyhold estate called the Rose Grove estate and mansion-house, where he then resided.

Peter Ormerod, by a codicil dated the 14th September, 1832, after reciting the above devise to his said son, revoked the same, and directed that his trustees should stand seised of the estate so devised upon trust to pay the annual proceeds thereof to the use of his said son for his life, and upon his decease upon trust to divide the same equally amongst the children of his said son, on the youngest child attaining twenty-one.

Peter Ormerod died on the 28th of the same month. George Ormerod the elder made his will, dated the 18th March, 1861, and thereby gave, devised, and bequeathed all his real estate, and the residue of his personal

estate to his sons, the plaintiffs in the case, namely, Peter Ormerod (now deceased) and Thomas Ormerod, their heirs, executors, administrators, and assigns, on trust to pay an annuity to his wife, and subject thereto he gave one-fourth part to each of his four children, including one such fourth to his daughter Ann Riley (the wife of Richard Riley), "in manner thereafter mentioned." Then after reciting the aforesaid devise in the will of Peter Ormerod of the estate called the Rose Grove estate, and that he (the said George Ormerod the elder) was desirous that that estate should become the sole property of his eldest son Peter, he willed and directed that each of his other three children, George, Thomas, and Ann Riley, should sell and convey their respective shares of the last-mentioned estate, and all their estate and interest therein, to the said son Peter, for the sum of 747*l.* each share; and in case any one or more of them, the said George, Thomas, and Ann, should decline or refuse so to do, upon the request of his said son Peter, then his will was that his or her share and interest in the whole of his said real and personal property should go over and belong to his said son Peter, his heirs, executors, administrators, and assigns for ever; and such child or children so refusing, or any of his or her issue, should take no benefit under that his will. And he declared that the share of the said Ann Riley, or so much thereof as should consist of money, should be invested in Government or real securities, and that the whole of her share of his property should be settled in trust for her separate use for her life, and after her death in trust for all her children and their respective heirs, executors, administrators, and assigns, in equal shares; and in the event of his daughter dying without leaving issue, he gave the same over to his three other children. And he willed and desired that his said daughter Ann Riley and her husband should, within three calendar months after his death, settle and assure the real property devised to, or devolving upon, her under the will of his late father Peter Ormerod, and also the money to arise from the sale of her share of the said Rose Grove estate, upon trusts corresponding with those already declared concerning her share or his (the said George Ormerod the elder's) estate; and in case she and her husband should refuse or decline to make such settlement, then that the property given by the now stating will to her and her issue should go over to his other children in equal shares, and to their respective heirs, executors, administrators, and assigns.

George Ormerod the elder died on the 21st March, 1861, and after his death the solicitor of the plaintiffs applied to the solicitor of the said Ann Riley and Richard Riley, her husband, to know whether the said Ann Riley would accede to the terms and conditions contained in his will, and with reference to that application Richard and Ann Riley signed and sent the following letter to their own solicitor:

Sir,—We the undersigned Richard Riley, of Burnley, in the county of Lancaster, fellmonger, and Ann Riley, the wife of the said Richard Riley, do hereby authorise you to inform Peter Ormerod and Thomas Ormerod, executors of the will of George Ormerod, deceased, or their solicitor, Mr. Richard Holmes, that we decline to accept the bequests made by the said will to the said Ann Riley upon the terms and conditions therein mentioned; and we authorise, empower, and retain you to act in all things for us as our solicitor and attorney in all matters arising out of or incident to the wills of Peter Ormerod, late of Rose Grove, deceased, or the said George Ormerod, deceased, or either of them. As witness our hands this 3rd day of July, 1861.

RICHARD RILEY.
ANN RILEY.

To Mr. Alexander Baldwin, solicitor, Burnley.

Mr. Baldwin, in pursuance of these instructions, wrote the following letter to Mr. Holmes:

Re George Ormerod, deceased.

Dear Sir,—Mrs. Riley and her husband authorise me to say that the

bequest made to Mrs. Riley by her father is declined upon the terms sought to be imposed upon her by his will. . . .—Yours truly,

ALEXANDER BALDWIN.

Burnley, 3rd July, 1861.

By an indenture dated the 12th June, 1862, Richard Riley and Ann his wife mortgaged all the undivided fourth part of her the said Ann Riley in the freeholds devised by the will and codicil of Peter Ormerod to George Ormerod the elder and his children. And the said Richard Riley covenanted that he and the said Ann Riley or her heirs would surrender all her undivided fourth part of the said Rose Grove estate, and all other the copyhold hereditaments which in and by the same will and codicil were devised to the said George Ormerod the elder and his children, to the use of the mortgagee, subject to the usual proviso for redemption.

The one-fourth of the Rose Grove estate was soon after surrendered in pursuance of this covenant, and Joseph Harrison was accordingly admitted thereto.

This mortgage was, in June, 1864, transferred, and the freehold estates were granted and conveyed, and the copyhold estates were covenanted to be surrendered, to the use of Peter Ormerod, George Ormerod, and Thomas Ormerod, subject to the like equity of redemption therein.

The special case stated that it was under these circumstances admitted by all parties that the said Ann Riley had declined and refused to comply with the directions contained in her father's will for the sale by her to Peter Ormerod, her brother, of the share of the Rose Grove estate devised to her; and also that the said Ann Riley and her husband did not within three calendar months of her father's death, and in fact did not at any time, execute any settlement of the real property devised to or devolving upon her under the before-stated codicil, in pursuance of the direction in that behalf contained in the will of her said father.

George Ormerod, jun., and Thomas Ormerod, however, both sold and conveyed their shares of the said estate to their brother Peter Ormerod, in pursuance of the said directions.

Ann Riley died on the 9th July, 1863, having made her will, whereby she appointed her husband her sole devisee, legatee, and executor. He survived her, and proved her will, and she left one child only, namely, the defendant Thomas Edmondson Riley.

On the 4th April, 1864, Richard Riley became bankrupt, and the defendants Johnson and Derbyshire were appointed his assignees.

In June, 1864, Peter Ormerod, George Ormerod, and Thomas Ormerod contracted to sell the said Rose Grove estate and other property subject to the trusts of the will of George Ormerod, sen., to the defendant David Ashworth.

The special case also stated that doubts had arisen whether the refusal of the said Ann Riley to accept the bequests made by the last-mentioned will to her, upon the terms and conditions mentioned, operated as a forfeiture of the interests in the said estates thereby given to the defendant Thomas Edmondson Riley, as well as of the interest thereby given to the said Ann Riley, and if so, whether such forfeiture accrued for the benefit of the said Peter Ormerod alone, under the first clause of forfeiture contained in the will, or for the benefit of the said Peter Ormerod, George Ormerod, and Thomas Ormerod under the second clause of forfeiture therein.

After the special case was filed Peter Ormerod died, and his representatives were brought before the court.

The questions which, upon this part of the case, were put to the court, were :

First, whether the share and interest of the said Ann Riley, or the share and interest of her said son, in the real estate, directed by the will of George Ormerod, sen., to be settled in trust for her for life, and after her death for

her children, their heirs, executors, administrators, and assigns, had become forfeited under the circumstances already mentioned. And secondly, whether any share or interest so forfeited went over to the said Peter Ormerod alone, or to him and the said George Ormerod and Thomas Ormerod in equal shares.

Baily, Q.C., and *Rowcliffe* were for the plaintiffs.

Hobhouse, Q.C., *Osborne, Q.C.*, *Wickens, Jolliffe, John Pearson*, and *Thomas Hughes*, for the several defendants.

The authorities referred to were—

Re Catt's Trusts, 2 Hem. & M. 46; 10 L. T. Rep. N.S. 409. *Rochford v. Hackman*, 9 Hare, 475. *Constantine v. Constantine*, 6 Ves. 100.

Baily, Q.C., having replied—

The LORD CHANCELLOR said:—We have had an opportunity of speaking to each other on this subject, and I believe we have all come to the same conclusion, without any hesitation; I must own that that conclusion is quite contrary to what was my impression at first. We think that there is no forfeiture at all, and for this simple reason. It is quite clear I was wrong in the suggestion I threw out, that this might probably be treated as a condition precedent. That will not do at all, because the true construction of the will is this. The testator says: "I give one-fourth part to my daughter Ann in manner hereinafter mentioned, that is to say, to her for her life, with remainder to her children," settled in the ordinary way. There is no distinct gift of it, first to her, and afterwards a direction to sell; it never vested in her; although, however worded, that was the true interpretation of it—"I give it to my daughter for life, with remainder over to the children in the ordinary way." Then there is this: "I direct my daughter to sell her share of the Rose Grove estate, which she derives from her grandfather, to my son Peter," at a certain fixed sum, which he names; "and if she refuses to do so, then I revoke the gift to her, and what I have given to her shall go over to Peter." I think, upon the true construction, that "what I have given to her," the share and interest, means the whole; because he does not qualify it, but adds to it by saying, "I will that her share and interest in the whole of my said real and personal estate shall go over and belong to my said son Peter, his heirs, executors, administrators, and assigns for ever, and such child or children so refusing, or any of his or her issue, shall take no benefit under this my will." Coupling these together, it is quite clear that what he meant by "the share and interest of my daughter" was the "share and interest of my daughter and her children." Therefore, having given this property to his daughter Ann, and settled it in the ordinary way, he revokes that, and gives it over to Peter, if she refuses to sell her interest in a certain estate which she derived from her grandfather, at a given sum of money. The testator then provides further thus: "I further direct my daughter and her husband to concur, within three calendar months after my death, in making a settlement of the property which she derived in fee simple from her grandfather;" of course excluding that which came for her share in the Rose Grove estate, but expressly mentioning that the purchase-money for that is to be deemed part of that which is so settled. "If she refuses to make this settlement, then I revoke the gift given to her;" not using the express words, but that is the meaning of it. "I give it over to the three; that is to say, having given her share to her and her children in the ordinary mode of a marriage-settlement, if she refuses to do one act, I give it over to Peter; if she refuses to do another act, I give it over to the three." Now, upon the death of the testator, she says, "I will do neither one nor the other." Well, who is to have the forfeiture? It is impossible to say. Therefore, the provision is absolutely void; not void because you do not understand what the testator means—you understand that perfectly plainly; but he has provided two alternatives, in either of which it is clear what he

meant, but if both of them happen he has not indicated what was to take place in that case; and therefore I think, especially considering that cases of forfeiture are construed with strictness, the whole thing becomes absolutely void or nugatory, and is incapable of being upheld. Mr. Baily pressed upon us, and at one time I thought there was something in it, that the latter alternative must prevail, upon the well-known rule that, though in a deed the earlier part prevails against the latter (so, at least, it is always said), in a will the latter is to prevail against the former. I think, considering both the one and the other, that the proper way of interpretation is, to see what is the real meaning of the whole taken together. That is rather a technical rule, but a rule which, perhaps, for want of a better, we might have adhered to in the present case; that is to say, if it had been a case to which such a rule could apply. But that rule could only apply to the case where the two statements are *ad idem*, or there is a disposition subsequent in the will inconsistent with what has been given before. That is not the case here, because what is said here is, not that he had in the first instance said, "Upon the first breach I give it to Peter," and had afterwards said, "On that same breach I give it to the three," then the rule would have applied; but here it is, "Upon a particular breach I give it to Peter, and upon a different breach I give it to the three." Both breaches happened, and both breaches happened at the same time. That being so, there is nothing to guide us as to which of these is to prevail; the consequence of which is, that the lady, or, now that she is dead, her children, must take the one-fourth of her father's estate as if there were no such direction in his will.

LORD JUSTICE KNIGHT BRUCE said:—I agree with the decision, and upon the same grounds.

LORD JUSTICE TURNER said:—I agree also upon the same grounds. It does not seem to me that the case can properly be considered a case of forfeiture; it is a case of gift over on certain events. Nor is it a case in which there are inconsistent dispositions, because the dispositions are upon different events, and the result, in my opinion, is as the Lord Chancellor has stated. It is a case in which the property is to go in a particular direction if one event occurs; it is to go in a different direction if another event occurs; and it does not say how it is to go if both events occur. The original disposition must therefore remain.

STUART, V.C., Dec. 14, 1865.

THE EARL OF HARRINGTON v. THE METROPOLITAN RAILWAY COMPANY.

13 L. T. 583: affirmed, [1866] E. R. A.; 13 L. T. 658.

Railway company—Notice to take land—Insufficiency of service.

COMPULSORY PURCHASE.—Where the defendants, a railway company, proposed, under their compulsory powers, to take lands belonging to the plaintiff, an infant, and served notice of such intention upon the plaintiff's next friend in certain proceedings pending in the court, and not upon his guardian, as required by their Act, and commenced their works; and, after the expiration of the time mentioned in the Act for the service of such notice, proceeded to take measures to assess the value of the land; on a motion by the plaintiff's guardian to restrain such proceedings:—Held, that the notice had not been served as the Act required, and an injunction granted accordingly.

This was a motion on behalf of the plaintiff, an infant, by his guardian, for an injunction to restrain the defendants (the company) from proceeding upon a notice to empanel a jury to assess the value of certain land belonging to the plaintiff, and which the defendants proposed to take.

The facts were these :

On the 29th July, 1864, an Act was passed authorising the defendants to take certain lands belonging to the plaintiff for the purposes of their undertaking. The Act obliged the defendants to give notice to the plaintiff within a year from the passing thereof, of the lands which they might require under their compulsory powers; otherwise, they were only permitted to get possession of the property by agreement. In a subsequent clause it was enacted that "Earl of Harrington" should mean, during his minority, his testamentary guardian, and, in case of the earl's death, notice was to be served on the person entitled in remainder to the estate.

On the 4th March, 1865, the solicitors at that time acting for the defendants served the solicitors of the Duke of Leinster (who was the next friend of the plaintiff in other proceedings pending in this court) with a notice specifying the lands required by the defendants. This notice, however, was not communicated to the plaintiff's testamentary guardian, his mother the Countess of Harrington, as she alleged, until the expiration of a year from the passing of the Act.

In September, 1865, the defendants' present solicitors served on the plaintiff's testamentary guardian a notice of their intention to empanel a jury for the purpose of assessing the value of the lands required. It was then objected by the solicitors of the guardian that no notice had been served upon them or upon the Countess of Harrington within the period required by the Act.

The defendants alleged that the solicitors on whom the notice had been served accepted the service on the 10th March, and had then forwarded a copy of the notice to the testamentary guardian of the plaintiff.

Sir Hugh Cairns, Q.C., and *Charles Hall* supported the motion.

The *Attorney-General* (*Sir R. Palmer*), *Malins, Q.C.*, and *W. J. Bovill*, for the defendants, contended that everything necessary under the Act had been complied with by the defendants. Notice had been given to plaintiff himself; but because, in point of form, there had been no personal service upon the testamentary guardian, the company's works were to be stopped. The guardian, however, in the course of a correspondence which passed between her solicitors and those of the defendants on the subject, had clearly waived the objection raised, and could not now be permitted, on a mere technical omission, to stop the works in progress.

No reply.

The VICE-CHANCELLOR.—The language of the Act of Parliament is clear and peremptory. It requires a notice to be served upon the plaintiff's guardian, and this has not been done. As to the question of waiver, I consider that there has been none, and I very much doubt whether a guardian could have power to waive a notice of this kind, without the sanction of the court. Under these circumstances I have no choice but to grant the injunction asked for.

[IN THE QUEEN'S BENCH.]

Nov. 8, 1865.

DODD (*appellant*) v. THE CHURCHWARDENS AND OVERSEERS OF
BILSTON (*respondents*.)

13 L. T. 589.

Poor-rate—Small tenements—Composition by landlord—What deductions to be made.

RATES AND RATING.—By a local Act the owner of small tenements, rented under a certain sum, might be rated instead of the tenants, and the rates might be compounded for, in which case he was to be liable to pay one-half of the rate only:—Held, that such owner is entitled to be considered as standing in the place of the tenant, and entitled to the same deductions as are allowed when the rate is payable by the tenant.

This was an appeal against a rate duly made and allowed on 24th May, 1864, and confirmed by the Justices in special sessions on the 12th August, 1864.

The following is an extract from the rate-book of the assessment which was the subject of the appeal:

No.	Names of occupiers.	Names of owners.	Description of property rated.	Name or situation of property.	Gross estimated rental.	Rateable value.	Composition on rate at 1s. 4d. in the pound.
1112	William Millward. Thomas Simms.	Richard Dodd and John Southam.	House.	Lunts...	£ s. d. 7 16 3 6 11 3	£ s. d. 6 5 0 6 5 0	s. d. 7 8

The appeal was heard at the Staffordshire Epiphany Quarter Sessions, 1865, when the court found that the gross estimated rental of each of the houses was 6l. 10s., and that their rateable value was 4l. 13s. 7d. each, and reduced the rate accordingly, subject to a further reduction of the rateable value, according to the opinion of the Court of Queen's Bench, upon the following case.

The appellants are the owners of the houses which are the subject of the above assessment, and which are let each at 2s. 6d. per week, giving an annual rental of 6l. 10s. Starting from this sum, it is to be taken that the rateable value is, in the present case, correctly arrived at by deducting in the first place from the gross rental of 6l. 10s. a sum sufficient to cover rates and taxes, and then by deducting from the remainder so left the sum of 1l. 3s. 5d., to meet the repairs and other deductions allowed by the Parochial Assessment Act.

It is to be taken that the sum to be deducted for rates and taxes in respect of houses which are not within the provisions of the Composition Act hereinafter mentioned is one-fifth of the gross rental.

By that Act, which was passed in the 10 & 11 Vict., and which is entitled "An Act for better assessing the poor's rates, highway rates, county and police, and other parochial and local rates on small tenements in the several townships of Wolverhampton, Bilston, Willenhall, and Wednesfield, in the county of Stafford," it is enacted that the owner of any tenement within the several townships of Wolverhampton, Bilston, Willenhall, and Wednesfield, being in the union of Wolverhampton, in the parish of Wolverhampton, in the county of Stafford, which may be assessed to the poor-rate and other rates mentioned in the Act, at an annual sum under 6l. 10s. rateable value, which first annual sum of 6l. 10s. shall be ascertained according to the

provisions of an Act passed in the 6 & 7 Will. 4, c. 96, entitled, "An Act to regulate parochial assessments," shall thereafter be rated, and pay such several poor-rate, highway rate, county and police rate, and the local rates aforesaid, in respect of such tenements, instead of the actual occupiers thereof; and it is further enacted that, in all cases where any owner shall have been or shall be liable to be rated in pursuance of this Act, in respect of any such tenement as aforesaid, it shall be lawful for such owner to give notice to the officer authorised to make or collect any such rate of his intention to compound for the same by payment of a reduced rate, whether such tenement be occupied or not, and that in every such case every such owner shall thenceforth, until he shall give like notice for determining such composition, be liable to pay one-half of such rate only, and all such compositions shall be entered in the rate-book of such officers, and such owners shall be thenceforth rated accordingly.

The houses which are the subject of this appeal are within the provisions of this Act and are in composition, the owners paying the rates but compounding for and paying in respect of them only one-half of the sum which would be payable in respect of the said houses if they were out of composition.

The Act above mentioned is to be taken as part of this case.

The appellants contend that, although these houses are in composition, they are entitled to the same deduction for rates and taxes as is allowed in respect of other property which is not in composition, and that the following statement and figures correctly represent the amount of rateable value and the mode in which it is arrived at:

Gross rental	...	...	...	...	£6 10 0
One-fifth deduction for rates and taxes	...	...	...	...	1 6 0
<hr/>					
Gross estimated rental according to Parochial Assessment Act	...	...	...	...	5 4 0
Deductions for repairs	...	...	...	...	1 3 5
<hr/>					
					£4 0 7

The respondents contend that, inasmuch as houses in composition only pay half rates and taxes, the owners of such houses are only entitled to one-half of the deduction, being the sum actually paid by them; and that the proper deduction in respect of such houses, therefore, is only one-tenth of the gross rental; and the following statements and figures correctly represent the rateable value and the mode in which it is arrived at:

Gross rental	...	...	...	...	£6 10 0
One-tenth deduction for rates and taxes	...	...	...	...	0 13 0
<hr/>					
Gross estimated rental according to Parochial Assessment Act	...	...	...	...	5 17 0
Deductions for repairs, &c.	...	...	...	...	1 3 5
<hr/>					
					£4 13 7

The question for the opinion of the court is, whether the owners of the houses the subject of this appeal are entitled to the same amount of deduction for rates and taxes in respect of such property as is allowed to the occupiers of property which is not in composition? If the court shall be of opinion that they are not so entitled, the rateable value of each of the houses is to stand as reduced by the Court of Quarter Sessions, viz., at 4l. 13s. 7d. If the court shall be of opinion that they are entitled to the same amount of deduction, then the rateable value of each of the houses is to be reduced by a further reduction of thirteen shillings.

Staveley Hill appeared for the respondents, and contended that the order

of sessions was correct, and that the appellant was not entitled to the deduction he claimed.

Keane, Q.C. (*M'Mahon* with him) was not called upon.

COCKBURN, C.J.—I am of opinion that the sessions were wrong, and that the appellant is entitled to this deduction. The Parochial Assessment Act is anterior to the local Act, and its enactments are quite irrespective of Acts allowing compositions. That Act points out what deductions are to be made in respect of usual tenant's rates and taxes. Now, that is a general enactment, and must be taken to apply to the case in which the landlord is put in the place of the tenant, and we must ascertain what are the usual tenant's rates and taxes, independently of the local Act. The landlord, therefore, must be considered as standing in the place of the tenant, and as being entitled to the deductions in respect of what the tenant would be rated at, and not at what he (the landlord) actually paid. The rate, therefore, must be amended.

BLACKBURN, J.—I am of the same opinion. The rateable value is ascertained under the Parochial Assessment Act, and then the local Act says, "If the landlord agrees to pay the rates, whether the house be occupied or not, he is only to be required to pay half the sum assessed." That, however, does not affect the deductions to be made in order to ascertain the rateable value.

MELLOR and SHEE, JJ., concurred.

Rate to be amended.

[IN THE QUEEN'S BENCH.]

Jan. 11, 1866.

HUNTER v. SHARP.

13 L. T. 592.

LIBEL AND SLANDER.—Practice—Libel—General justification—Particulars of specific acts imputed.

This was an action by the plaintiff, Dr. Hunter, against the printer of the *Pall Mall Gazette*, for an alleged libel upon him in that paper. The article set out in the declaration was as follows:

IMPOSTORS AND DUPES.

"The modern system of easy advertising and the facilities of the penny post have many advantages, but they have also their attendant evils of no little weight. One of these evils is nothing less than a curse upon English society. Occasional exposures in the law courts and the newspapers have made us familiar with the advertising practices of a certain class of medical impostors, and with the misery they inflict upon their unhappy dupes. And now a series of recent proceedings in the Marylebone Police Office has revealed the existence of ramifications of the detestable system in question for which few ordinary readers will have been prepared. Persons who turn over the pages of the cheap newspapers in search of the curiosities of advertising will have noticed the frequent recurrence of a whole column, purporting to give a consecutive series of extracts from a medical work on consumption by a person signing himself 'Robert Hunter, M.D.' If they have taken the trouble to read its uninviting paragraphs they will have found that they are a long rigmarole of some scientific declamation, professing

to expound to the non-professional invalid the causes and symptoms of disease of the lungs, and to prove that nobody knows how to cure it except this same Dr. Hunter, whose method is one of inhalation. On the face of all this there is nothing more than the puffery of the dealers in the various pills, potions, ointments, and liniments, who rejoice in the profusion of testimonials from innumerable correspondents who bless the day that they first made their acquaintance. That any reputable physician would thus advertise for patients is, of course, out of the question; but, although these advertisements are free from the mysterious hints and suggestions and the scarcely veiled offensive phraseology of the basest class of medical puffs, one is led to suspect the existence of very serious malpractices by observing the length and frequency of these recommendations of Dr. Hunter and his inhalations. When a man finds it worth his while to insert a very costly advertisement in several papers, and to go on with it from day to day, or week to week, it is clear that his patients must be dupes of a very different class from the simple people who buy pills by the gross and potions by the gallon. Nor need there be any actual difficulty in putting a stop to such advertisements by Act of Parliament. It should be an indictable offence for any man to call himself a physician, surgeon, apothecary, or dentist, unless empowered to practise by the colleges or societies recognised by the law of the land. The assumption of all foreign medical degrees should be absolutely forbidden under the same penalties, whether claimed by English subjects or foreigners. English subjects are forbidden to assume any foreign title of rank without the permission of the Crown. But what would be the evil of permitting some foolish gentleman to call himself 'count' or 'baron' compared with the mischief done by scoundrels who utter this base forged coin, and claim to be respected as qualified physicians on the strength of some diploma obtained in Canada or New York."

Pleas:—1. Not guilty. 2. A general justification that the libel was true.

A summons was taken out at chambers to strike out the plea of justification, or to compel the defendant to give particulars, but Lush, J. declined to make any order thereon.

Hume Williams now made a similar application to the court.—The article makes several imputations on the plaintiff; it charges him with being a medical impostor, and unfairly assuming the degree of M.D., as if he were not a doctor. [COCKBURN, C.J.—It appears to me, on reading the article, that it is only a comment upon allowing persons to assume degrees which they have acquired abroad. That is a fair subject of comment, upon which the writer might entertain a very honest opinion.] The article assumes that the plaintiff does not possess the degree, and it goes on to compare the plaintiff to an utterer of forged coin. The libel then refers to the existence of certain ramifications revealed by the proceedings in the police court. It then charges that his patients are dupes. Now, under the plea of justification, it was open to the plaintiff to call any number of persons to prove this allegation. He should give a list of such persons as he intended to call to support the justification. [BLACKBURN, J.—There is no case that goes so far as to compel the defendant to give a list of the witnesses he intends to call to prove his case.] In *Hickinbotham v. Leech* (10 M. & W. 363), Parke, B. said: "In libel or slander, where the charge is general in its nature, the defendant in his justification must state specific instances of the misconduct imputed to the plaintiff. As it is, the statement (in the plea then before the court) is so general, that the plaintiff cannot know with what he is intended to be charged. The defendant is bound to give him information of some specific acts with which he intends to charge him." Here the plaintiff asks the defendant to state the specific acts of misconduct which he intends to impute to the plaintiff. The plaintiff asks for the particulars on which these general allegations in the libel are founded.

COCKBURN, C.J.—The whole scope of the alleged libel which the plea justified was professional malpractice or quackery, whereas the other matter

referred to was altogether unprofessional. The charge justified was founded upon the published letters of the plaintiff himself, which it was open to any one to criticise and comment upon. It was true the hearing at the police-court was alluded to, but only as having incidentally revealed the system of quackery denounced. That system was the advertising of particular modes of cure, under the auspices and with the apparent authority of a medical degree obtained abroad, but which would be naturally supposed to have been conferred by some British college, and which thus was used to convey a sanction or authority which might not really belong to it; and, further, that the mode of cure thus published and put before the world by every species of puffery was purely illusory, and that, in short, the whole system was one of mere puffery. Now, a public journal had a right to comment upon publications of this kind, especially if they partook of the character of puffery. It was clear that this, at all events, was the scope of the alleged libel, and, therefore, the scope of the plea. There was no reference to any other matter: if there were, it would have been otherwise. The meaning of the libel and of the plea was this: You, the plaintiff, professing to describe yourself as a "doctor," represent yourself publicly as possessed of a perfect cure for consumption or pulmonary complaints, which in reality is mere nonsense. You are taking people's money for what is doing them no good. Your pretended "degree" conveys the idea of a British degree, whereas it is not so. Your thus advertising for patients is unprofessional, and a course which no respectable physicians adopt. And in short, the whole thing is quackery, and in this way you are an impostor and a quack. Now, that being the substance and scope of the libel, is also the substance and scope of the plea, and it is perfectly intelligible and sufficiently explicit. No other matter could be open to the defendant to plead under that plea. That being so, the plea was fairly allowable, and no "particulars" were required. The plaintiff must well enough know what it meant. The plea might be proved either by scientific evidence upon the subject, showing that the mode of proof described in the plaintiff's letters was purely illusory, or by calling persons who had adopted this plan of inhalation, and had found themselves no better, or rather worse. On the other hand, it would be open to the plaintiff to call as witnesses the persons he had cured of consumption, and thus falsify the plea. Any other matter than this would be excluded at the trial.

BLACKBURN, J. concurred.—The scope of the plea was the same as the scope of the libel, which was, in effect, that the plaintiff was one of those who called themselves "doctors" or "physicians," which would imply that they were so by British diploma or degree; when, in point of fact, they were only so by some foreign diploma or certificate which might be of little or no value, and that his letters amounted to quackery and puffery.

LUSH, J. likewise concurred.—As he read the libel, that was its scope, and the plea could not be carried further.

Application refused.

[IN THE QUEEN'S BENCH.]

Jan. 12, 1866.

HAZLITT v. TEMPLEMAN.

13 L. T. 593.

Copyright before statute of Anne—Registration under 5 & 6 Vict. c. 45.

COPYRIGHT.—*H. agreed with T. to edit a translation of a foreign work, and*

compose a biographical sketch of the author, and give notes, &c., of his own. It was intended that T. should have the sole right of multiplying copies of the work, and the work was published before the passing of the 5 & 6 Vict. c. 45. There was no assignment of the copyright from H. to T. After T.'s death, T.'s widow, with H.'s knowledge and assent, registered the copyright in her own name under 5 & 6 Vict. c. 45:—Held, that the copyright was in T.'s widow and not in H.

After H.'s assent to T.'s widow registering the copyright in her own name, she paid to him money, and he received from her books on the publication of a fresh edition on the same terms as stipulated in the agreement between H. and her husband in his lifetime. H., on three occasions, claimed remuneration on those terms, and she did not repudiate all liability, but disputed the quantum merely:—Held, evidence from which the jury might infer an agreement by the widow to remunerate H. on the same scale as in the agreement with her husband in consideration of his assenting to her registering the copyright in her own name.

Declaration.—First count, for printing and causing to be printed, and publishing and exposing for sale, divers copies of the works of Michael de Montaigne.

Second, for wrongful conversion of plaintiff's goods, viz., printed paper and manuscripts.

Third, for money payable by defendant for privilege given to her by plaintiff of printing, publishing, and selling a certain edition of a certain book, the copyright of which belonged to the plaintiff, and for the copyright of a certain work bargained and sold to her by plaintiff.

Fourth, for money had and received, money paid, for interest, and on accounts stated.

Pleas:—To first and second counts, 1. Not guilty. To first and third counts, 2. Plaintiff not proprietor of copyright. To same, 3. Non-registry pursuant to 5 & 6 Vict. c. 45. To second count, 4. That said goods were not plaintiff's. To third count and residue of declaration, 5. Never indebted. To third count, 6. Accord and satisfaction. To third count, 7. That the said edition of book in said third count mentioned was an edition published in 1853, and that before action plaintiff accepted and received of defendant certain books, in full satisfaction and discharge of his claim therein pleaded to. To whole of declaration, Statute of Limitations.

At the trial before Mellor, J., in Middlesex, on the 10th May, 1865, it appeared that some time prior to the passing of the Copyright Amendment Act, 5 & 6 Vict. c. 45 (1st July, 1842), the plaintiff negotiated with the deceased husband of the defendant to bring out an edition of the works of Montaigne, comprising the essays, letters and journeys through France and Italy, with notes and a review of the previous editions, and a biographical preface. Cottons' translation was to be taken as the basis of the new edition. The work was partly re-translated by the plaintiff; the notes were original by the plaintiff, and also the notice of former editions and the biographical preface. Several letters passed between the plaintiff and the late Mr. Templeman as to terms, but the one mainly relied on was the following:

"Dear Sir,—You must be aware the proposition to read Montaigne for 10*l.* was your own, and then you suggested writing a life, and comparing the quotations, and giving a bibliographical sketch of the various editions, and for this you stated you should require 40*l.* You then suggested translating the travels, and said for that you should require 10*l.* in addition. To this I acceded if I determined to print the travels only, varying the payments, viz., 20*l.* for the second edition, and printing 500 only; the same for the third of 1,500, and 10*l.* on the fourth of 500. If I printed 1,000, the second edition, of course you would be entitled to the 40*l.*; and if the translation of the travels was made, you would be entitled to the 20*l.* for the first edition. It would require the sale of 1,500 to

bring me home, and should it not sell beyond that, you would receive 40*l.* for your labour, and I should be *minus* my exertions, and if I did not sell 1,000, I should be a considerable sum *minus*. I do not think you should abide by your proposals. When Mr. Reynell asked me if I had decided when I would commence, I said that everything was so exceedingly dull, that I should not commence at present; at no time have I stated that I had given up the intention of printing it.—Yours truly,

“ JOHN TEMPLEMAN.

“ P.S.—The first time 65*l.* was mentioned is in your note of about a month since. To show you that I do not wish to be hard on you, I will give you 10*l.* for every 500 I print after the first 2,000, and for that number you will receive 60*l.*”

Mr. Templeman supplied the plaintiff with many of the books necessary for bringing out the work, and the work was published in the early part of 1842, and before the passing of the Copyright Act, 5 & 6 Vict. c. 45. The work was brought out in monthly parts, and two editions were published in Mr. Templeman's lifetime. He died in April, 1843, having mortgaged the copyright of this and other works. The defendant was executrix and continued to carry on the business. In 1853 she published what she called a third edition of the work, and the plaintiff applied to her, claiming the sum of 20*l.* under the agreement with her husband, when she said that it was not a new edition, but that she was only using up the old copies. Subsequently there was another edition published, on which the plaintiff claimed 20*l.*, but received 10*l.* only in cash, and 10*l.* in copies of the work. Then came the present edition, in respect of which the plaintiff claimed 20*l.*, and in reply to which she said “ she could only, and would only, pay 10*l.*” It was proved that on the 3rd June, 1845, the defendant registered herself as the proprietor of the copyright at Stationers' Hall, under the 5 & 6 Will. 4. c. 45. The defendant, in her evidence, said she had a conversation with the plaintiff about registering it, and that he said it ought to be registered for her, and that she accordingly registered it in her own name with his assent. The jury returned a verdict for the plaintiff for 20*l.*, and leave was reserved to the defendant to move to enter a nonsuit or verdict for the defendant, the court to be at liberty to draw inferences of fact.

A rule *nisi* was accordingly obtained, on the ground that on the facts proved the plaintiff was not the proprietor of Montaigne's works, within the meaning of the Copyright Acts.

Crompton showed cause.—This question arises under the old Copyright Act of 8 Anne, c. 19. The legal copyright was in the plaintiff. The work was the subject of copyright. The plaintiff had to furnish much original matter of his own; and though it may be both plaintiff and Templeman thought that the copyright was to belong to Templeman, yet there has never been any assignment from the plaintiff. The statute 8 Anne, c. 19, requires an assignment in writing, attested by two witnesses:

Davidson v. Bohn, 6 C.B. 456. *Shepherd v. Conquest*, 25 L. J. 127, C.P. *Sweet v. Benning*, 16 C.B. 459. *Hatton v. Kean*, 29 L. J. 20, C.P.; 1 L. T. Rep. N.S. 10. *Allen v. Rawson*, 1 C.B. 551. *Stevens v. Benning*, 24 L. J. 153, Ch.

Secondly, the plaintiff is entitled to retain his verdict of the *indebitatus* counts. When the defendant chose to publish another edition, with knowledge of the original agreement, she was liable to the plaintiff for similar remuneration.

Werner v. Humphries, 2 M. & G. 853.

There was evidence for the jury of a promise by the defendant to pay the plaintiff:

Gibson v. Carruthers, 8 M. & W. 321, C.B., Lord Abinger, C.B.

Huddleston, Q.C. (*McIntyre* with him) in support of the rule.—The defendant was the registered proprietor of the copyright within sect. 13 of

5 & 6 Vict. c. 45. [BLACKBURN, J.—Registration is only *primâ facie* evidence of proprietorship, and is liable to be rebutted.] The registration was made with plaintiff's knowledge and assent. Here the plaintiff was employed by Mr. Templeman to write these notes, &c. for him, and the plaintiff was supplied with the necessary books by Mr. Templeman, so that what the plaintiff contributed was merely incidental to the publication of Montaigne's works, in the same way as, in *Hatton v. Kean*, the music supplied by Mr. Hatton was held to be merely incidental to the production of Shakespeare's plays, and Mr. Kean was held to have the sole right of performing the music, as part of the plays, without assignment or consent in writing from Mr. Hatton. Moreover, that was the understanding of the parties in this case. Secondly, as to the defendant's liability upon the common counts. If she is liable at all, it is in her representative character as executrix. This, with other works, was mortgaged by Mr. Templeman, and the publication was in her character as executrix.

BLACKBURN, J.—I am of opinion that this rule should be discharged. Several curious points of law have been raised, some of which are open to very considerable doubt, but which it is not necessary to decide now. The facts are these: Mr. Hazlitt, the plaintiff, entered into an agreement with Mr. Templeman, the defendant's late husband, by letters [the learned Judge then recapitulated the leading facts of the case.] All the copies published were to be printed by Templeman. That shows that the copyright was to be his, and that the right of multiplying copies of the work was to belong to Templeman, and not to Hazlitt. Had the case stood there, the question would have been raised, whether or no Hazlitt was the author and owner of the copyright in the work. I do not wish to express a decided opinion; but my present impression is that he would have been the author, and that the copyright would have been in him, although a court of equity might have called on him to transfer the copyright to Templeman. The case, however, does not rest here, because, after the death of the defendant's husband, she acted as his executrix, and also carried on the business on her own account, and she, with the consent of the plaintiff, made an entry of her proprietorship in the work in the register at Stationers'-hall. Although that entry is only *primâ facie* evidence of the proprietorship or assignment of copyright, or licence, yet finding that to exist, and regarding it as a mode of conveying the copyright in furtherance of the original agreement, I think that the *primâ facie* evidence of proprietorship ought not to be upset by the want of proof of some technical requirements, particularly when the statute makes it *primâ facie* evidence, and the moral evidence supports it. On the second count of the declaration, however, we think that the plaintiff is entitled to recover 20*l.* for the edition actually published. The effect of what has taken place between the plaintiff and the defendant is, that the defendant was to have herself the copyright and herself to take the onus of remunerating the plaintiff, and it amounts to a promise by her to pay what her late husband would have had to pay the plaintiff under the original agreement. The court draws this inference from the facts of the case, and it is not a stronger inference than that drawn in the case of an assignment of a bill of lading, of a promise by the assignee to pay the freight. Here it is true there is no lien to be given up; but the plaintiff gave his consent to the defendant registering herself as the proprietor of the work, and that was an ample consideration for her promise to pay him according to the original agreement. Moreover, the parties subsequently acted on this view, for when the plaintiff first applied to the defendant after her husband's death, when she was carrying on the business, and told her that she was bringing out a new edition of Montaigne, she did not say that she was not bound to pay him anything, but that she was not bringing out a new edition, but only using up the old parts. Subsequently when another edition was brought out she paid the plaintiff 10*l.* in cash, and he took 10*l.* in books in addition. So that both sides understood that she was to pay the plaintiff in the same manner as her husband had stipulated to do. On that view

of the case the plaintiff is entitled to keep the verdict, and this rule must be discharged.

MELLOR, J.—It is not necessary to decide whether the plaintiff was an author who would have been entitled to the copyright of this work except for his agreement with Mr. Templeman, of which the true meaning probably was, that he should write the work, but transfer the copyright to Mr. Templeman. At present I am inclined to think that he was an author so entitled, but it is not necessary to decide the question. I base my judgment on the facts my brother Blackburn has relied on, which I think entitle the plaintiff to maintain his verdict on the common counts. I should have been satisfied with their verdict if a jury had drawn the inference he has drawn from the facts, and sitting as a jurymen, I draw that inference.

LUSH, J.—I am of the same opinion. By the terms of the original agreement, and the subsequent conduct of the parties, I think it was the original intention of the parties that Templeman should be the proprietor of the copyright. The agreement, however, does not make Templeman the author in the sense of the statute of Anne, entitled to the copyright; but then there comes the entry in the registry at Stationers' Hall, by the defendant, as the proprietor of the copyright. That *prima facie* evidence of her title is not sufficiently rebutted by the absence of proof of a formal assignment in writing. That entry was made with the assent of the plaintiff, on the terms that he should receive payment for each edition published according to the original agreement. It was not intended by the plaintiff to forego the benefit of the original agreement, but as far as he was concerned, he intended to have the benefit of the subsequent editions. She did not repudiate the agreement, but said on the first occasion, "I am not publishing a new edition." And on the second occasion she paid the plaintiff 10*l.*, and he took 10*l.* worth of books; and even when this action was brought I do not understand that she denied all liability. On these grounds the plaintiff is entitled to retain the verdict for 20*l.*

Rule discharged.

[PROBATE.]

Jan. 12, 1866.

DAVIES v. REES.

13 L. T. 609.

Will—Undue execution—Executors' costs.

WILL.—An executor propounded a will in the interest of infant children, and did not become aware, until after the suit was instituted, that it had not been duly executed:—Held, that under the circumstances the executor was entitled to his costs out of the estate.

The testator, Enoch Rees, a farmer in Cardiganshire, made a will in September, 1865, shortly before his death. He was at the time very ill of smallpox, and was almost blind from the disease. The evidence showed that it was prepared by one of the attesting witnesses from instructions given by the testator; that when it was reduced to writing it was not read over to him, and that it was signed by the witnesses in a different room from that in which the testator lay, and where, supposing he had the full possession of sight, he could not see them. The property was left among several members of his family,

of whom some were infants. The executor did not become aware of the circumstances of the execution until after the suit had been instituted.

Dr. Spinks, for the plaintiff, the executor.

Dr. Swabey, for the defendant, the next-of-kin.

Sir J. P. WILDE pronounced against the will, but allowed the costs of both parties out of the estate.

[PROBATE.]

Jan. 12, 1866.

TOLLAND v. STEVENSON AND OTHERS.

13 L. T. 609; 12 Jur. N.S. 300.

Will—Plea of undue influence—No withdrawal and no appearance at trial—Defendant condemned in costs.

WILL.—To a declaration on a will, the defendants, the widow and daughter of the testator, pleaded undue influence and incapacity. The daughter obtained leave to withdraw from the suit on payment of costs up to the time; the other defendant did not withdraw, and did not appear at the trial.

The Court, having pronounced for the will, condemned her in costs.

Dr. Spinks, for the plaintiff, the executrix.

The testator, a retired clerk in a Government office, died in March, 1865. He had been separated from his wife, and on the 15th March, 1858, he executed a will in favour of his housekeeper, who had lived with him for many years. His widow and daughter opposed probate, and pleaded undue influence and incapacity. The daughter applied for and obtained leave to withdraw from the suit on payment of costs up to the time. The widow did not withdraw, and no one appeared on her behalf to support the pleas.

The attorney who prepared the will, and the attesting witnesses, having proved its due execution and the testator's capacity,

Sir J. P. WILDE pronounced for the will, and condemned the defendant in costs.

[MATRIMONIAL.]

Jan. 12, 1866.

CUFLEY v. CUFLEY AND LOVECK.

13 L. T. 610.

Husband's petition—Voluntary separation by wife.

DIVORCE AND MATRIMONIAL CAUSES.—Where the wife's conduct showed that her separation from her husband was voluntary, the Court held that he had not failed in his duty towards her, although he had no knowledge of her whereabouts for five years, and apparently made no effort to find her.

Warner Sleigh, for the husband, the petitioner.

The respondent and co-respondent did not appear.

This was a husband's petition for dissolution of marriage on the ground of the wife's adultery with the co-respondent, and it was tried by oral evidence before the Judge Ordinary. The adultery having been clearly proved, the petitioner, a domestic servant, was called and examined by the court. He stated that he made the acquaintance of the respondent while in the same service, and that at the date of the marriage, which took place at St. Leonard's Church, Shoreditch, on the 21st March, 1857, he was sixteen and she thirty years of age. They slept together one night after the marriage, and the respondent then went home and gave birth to a child within three months. During this time the petitioner was in service. He frequently wrote to the respondent, and also occasionally forwarded her a portion of his wages. He met her once by appointment at the Shoreditch station, when she came up to town in search of a situation, and about two months afterwards her brother wrote to him to say that she had obtained service at Inverness Terrace, Bayswater. There was no correspondence of any kind between them after that, and he heard nothing more of her till five years afterwards, when her sister informed him that she was living with another man.

WILDE, J. O.—It is quite plain that this woman has been living in adultery for some time, and from the statement of the petitioner I am satisfied that she voluntarily separated herself from him. His senior by several years at the time of the marriage, it is probable that she inveigled him into it, and then, not caring to continue the connection, she went into service without communicating with him. He cannot be said to have failed in his duty towards her, and is entitled to a decree *nisi*.

Decree nisi accordingly.

[ADMIRALTY.]

DR. LUSHINGTON, July 22, 1865.

THE FRUITER v. THE FINGAL.

13 L. T. 611.

Steamship meeting end on—Collision—Admiralty regulations as to rules of the road—Construction of.

SHIPPING.—13th regulation: *If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helm of both shall be put to port, so that each may pass on the port side of the other.*

14th regulation: *If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.*

Brett, Q.C., and E. C. Clarkson for the Fingal.

Butt and Pritchard for the Fruiter.

Dr. LUSHINGTON gave judgment in this case, which came before the court in the form of an action brought by the schooner *Fruiter*, 105 tons, from London for Plymouth, laden with fruit, against the screw steamship *Fingal*, 613 tons, 90-horse power, from Dantzic for London, laden with a general cargo

and passengers, to obtain compensation for damages sustained by a collision between them off Cuckold's Point, in the river Thames, about eight o'clock in the morning of December last. The wind was stated by the parties as S.W.; and the weather on one side was described as dull but no fog or rain, and on the other as moderate and clear, the tide being about high water. The case for the *Fruiter* was, that on the morning in question she was in tow of a steam-tug called the *Highland Maid*, and was in the river Thames off Rotherhithe; that the steam-tug had also another vessel, called the *Esperanza*, in tow, and the *Fruiter* was being towed astern of the *Esperanza*, and by a separate hawser fastened to the tug and not to the *Esperanza*; that the jib, topsail, topgallant-sail, and mainsail were set, but only occasionally drawing, and the *Fruiter* was being towed at the rate of about three knots an hour; that the master was at the wheel steering, and the waterman and all the crew were forward on the look-out, and a good look-out was kept on board the vessel; that the *Fruiter*, in tow of the steam-tug, was proceeding down the river to the southward of mid-channel, and when the tug reached Cuckold's Point, Rotherhithe, those on board the tug, and immediately afterwards those on board the *Fruiter*, observed the steam-vessel *Fingal* coming up the river, and distant from 200 to 300 yards, and about two points on the port bow of the tug; that the helm of the tug was put hard a-port, and the helm of the *Fruiter* was ported as much as possible consistently with passing a brig at anchor on her starboard side, and on the *Fruiter's* passing the brig the helm of the *Fruiter* was put hard a-port, and all the three vessels were kept as near as possible to the southern shore; that the *Fingal* nevertheless continued to approach the *Fruiter*, apparently under a starboard helm, and the *Fruiter's* bow-rope was, therefore, cast off from the tug, and the *Fingal* immediately afterwards, still apparently under a starboard helm, and without stopping her engines, struck with her stern and port bow the port quarter of the *Esperanza*, and then with her starboard bow struck first the jibboom and then the port bow of the *Fruiter*; that the *Fingal* carried away the jibboom, bowsprit, knight-heads, and cutwater of the *Fruiter*, and did other damage; that the *Fingal* backed astern and away from the *Fruiter*, and afterwards continued her course up the river. The anchor-chain of the *Fruiter* was set fast by the collision, but was, after some delay and difficulty, cleared, the anchor let go, and the vessel brought up, and as the *Fruiter* had received so much damage as to be unable to continue her voyage, she was subsequently towed back again to London. The defence on the part of the *Fingal* pleaded, that while in charge of a duly licensed Trinity pilot, and being at the upper end of Limehouse Reach, as a matter of precaution, and owing to the great number of craft coming down the river, her engines were stopped, and she was allowed to drift with the tide, with her head angling in towards the south shore; that whilst so drifting the *Fruiter*, which was the aftermost vessel in tow, was seen distant 500 or 600 yards on her starboard bow coming down the river; that the tug with the two vessels in tow, instead of passing to the northward of the *Fingal*, as she could and ought to have done, and although warned and hailed from the *Fingal* so to do, attempted, under a port helm, to pass to the southward of her; and, notwithstanding the engines of the *Fingal* were turned astern with a view, if possible, of avoiding a collision, the foremost of the vessels in tow with her port quarter struck the stern of the *Fingal*, and the *Fruiter*, which had been cast off by the tug, with her jibboom and bowsprit struck the *Fingal* on the starboard bow, about the cathead. It was then denied that the collision was in any way caused by the *Fingal*, or those on board her. Now, the article of the Admiralty Steering and Regulation Rules was, that "if two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helm of both shall be put to port, so that each may pass on the port side of the other." Looking at the facts of this case, and the conflicting evidence, could it be said that these two vessels were meeting end on, or nearly end on? Part of the evidence stated that they were within two points of meeting end on, and if they were so they would fall in with the latter part of the statement

—nearly end on; and if they did, and there was no nautical impediment, undoubtedly the directions of the 13th article were not complied with, because both these vessels did not put their helms a-port. If the 13th article did not apply, we come to the next, the 14th, viz., "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of the way of the other." Now, it appears to the court, that the *Fingal* had the other vessel on her starboard side, and therefore it was her duty to keep out of the way. As to the tug with the two vessels in tow, did she or did she not keep to the southward coming round this place called Cuckold's Point, and was she or was she not to the southward of mid-channel before the collision, and at the collision? Upon that there is conflicting evidence beyond all doubt. It has been pointed out that one of the strongest arguments in favour of her being to the southward is that the *Fruiter* was close to the brig at the time of the collision. Undoubtedly that was a fact, supposing it to be of importance, or that there was any doubt whatever that she was at the time in question considerably to the southward of mid-channel. Take it she had ported in due time, and was to the southward of mid-channel, and saw the screw coming across from the north shore angling to the south, was it her duty or not to port? That she did port there is not a shadow of doubt; but the question raised was, whether she was to the southward of mid-channel at the time? The screw-ship states that, as she was approaching, going to Cuckold's Point, she saw the road was blocked off Cuckold's Point, and she could not proceed to the northward, and she then stopped and reversed her engines, and at the time in question she was going a very little ahead, if at all. On a careful consideration of the evidence on both sides, the court was of opinion that the *Fingal* was wholly to blame, and must be so held.

The Court was assisted by Capt. Pigott and Capt. Webb of the Trinity House.

[ADMIRALTY.]

July 22, 1865.

THE WHEATSHEAF v. THE INTREPID.

13 L. T. 612.

Overtaking ships—Collision—Admiralty regulations as to rules of the road—Construction of.

SHIPPING.—The 17th Admiralty regulation, "that every vessel overtaking any other vessel shall keep out of the way of the vessel being overtaken," applies to foreign ships as well as to British.

A French ship, under sail, following a British ship in tow on entering a harbour, came into collision with her whilst crossing the bar:—Held, that the collision so occurring was occasioned by the negligence of the French ship in not attending to the rule of the road as laid down in the 17th Admiralty regulation, and that the French ship was liable for the loss caused by such collision.

Brett, Q.C., and E. C. Clarkson appeared for the *Wheatsheaf*.

Deane, Q.C., and Vernon Lushington for the *Intrepide*.

Dr. LUSHINGTON gave judgment in this case, which was an action of

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damage brought by the British ship *Wheatsheaf*, 108 tons, from London, in ballast for Sunderland, against the French schooner *Intrepide*, 105 tons register, to obtain compensation for damage sustained on the 17th November last under the following circumstances. The case of the *Wheatsheaf* was, that when about two miles off Sunderland harbour, the master of the *Wheatsheaf* engaged a steam-tug to tow her into the harbour, and such tug accordingly took her in tow, and between eight and nine a.m. of the day in question proceeded with the *Wheatsheaf* in tow for that harbour, and whilst approaching that harbour, and before entering it, all sail was taken off the *Wheatsheaf*; that the wind at this time was about S.E. by S., a fresh breeze, the weather was fine, and the tide was about half-ebb; that the *Wheatsheaf*, in tow of the tug, proceeded into harbour, and as she was entering it the *Intrepide*, which had previously been seen hove-to outside the harbour, was noticed at the distance of about a cable's length astern of the *Wheatsheaf* and also coming into Sunderland harbour; that the *Intrepide* was under sail, and was going very considerably faster than and overtaking the *Wheatsheaf*; that the *Wheatsheaf* and her tug kept on up the harbour, in the expectation that the *Intrepide* would keep clear, as she ought to have done; that the *Intrepide* passed very close to the *Wheatsheaf* on her starboard side, ran against the tow-rope with which the tug was towing the *Wheatsheaf*, and rendered a collision between herself and the tug imminent; whereupon the tug, to save herself, slipped the tow-rope, and although every endeavour was made by those on board the *Wheatsheaf* to save her from so doing, the *Wheatsheaf* drove on to the ground and suffered considerable damage, and was compelled to take the assistance of her tug and another tug to get her off; that those on board the *Intrepide* did not whilst passing the *Wheatsheaf* and her tug take proper measures to keep clear of the *Wheatsheaf* and her tug as they ought to have done; that those on board the *Intrepide*, whilst passing the *Wheatsheaf* and her tug, improperly starboarded the helm of the *Intrepide*; that the collision and the damages and losses consequent thereon were occasioned by the negligence and improper navigation of the *Intrepide*, and no blame with regard thereto was attributable to the *Wheatsheaf* or her tug. The defence on the part of the *Intrepide* set forth, that on the morning in question she was lying-to off the harbour of Sunderland, when those on board her observed the *Wheatsheaf* two miles distant, bearing about S.W.; that the wind was blowing fresh from about S.S.E.; the tide was ebb, running strong, and there was a heavy sea on; that about 9 a.m. the *Wheatsheaf*, then in tow of a steam-tug, was observed to be making for the entrance of the harbour, and when it appeared, as the fact was, that she had got near enough to the harbour to get in safely before the *Intrepide*, the *Intrepide's* sails were filled, and her course made to cross the bar; that as the *Intrepide* was advancing, being astern but to the northward of the *Wheatsheaf*, the *Wheatsheaf* was observed to touch the bar in crossing; that the *Wheatsheaf's* engine was thereby stopped, and the distance between the two vessels was diminished; that the *Intrepide* crossed the bar, being then under all sail except the flying jib and foretopsail, and sailing at about the rate of four knots an hour, and between the piers picked up a licensed pilot, who, on boarding, took the wheel; that the *Wheatsheaf* was then observed to take the ground on the couch or bank near the south pier, and the steam-tug, in order to try to get her off, crossed over to the northward, carrying the tow-line across the *Intrepide's* course; that the *Intrepide*, meanwhile, necessarily advanced, and, as there was no room for her to pass between the steam-tug and the north pier, was obliged to continue her course, and she consequently ran against the tow-rope between the tug and the *Wheatsheaf*, but the *Intrepide's* helm was not starboarded; that the pilot on board the *Wheatsheaf* hailed those on board the tug to let go the tow-rope, but it was not let go till just as the *Intrepide's* stem came against the rope; that the rope was not carried away, and the *Intrepide* never touched either the *Wheatsheaf* or the tug. It was then pleaded, that the *Intrepide* was in no wise instrumental to the *Wheatsheaf's* getting on shore; that the contact of the *Intrepide*

with the tow-rope between the *Wheatsheaf* and the tug was not caused by any negligence of those on board the *Intrepide*, but was, so far as they were concerned, an inevitable accident; and that the contact of the *Intrepide* with the tow-rope between the *Wheatsheaf* and the tug was occasioned by the default of those on board the *Wheatsheaf* or the tug. Now the court could not discover any materials to conclude that it was an inevitable accident which caused this calamity, and therefore one or other of the two vessels must be to blame. There was great difficulty from the extreme contradiction in the evidence in the case, and more especially from a fact that crept out in the course of that evidence, which was, that there was a sort of feud sprung up between the pilots, and they seemed to have adopted their own courses, and, as frequently arises in such a state of things, the evidence was not to be relied on, on the one side or the other, with the same satisfaction as if no such feeling had previously existed. The case appeared to fall within the 17th rule of the statutory regulations, that "Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel." The fact was undoubted, that the *Wheatsheaf* was first, and that the *Intrepide* was following her, and that it was not a matter of necessity that the *Intrepide* should have kept so close to the *Wheatsheaf* as she happened to do; and it was her duty, therefore, in accordance with this 17th article, which was equally binding upon French vessels as upon English vessels, to keep out of the way. Therefore, one of the principal questions to determine was this: did the *Intrepide* adopt those proper measures which would enable her to escape the consequences which subsequently occurred? It had been said, on the part of the French vessel, that it was very improbable she should have starboarded, there being no necessity for such a proceeding, and it being obviously indiscreet for her to do so. It was said for the *Intrepide* that the *Wheatsheaf* struck on the bar on getting between the piers, but that was entirely unsupported by the evidence. Upon the whole of the evidence taken together, the court was of opinion that the *Intrepide* was solely to blame, and there must be a decree accordingly.

The court was assisted by Captain Bax and Captain Lambert, of the Trinity-house.

STUART, V.C., Jan. 12, 1866.

HOPE v. CARNEGIE.

13 L. T. 624; L. R. 1 Eq. 126.

Administration — Real and personal estate abroad — Foreign suit — Injunction.

INJUNCTION. INTERNATIONAL LAW.—Where the testator, a domiciled British subject, died possessed of real and personal property in a foreign country, and a decree had been made for the administration of his estate by an English court, and subsequently proceedings were instituted in the courts of a foreign country for the distribution of the estate according to the laws of that country:

The Court granted an injunction to restrain such proceedings, without prejudice, however, to any future proceedings as to the real estate.

This was a motion on behalf of the plaintiff, Adrian Elias Hope, an infant, for an injunction to restrain the defendant, Emily Mathilde Hope, from prosecuting any legal proceedings in the kingdom of Holland or elsewhere, in respect of the estate of the testator in the cause, Adrian John Hope.

The testator by his will, dated the 29th August, 1862, gave the residue of his real and personal property, whether in England, Holland, or elsewhere (but as to his foreign property, only so far as he had power to dispose of the same by the law of the country in which the same was situated, and as not intending by his will to interfere with the operation of such law or preventing any of his children taking benefits under his will from also taking under such law, or as depriving them of any benefit under his will by reason of their so taking), to two trustees, upon trust (subject to two legacies of 10,000*l.* each for the defendants Emily Mathilde Hope and Henrietta Hope), for the plaintiff if he should attain the age of twenty-one, with a gift over, in the event of his dying under that age, to the defendants Emily Mathilde Hope and Henrietta Hope equally; and the testator gave to his trustees powers of maintenance and advancement and other powers, and nominated them his executors.

The testator died in 1863, leaving his widow the defendant Emilie Meleanie Mathilde Hope, the plaintiff, and the defendants, Louisa Albertine Carnegie, Emily Mathilde Hope, Henrietta Hope, and Jean Henry Hope, his only children surviving him.

The testator was a British subject, and at the time of his death, as the bill alleged, was domiciled in England.

His property comprised real and personal estate in England, various stocks of the Russian, Austrian, Netherlands, and many other Governments, shares of public companies in those countries, and other personal estate, and also real estate in the Netherlands.

In October, 1864, a suit was instituted in England on behalf of the present plaintiff, for the administration of the real and personal estate of the testator, and a decree was then made whereby it was declared that the trusts of the will were to be carried into execution, and the usual accounts and inquiries were directed as to the real and personal estate, and also an inquiry whether it would be for the advantage of the plaintiff and the testator's estate that the litigation commenced should be prosecuted or compromised.

Accordingly, by a certificate dated the 10th December and approved of by his Honour, it was found advantageous to enter into a compromise, and this was done by a deed dated the 19th December, 1864, and made between Mrs. Hope, the testator's widow, of the one part, and the trustees of the will of the other part, whereby it was agreed that, in consideration of a sum of 268,315*l.* 23*s.* paid by Mrs. Hope to the trustees, they should pay to her (she performing the covenants and stipulations therein contained) a jointure of 3,000*l.* a year.

It appeared that since the date of the above-mentioned decree it had been contended by some of the defendants that the testator at the time of his death was domiciled in the Netherlands, and that his will ought to be construed in accordance with the law of that country, and if this were done an intestacy would at once arise as to the greater part of the property in England and elsewhere. Acting upon this contention, the defendant, Emily Mathilde Hope, who was residing abroad with her mother, had commenced in Amsterdam the proceedings complained of against the agents of the testator's property, requiring them to concur in the distribution of the movable and immovable estate within the kingdom of the Netherlands, according to the laws of that country, as in an intestacy.

The bill charged that there was no such intestacy, and that the whole of the testator's property, whether in England, the Netherlands, or elsewhere, was, after payment of the legacies given by the will, subject to the trusts declared in favour of the plaintiff, and on his death under the age of twenty-one, in favour of the defendants, Emily Mathilde Hope and Henrietta Hope. The bill further charged that the defendant Mrs. Hope was precluded by the deed of compromise from any other claim than that of jointure out of the testator's estate.

Malins, Q.C., and *Hemming*, in support of the motion, submitted that there was clearly an English domicile, and consequently that the whole of the

personal estate ought to be governed by the law of England, and could in no way be subject to the law of the Netherlands. It was further submitted that although the defendant might be entitled to take measures in the Dutch courts with reference to the real estate, yet, as the proceedings now pending embraced both real and personal property, they ought to be restrained.

Bacon and *Swanston*, for the defendant E. M. Hope, contended that there was a conflict of evidence as to the domicile, which the court, in the present state of the proceedings, could not enter into. Even if it should appear, however, that the defendant was not entitled to take measures in respect to the personal estate, still her right to sue as to the real estate in Holland was undoubted, and could not be interfered with. The defendant had been put to great expense by the proceedings in the Dutch court, and had clearly a right to continue them with regard to the real estate, and any interference now on the part of the court would occasion the loss of the payments incurred.

Cole, Q.C., and *Druce* for Mrs. Hope.

The VICE CHANCELLOR.—I consider from the evidence before me that the testator was clearly a domiciled British subject. A suit has been instituted in this court in which a decree has been made for the administration of the testator's estate. There is a remarkable provision in his will as to the disposition of the testator's foreign property, for it appears that he was entitled to both real and personal estate abroad as well as to property in this country. By the law of this country the real estate of a testator who dies domiciled in England is subject to and governed by the law of the country in which such estate is situated. With respect, however, to the personal property abroad of a testator who dies domiciled in England, such property must be controlled by the law of this country, and is distributable accordingly. The evidence shows that the injunction asked for is to restrain proceedings in a foreign country, comprising both real and personal estate, or, as it called in the bill, movable and immovable property. The court cannot permit this interference as to the personal property, and therefore these proceedings must be restrained. With respect, however, to any future proceedings that may be taken as to the real estate, no order can now be made.

[IN THE QUEEN'S BENCH.]

Jan. 18, 1866.

SHELBOURNE (*appellant*) v. OLIVER (*respondent*).

13 L. T. 630.

See *Skinner v. Kitch*, [1867] E. R. A.; 36 L. J. M.C. 116; L. R. 2 Q.B. 393; 16 L. T. 413; 15 W. R. 830 (Q.B.).

6 Geo. IV. c. 129 was repealed by 34 & 35 Vict. c. 32.

*Master and workmen—Combination—Intimidation—*6 Geo. 4, c. 129, s. 3.

CRIMINAL LAW.—By the 6 Geo. 4, c. 129, s. 3, it is enacted that if any person shall by threats or intimidation force, or endeavour to force, any manufacturer to limit the number or description of his workmen, he shall, on conviction, &c.

The workmen of the respondent had all struck, with the exception of one man of the name of James. The men, however, agreed to resume work, but upon returning and finding James still at work they gave over work and retired, and in answer to a question of the respondent why they did so, a deputation from a trade's union headed by the appellant attended, who said,

"We've come about James, we shall not allow James to work;" whereupon the respondent said, "It is a very hard case; James was the only man who stayed to help me with the special orders in hand;" whereupon the appellant said, "Well, it's of no use, we have made up our minds. He shall not work, he's a scoundrel; unless you discharge him your men shall not be allowed to work":—Held, that the appellant brought himself within the meaning of the foregoing section.

This was a case stated under the 20 & 21 Vict. c. 43, upon a decision of justices at Nottingham, convicting the appellant under the 6 Geo. 4, c. 129, s. 3, for having on the 10th July, 1865, at Basford, unlawfully by threats endeavoured to force George Oliver to limit the description of his journeymen and workmen. It appeared that the respondent carried on the business of a bleacher and trimmer, at Basford, and employed more than 100 workpeople; that Benjamin Samuel Oliver was the acting manager of the works, with power to employ and discharge workmen, and that a man named James was employed by Oliver as a journeyman; that the appellant was not in the employment of Oliver, but was in the service of another bleacher and trimmer in the neighbourhood, and that he was a member and acted as vice-president of a trade's union society at Basford; that demands had been made by the men employed in different bleaching yards for an advance of wages, which demands were resisted by the masters, and that striking had taken place in some of such yards, and in Oliver's yard amongst others; that, after Oliver's yard had struck, James worked for a short period to finish some orders specially required to be finished, and subsequently to this Oliver agreed upon certain terms with his workmen, and some of those men came back to work, and found James at work; that, on seeing James at work, the men immediately gave over work, and, in answer to an inquiry by Oliver why they did so, a deputation from the society (of which deputation the appellant was one) went to Oliver's works and saw the manager, B. S. Oliver; that the appellant was the spokesman, and said to B. S. Oliver, "We've come about James; we shall not allow James to work;" that B. S. Oliver replied, "It is a very hard case; James was the only man who stayed to help me with the special orders in hand;" that the appellant said, "Well, it's of no use; we have made up our minds; he shall not work; he's a scoundrel; unless you discharge him your men shall not be allowed to work;" that B. S. Oliver said, "If I be compelled to do it, I must discharge him;" that, in consequence of what passed as above, James, who was then at work, was immediately dismissed, and the next day Oliver's men returned to work, James being discharged as above; that counter-evidence was given on behalf of the appellant, but the justices found the facts to be as above set out.

By sect. 3 of 6 Geo. 4, c. 129, it is enacted—

That, if any person shall . . . by threats or intimidation . . . force or endeavour to force any manufacturer to limit the number or description of his journeymen, workmen, or servants, any person so offending shall, &c.

Cave appeared for the respondent in support of the conviction, and cited—

Walesby v. Anley, 30 L. J. 121, M.C.; referred to and approved by *O'Neill v. Longman*, 32 L. J. 259, M.C.

He was stopped by the Court, who called upon

Sergt. O'Brien, in support of the appeal, and who contended that the facts would not bring the appellant within the Act, for that all that he did was to remonstrate with the respondent for keeping James in his employment. [COCKBURN, C.J.—This is not the exercising of a man's right to refuse to work, but it is the coming forward of a man who says, your men shall not work if a particular person is employed.] There is no endeavouring to limit the number or description of the workmen as contemplated by the statute.

COCKBURN, C.J.—That is not so. He says in effect that, notwithstanding this man has well served you, and you are satisfied with him, yet we will not permit others to work for you unless you discharge him. I think this is quite a case within the Act.

BLACKBURN, J.—I think the case is quite clear, and is governed by the previous one of *Walesby v. Anley*.

Conviction affirmed.

[PROBATE.]

Jan. 16, 1866.

In the Goods of THOMAS MARSHALL (deceased.)

13 L. T. 643.

Will—Signature of testator by third party—Necessary acknowledgment—
1 Vict. c. 26, s. 9.

WILL.—*If the signature of a testator, who is too ill to write himself, be signed in his presence and that of the attesting witnesses to the will by a third party, such signature must, nevertheless, be accompanied by some act or word on the part of the testator to show that it was made at his request.*

The testator, Thomas Marshall, late of Durham, was a labourer. Being very ill, a will was prepared for him, at his request, by a person of the name of Ward, on the 22nd August, 1865, and he then asked another neighbour, named Errington, to sign it for him, saying that he was too weak to sign it himself. Errington did not do so at the moment, but, having sent for two witnesses to attest the execution of the will, signed it, in the name of the testator, in his and their presence; but it did not appear from the affidavits that the testator had repeated his request to Errington, or that he had done any act in acknowledgment of the signature in their presence.

Dr. Tristram moved for probate of the paper, and submitted that the requirements of the 9th section of the Wills Act had been complied with. He cited

In the Goods of James Clarke, 2 Curt. 329.

Sir J. P. WILDE.—That case only goes this length—that, where a person who was requested by a testator to subscribe his will for him, wrote his own name instead of that of the testator, such signature was held sufficient. The case had better be postponed, as you may be able to present a further affidavit as to what passed at the execution. On the construction of the section, I am very clear that, by act or by word, the testator must in some way indicate to the two witnesses present that the signature was put there at his request. Of course, if a previous positive direction had been made to the agent to sign the will, it might not be that the testator would repeat that direction in the presence of the witnesses; but he must do something to shew that they understood at the time that the other party was signing for him.

LORDS JUSTICES, Dec. 21, 22, 1865.

THE EARL OF HARRINGTON v. THE METROPOLITAN RAILWAY COMPANY.

13 L. T. 658: affirming, [1866] E. R. A. 3235; 13 L. T. 583.

Railway company—Compulsory powers—Infant—Guardian—Notice to take land—Defective service.

COMPULSORY PURCHASE.—*By the defendants' Act of Parliament it was enacted that they should, within twelve months, give notice to the plaintiff (an infant) of the lands belonging to him which they might require to take; and it was declared that by the "Earl of Harrington" should be meant, during his minority, his testamentary guardian. Other proceedings were pending in which the plaintiff was represented by a next friend, and the notice was, within the limited time, served upon that next friend; but it was not until after the expiration of twelve months that any notice was served upon the guardian:—Held (affirming the decision of Stuart, V.C.), that no notice had been given under the Act, and that the company must be restrained from taking the land.*

This was an appeal motion by the railway company above mentioned to dissolve an interlocutory injunction granted by Stuart, V.C. The case is reported (13 L. T. 583), where the circumstances are sufficiently stated.

The Attorney-General, Malins, Q.C., and Bovill for the appellants.

Sir Hugh Cairns, Q.C., and Charles Hall, for the earl, were not called on.

LORD JUSTICE KNIGHT BRUCE said.—That which was directed to be done within the prescribed twelve months was not so done. If the omission to do that act within the time could have been waived in the case of an infant, it has not been so waived. It appears to me plain that the Vice Chancellor had no alternative but to grant the injunction, and there is no case whatever, in my judgment, for disturbing it.

LORD JUSTICE TURNER said.—I entirely agree with my learned brother's opinion. Assuming, for the purposes of the argument, that which is probably the fact, that the notice required by the 28th section is not the general notice to treat, as I understand the Attorney-General to argue, still there is this provision, that no lands are to be taken unless the notice required by the 28th section be given. Then comes the question, what is the notice required by the 28th section? The notice is distinct. In the body of the section it says it is to be served on Lord Harrington, and in the 4th article of the section that "Lord Harrington" is to be read as "the guardian during his minority." There is no pretence for saying there was service on the guardian, and I cannot agree with the Attorney-General's argument that that is a question of form and not of substance, because, in my opinion, the guardian is the proper person to consider what steps should be taken on the part of the infant on the notice required by the 28th section being given; and to say that the next friend in the suit was the proper person to consider the question, really amounts to substituting the discretion of one person for that discretion which the Legislature has vested in another person. I think, therefore, the order of the Vice Chancellor is perfectly right, and that this motion must be refused, and with costs.

Lord Justice KNIGHT BRUCE.—Certainly.

STUART, V.C., Jan. 20, 1866.

EWINS v. WAITE.

13 L. T. 664.

Sale under order of court—Opening biddings.

VENDOR AND PURCHASER.—*An estate, put up for sale by auction under the court's direction, was knocked down to B.; and the order then drawn up, after reciting that the property was about to be offered again for sale, directed that, in the event of there being no higher offer, B. was to be allowed to be purchaser. On the day named the estate was again put up for sale, but no offer was then made, and the chief clerk subsequently certified B. to be the purchaser. Within eight days after the certificate an advanced offer was made.*

The Court, on an adjourned summons, directed the biddings to be opened.

This was an adjourned summons into court for the purpose of opening the biddings to certain property sold under a decree in the above suit.

In pursuance of the decree, the property was offered for sale by public auction on the 8th May, 1865, and was knocked down at 19,000*l.* It was again opened at an advance of 500*l.*, and knocked down at 28,000*l.*; and finally it was opened on an offer made by a Mr. J. P. Bowring for 29,000*l.*

The order drawn up on this occasion, after reciting (*inter alia*) that the property had been knocked down to Bowring, and that it was about to be again offered for sale by auction, directed that, in case there should be no bidding for the estate at such resale higher than the sum of 29,000*l.*, the said J. P. Bowring was to be allowed to be the purchaser thereof at the sum of 29,000*l.*

On the 12th December, 1865, the property was accordingly again put up for sale, but no offer was made.

On the 16th December, 1865, the chief clerk certified that there being no bidding at the last auction, J. P. Bowring was the purchaser of the estate.

The present application resulted from an offer made within eight days from the date of the certificate, of 1,000*l.* in advance of the price last named.

Fischer, in support of the application, contended that the chief clerk's certificate was not final; and, as a matter of course, the applicant had a right to have the biddings opened.

Dickinson and Langworthy, for other parties, also supported the summons.

Ince, for Bowring, submitted that the chief clerk's certificate was immaterial. He relied on the order, the effect of which was to constitute Bowring a purchaser in the event of there being no bidding at the last sale. He cited

Milliken v. Vanderplank, 11 Hare, 136. *Barlow v. Osborne*, 6 H.L. Cas. 556.

The VICE CHANCELLOR.—The order has been drawn up in the usual form. The court is always desirous of doing all that is possible for the benefit of the estate before the final order; and there is nothing in the present case to preclude it from so doing. There must be a direction that the biddings are to be opened.

STUART, V.C., Jan. 19, 1886.

Re LYE'S ESTATES AND *Re* BERKS AND HANTS EXTENSION
RAILWAY ACT, 1859.

13 L. T. 664.

See *In re Brooshofts' Settlement*, [1889] E. R. A.; 58 L. J. Ch. 654;
42 Ch. D. 253; 61 L. T. 320; 37 W. R. 744 (Ch. D.).

Railway company—Costs—Lands Clauses Consolidation Act.

COMPULSORY PURCHASE.—*Where the purchase-money of land taken by a railway company has been paid into court to their credit, and subsequently invested in stock in trust for B., who dies, bequeathing it to C. for life.*

The Court, on a petition by B.'s executors, in directing payment of the dividends to C., ordered the costs of the petitioners to be paid by the company.

This petition was presented for payment of the dividends of stock purchased with the proceeds of certain land taken by the Berks and Hants Extension Railway Company.

Under the will of Richard Lye, who died in 1847, his daughter, Mary Mather, became entitled to the above property.

In October, 1860, the railway company agreed to purchase part of the property. Subsequently, in 1861, Mary Mather's husband (C. B. Mather) was declared bankrupt, and under an order made in the bankruptcy Ann Lye became the purchaser, for 460*l.*, of the whole of the interest, which the bankrupt, in right of his wife, possessed in the property, including the purchase-money agreed to be paid by the company.

In January, 1862, the company paid the purchase-money, 315*l.*, into court, "to the credit of *ex parte* the Berks and Hants Extension Railway Company," and in the same month the whole estate and the fund in court were conveyed to a trustee, to hold the same, subject to the agreement with the company.

Upon a petition presented by Ann Lye, in June, 1862, the fund in court was directed to be invested in consols in trust for the petitioners during the joint lives of Mrs. Mather and her husband.

In December, 1863, Ann Lye died, and by her will she gave all her interest in the property in trust to pay the rents to Mary Mather, for her separate use for life, with remainder to her husband for life, with remainder to such person or persons as Mary Mather should appoint, and in default of appointment, to her children.

The testatrix also bequeathed all the rest of her personal estate to Mary Mather absolutely.

The testatrix's executors were the present petitioners, and they asked for an apportionment of the property, and that the dividends of the stock might be paid to Mary Mather for her separate use for life; and "that the costs, charges, and expenses of the petitioners might be paid by the railway company."

Dewsnap, for the petitioners.

Streeten, for the company, opposed the application.

THE VICE CHANCELLOR.—The order must be drawn up as prayed, and the costs of the petitioners paid by the railway company.

[PROBATE.]

Jan. 28, 1866.

COLMAN AND BARLOW v. COLMAN.

In the Goods of THOMAS COLMAN (deceased).

13 L. T. 682; 14 W. R. 291.

Lost will—Parol evidence of substance—Probate.

WILL.—*The will of a testator was brought to the house by an executrix, in whose custody it had been, on the morning of the funeral. It was suddenly missed, and there was reason to suspect that it had been abstracted and destroyed by the only party who was interested in an intestacy, and who was cited, but did not appear.*

The Court, under these circumstances, did not require the will to be propounded in solemn form of law, but granted, on motion, probate of the substance as proved by parol evidence.

The deceased, Thomas Colman, died on the 29th October, 1865. On the 10th April, 1865, he brought home a lithograph form of will, and filled it up, bequeathing all his property to his wife, in the presence of four persons, two of whom signed it as attesting witnesses. The will was then given into the charge of one of those persons, Elizabeth Barlow, who was named an executrix, and she, on the morning of the funeral, brought it with her to the house of the deceased, and placed it on the parlour table. After the funeral it was missed. Every search was made, and advertisements were inserted in the newspapers, offering a reward, but it could not be found. Affidavits in support of these facts were filed by the parties, and the testator's father, who was the only person interested in an intestacy, and who was suspected of having taken the will, had been cited, but had not appeared.

Dr. Spinks now moved for probate, and submitted that it was a case in which the practice of the Prerogative Court ought to be followed. According to that practice, probate was always granted of a lost will where the affidavits fully showed the substance and the execution, and accounted for the destruction of the instrument.

Sir J. P. WILDE.—I have seen no reason, in any of the cases which have come before the court, to depart from the general rule which I have laid down in these matters—that where parties do not choose to take care of a will and lose it, they must be content to be put to the expense of propounding it in open court, that the court may hear the testimony of the witnesses, and be thoroughly satisfied that such a will existed at the time of the death of the testator, and that its substance was such as represented. But all rules, intelligently applied, are subject to, and admit of, exceptions. I think this is a case in which the court may depart from the rule, for here is the testimony of four persons as to the making of the will, the contents of it at the time it was made, and after the death of the testator, its due execution, its possession, and lastly, the way in which it disappeared. On the other hand, there is only one person who would be injured by a grant of probate as now asked for, and that person has been cited, but has not chosen to appear. The estate also is a very small one, and the party who has been cited, and who is alone interested in the destruction of the will, not having appeared, there is no one upon whom the cost of propounding the will could be thrown, except the person intended to be benefited under it. The substance of the will is very short, and there can be no question as to its being accurately recollected. The case is free from all reasonable doubt or suspicion and I think I ought to make the grant.

Probate decreed.

[MATRIMONIAL.]

Jan. 20, 1865.

LING v. LING AND PRIOR.

13 L. T. 683.

Husband's petition—Custody of children in father's absence—Practice.

DIVORCE AND MATRIMONIAL CAUSES.—*The Court decreed the custody of the children, in a suit for dissolution by the husband, who was in India, to "the father or his agent," with the view that, in the father's absence, the grandfather should have charge of them.*

This was a husband's petition for dissolution of marriage on the ground of the wife's adultery. Neither of the respondents appeared. It was heard by the Judge Ordinary on Saturday, January 20, and a decree *nisi* was granted.

Dr. Spinks, for the petitioner, who was employed as a railway engineer in India, asked that the custody of the children might be given to the grandfather in the absence of the father.

WILDE, J.O.—I cannot do that, but I will make the order to "the father or his agent," which will serve your purpose equally well.

Order accordingly.

STUART, V.C., Jan. 22, 1866.

SHEPHERDSON v. DALE.

13 L. T. 699; 12 Jur. N.S. 156.

Dissented from, *In re Yates*, [1891] 3 Ch. 53; 64 L. T. 819; 39 W. R. 573 (Ch. D.).

Will—Tenants in common.

WILL.—*Gift among all and every testator's "brothers and sisters who should be then living, and the children of such of them as should be then dead, such children to take their respective parents' share only:"—Held, that the children of the brothers and sisters took their parents' shares as tenants in common, inter se.*

This was an administration suit.

Robert Banks, by his will, dated the 3rd January, 1845, after having given to trustees all his real and personal estate upon trust to provide for his widow certain benefits during her life or widowhood, and declaring certain trusts in favour of his son and daughter, and their children respectively, directed that in the event of both his son and daughter dying under the age of twenty-one, without leaving any children who attained that age, his trustees should sell the whole of his real estate, and hold the proceeds thereof, together with his personalty, in trust for, and to be equally divided among, all and every his brothers and sisters who should then be living, and the children of such of them as should be then dead, such children to take their respective parents' share only.

The testator died on the 4th March, 1845, and his widow in July of the same year. Both of the children died under twenty-one unmarried.

The testator left several brothers and sisters; one of the sisters married George Shepherdson, and died in 1856, leaving several children, of whom the plaintiff was one.

The executors, the defendants in the suit, were still in possession of the real and personal estate, and in consequence of their liability (as they alleged) to decide who were the proper recipients of the proceeds, had refused to take any further steps towards carrying out the trust of the will.

The bill prayed that the trusts of the will might be executed, and the real and personal estate of the testator administered under the direction of the court, and that for that purpose all proper accounts might be taken and inquiries made.

Wickens for the plaintiff.—The only question was, whether the children of the testator's brothers and sisters took as tenants in common or as joint tenants; he submitted there was a joint tenancy. He cited

Bridge v. Yates, 12 Sim. 645; *Penny v. Clark*, John. 619; 1 L. T. Rep. N.S. 537.

Davey, for other children, supported the view taken by the plaintiff.

Chapman Barber, for the executors, left the question for the decision of the court.

The VICE-CHANCELLOR.—The best guide for the court in cases of this description is the will itself. The testator directs that his property is to be equally divided among all his brothers and sisters living at his decease, and that the children of such of them as should be dead are to take their parents' share only. There must be a declaration that the children are to take their parents' shares as tenants in common, *inter se*. To avoid the necessity of a certificate a statement as to the number, &c., of the children may be drawn up on affidavit.

[IN THE COURT OF EXCHEQUER.]

June 7, Nov. 25, 1865.

DRAKE v. PYWELL.

13 L. T. 714; 4 H. & C. 78.

Pleading—*Plea on equitable grounds*—*Trespass by husband of cestui que trust, on land alleged to have been improperly conveyed away by the trustee.*

TRUST AND TRUSTEE.—*To a declaration in trespass to land, and for throwing down a wall, defendant pleaded upon equitable grounds that one Brown was seised of the land in trust for the defendant's wife for life, and by the permission of Brown, defendant and wife occupied it; that Brown, in breach of the trust, and with plaintiff's knowledge of all the facts, conveyed the land to the plaintiff, who built the wall upon it, which the defendant threw down:—Held, upon demurrer that the plea was bad.*

The declaration stated:

That the defendant broke and entered a certain close of the plaintiff situate and being in the parish of Uppingham in the county of Rutland, that is to say, a certain close bounded on the south by a certain stable or building there, in the occupation of one John Edwards, and on the north by certain

land there used as a road or way to the said stable or building, and certain other premises of the said John Edwards, and on the east by a certain messuage or tenement of the plaintiff, and on the west by certain land there in the occupation of one Thomas Brown, and then and there broke, pulled down, prostrated, and destroyed, a certain wall of the plaintiff, which was then being built and erected by the plaintiff in and upon the said close of the plaintiff, and then and there threw down, placed and deposited, large quantities of bricks, lime, mortar, and other materials in and upon the said close of the plaintiff, and thereby greatly incumbered the said close, and hindered and prevented the plaintiff from having the use and enjoyment of the same, and of a certain road or way over and across, the said close, and the plaintiff claimed 100*l*.

Twelfth plea :

Upon equitable grounds, that before the time of the committing of the trespasses in the declaration mentioned one Thomas Brown was seised in his demesne as of fee of the said land in which, &c., in trust to pay the rents and profits arising therefrom unto Grace, the wife of the defendant, for and during the term of her natural life, for her sole and separate use, free from the control, debts, and engagements of the defendant her husband, and so that during her coverture she should have no present power to alien or anticipate the said rents and profits, or any part thereof, and after her death upon certain other trusts, all which trusts the said Thomas Brown had accepted and had entered upon, and the defendant says that afterwards and whilst the defendant and Grace his said wife were in occupation of the said land, and in enjoyment of the profit of and in the same, with the assent of the said Thomas Brown as such trustee as aforesaid, and before the time when, &c., the said Thomas Brown committed a breach of the said trusts, and wrongfully, illegally, and improperly, and without the consent or knowledge of the defendant, or his said wife, conveyed and assigned the said land in which, &c., to the plaintiff in fee-simple, and the defendant says that always before and at the time of the said conveyance, and ever afterwards, the plaintiff had full notice of the premises and of the said breach of trust, and joined with the said Thomas Brown in committing the same, and persuaded and induced him to commit the same and to make such conveyance as aforesaid; and the defendant says that at the time of the said breach of trust his said wife Grace was and still is alive, and that in equity the said land in which, &c., belonged to and still belongs to his said wife Grace, and to him as her husband, and the defendant further says that after such conveyance and breach of trust as aforesaid, and whilst the defendant and his wife Grace were in such occupation and enjoyment, and before the time when, &c., the plaintiff wrongfully and improperly built a wall on the said land in which, &c., which incumbered the same and prevented the defendant and his said wife Grace from enjoying the same, wherefore the defendant in his own right, and by the permission and direction of his said wife Grace, committed the acts in the declaration mentioned, doing no more damage to the plaintiff than was necessary in order that he or his said wife might enjoy the said land in which, &c., which are the trespasses in the declaration mentioned.

Demurrer thereto, and joinder in demurrer.

C. W. Wood, for the plaintiff, argued, first, that, admitting the statements made in the defendant's twelfth plea to be true, still a court of equity would not stay the present action by unconditional injunction without first setting aside the alleged conveyance to the plaintiff. Secondly, that the mere title of the defendant in right of his wife to the rents and profits of the land in question is not sufficient ground for the interference of a court of equity in favour of the defendant, who is an admitted trespasser over such land. Thirdly, that the commission by the defendant of the trespasses alleged on the declaration could not in any way further the defendant in

obtaining the rents and profits of land to which alone he asserts that he is entitled in the right of his wife. Fourthly, that a court of equity upon the facts stated in the twelfth plea would be unable to do complete justice in this matter without taking an account of the rents and profits of which the defendant and his wife have been deprived as alleged in that plea; and before such a court would interfere by way of injunction upon the facts stated in the plea, it would be necessary that the deed should be set aside under a suit instituted for the purpose. The deed of conveyance is a good and valid deed, and as the defendant is merely tenant at will, that was put an end to by the conveyance; the defendant was not entitled, nor does he show his right to the actual possession, but only to the rents and profits, and the wall in question might have been built in pursuance of the trusts. *Scott v. Colborn*, 28 L. J. 635, Ch., is directly in favour of the plaintiff. He also referred to

Hyde v. Graham, 32 L. J. 27 Ex. 7 L. T. Rep. N.S. 563. *Rolfe v. Gregory*, 34 L. J. 275 Ch.; 12 L. T. Rep. N.S. 162.

Crompton contra, for defendant, in support of the plea, contended that the plea was good, first, because the breach of trust having been committed with the assent and knowledge of the plaintiff, he must be considered a trustee, and to hold the property under the trusts of the settlement. Secondly, that the Court of Chancery would restrain an action brought by such trustee against the defendant for mere acts of ownership exercised by him and his wife on the property, the subject of the trusts. He referred to *Williams v. Waters*, 14 M. & W. 166. Story on Equity Jurisp. 595, section 533. The Court of Chancery would restrain this action absolutely on the facts now before the court, if brought by the trustee himself.

Wood in reply.

Cur. adv. vult.

Nov. 25.—BRAMWELL, B. delivered judgment.—The declaration stated that the plaintiff was possessed of land, and the defendant pleaded an equitable plea, that one Brown was seised of the land in trust for the defendant's wife for life, and, by the permission of Brown, the defendant and his wife occupied; that Brown, in breach of the trust, and with the knowledge of the plaintiff, conveyed the land to the plaintiff, whereupon the defendant pulled a wall down that had been built upon the property. We think this is a bad plea, because, although there may have been a breach of trust in what Brown did, still the building of the wall, though the defendant may have objected to it, may have been a benefit to the estate which was so improperly conveyed by Brown, and which, on the conveyance thereof, the parties interested in the estate would be glad to have left standing, rather than that it should have been pulled down. Besides, there are other considerations tending to show that the plea is a bad plea, namely: one would have thought the right course to be adopted would be to file a bill against the trustee and the plaintiff, and to procure a reconveyance, and upon that reconveyance it might very well be that some compensation should be made for that wall, benefiting the property, which had been erected during the time the legal estate vested in the plaintiff. We think, therefore, the plea is a bad plea, and it is clear the replication is a good one and an answer. We pronounce judgment therefore against the plea, and in favour of the plaintiff; but we also think, if the plaintiff should be minded to apply under the Common Law Procedure Act to have the plea struck out, he may, notwithstanding our judgment that it is a bad plea, and that the replication is good.

Judgment for the plaintiff.

[BAIL COURT.]

MELLOR, J., Jan. 31, 1866.

REG. v. THE JUSTICES OF RUTLANDSHIRE.

13 L. T. 722.

MAGISTERIAL LAW.—*Justices are not bound to state a case under 20 & 21 Vict. c. 43, when the application discloses no point on which a case ought to be granted.*

Francis Russell had obtained a rule calling on these justices to show cause why a *mandamus* should not issue calling on them to state a case for the consideration of the court under 20 & 21 Vict. c. 43.

Serjt. O'Brien now showed cause.—The applicant had been convicted under the Highway Act for ploughing up and injuring the surface of an uninclosed public road through a field. He appealed to Quarter Sessions and there contended that the road had been dedicated to the public subject to this use of it by the owners of the adjoining land. The appeal was dismissed, and the offence being repeated, the defendant was again convicted.

There were no facts disclosed at the hearing on which the justices could raise a point for the consideration of the court, and it was not their business to raise one for the benefit of the applicant.

MELLOR, J. held in accordance with this view, and discharged the rule, saying that if hereafter the defendant should be in a position to prove the claim he had set up, he could maintain it before the justices, and it might then be their duty to state a case, but that was clearly not their duty at present.

Rule discharged.

LORDS JUSTICES, Jan. 13, 23, 1866.

MOORE v. MARRABLE.

13 L. T. 725; L. R. 1 Ch. 217.

Specific performance—Agreement for lease—Substituted agreement—Lapse of time—Laches.

LANDLORD AND TENANT.—In 1856 the plaintiff and defendant agreed that the former should let to the latter a house for seven, fourteen, or twenty-one years, the defendant agreeing not to underlet without the plaintiff's consent in writing, and also to execute forthwith a lease and counterpart. No lease was ever executed. In October, 1859, an agreement was executed between them whereby the plaintiff agreed to accept W. as his tenant in lieu of the defendant, and on the same terms and conditions; the defendant undertaking to give a guarantee for the rent. W. entered into possession and paid rent to the plaintiff, for which receipts were given as though the payments were by the defendant. In March, 1863, the defendant gave notice to determine the tenancy at the end of the first seven years (then about to expire), but

said that he did so merely as a matter of form, as he concluded that all liability on his part had long been at an end. In November, 1864, this bill was filed for specific performance, and the Master of the Rolls having decreed accordingly, it was—Held, on an appeal by the defendant, that as the agreement of 1859 was inconsistent with that of 1856, it must be taken as a substitution for it, and that the plaintiff could not revert to the original. The bill was therefore dismissed, but without costs. But, as the defendant had never procured W. to accept a lease in his place,

Quære, whether, but for the lapse of time, the plaintiff might not have insisted upon the original agreement against the defendant himself.

This was an appeal by the defendant against a decree of the Master of the Rolls, under the following circumstances:

The bill was filed by Mr. David Moore, of No. 2, Clarendon Road, Kensington, and its object was to compel the specific performance of an agreement dated the 12th August, 1856, which was made between the plaintiff of the one part, and the defendant Frederick Marrable of the other part, whereby the plaintiff agreed to let, and the defendant agreed to take a messuage in Eldon Road, Kensington, called Malvern Villa, with garden, &c. adjoining, for a term of seven, fourteen, or twenty-one years from Michaelmas, 1856, at the yearly rent of 100l.; and the defendant agreed to keep the premises in repair, and to paint them outside in every third year, and to paint and paper them inside in every seventh year, and not to underlet without the consent in writing of the landlord; and he also agreed forthwith to execute a lease and counterpart, embracing the above and all other usual conditions and covenants.

In pursuance of this agreement the defendant, shortly after its date, entered into possession of the premises, and he continued in possession until the month of August, 1859, holding under the agreement, without any lease having been executed, and he paid to the plaintiff the agreed rent, down to and including the quarter's rent to Christmas, 1863 (or at least the plaintiff treated the payments as payments by him); but the bill alleged that he had not performed the agreement so far as it related to repairs and painting.

In August, 1859, the defendant entered into a negotiation with Mr. Henry Williams for the transfer to him of the agreement, and this negotiation led to communications and correspondence between him and the plaintiff, which resulted in a further agreement between the defendant and the plaintiff, which was dated the 12th October, 1859, and was to this effect: that the plaintiff agreed to accept Mr. Williams as his tenant of Malvern Villa in lieu of the defendant, and on the same terms and conditions, and to grant him an agreement for a lease of the said house for four, eleven, or eighteen years from Michaelmas then last (being the same terms as were mentioned in the earlier agreement, after deducting the three years which had then already elapsed); and the defendant undertook to give to the plaintiff a guarantee for the rent during Mr. Williams's tenancy.

A few days before this agreement was executed Mr. Williams had been let into possession of the premises, under an agreement between himself and the defendant (to which the plaintiff was no party), by which Williams had agreed to take an assignment of the defendant's agreement with the plaintiff, provided the plaintiff would consent thereto, and on certain conditions as to some decorative repairs which were to be done by the defendant. Shortly after the date of this agreement the plaintiff, at the request of the defendant, sent him the draft of the lease which he proposed to grant, being a lease to Mr. Williams, to which the defendant was also made a party, for the term of four, eleven, or eighteen years, with covenants

by the defendant as well as by Mr. Williams for the payment of the rent, and for the repairs, painting, and papering stipulated for by the original agreement between the plaintiff and the defendant.

When the defendant received this draft he made some alterations in it and struck out his name as one of the parties to it, and after doing so he forwarded it to Mr. Williams. However, it did not appear that the plaintiff was informed that the defendant had thus struck out his own name, but only that he was told that some parts of the draft had been struck out as not being mentioned in the original agreement. But when the draft was forwarded to Mr. Williams he was on the point of going to America; he did not altogether approve of the draft, but sent it back to the defendant desiring that the matter might stand over until his return. When Mr. Williams left this country he left his wife in the occupation of the house, and she paid the rent for the three following quarters to the defendant, who handed it over to the plaintiff, but subsequently she paid the rent to the plaintiff himself, who gave receipts for it as on account of the defendant, and this course of payment continued for some time after the year 1860, when Williams returned to this country.

On the 9th March, 1863, the defendant wrote to the plaintiff the following letter:

My dear Sir,—As the first seven years of the lease of Malvern Villa, Eldon Road, Kensington, will expire at Lady-day next, I beg to give you notice that it is not my intention any longer to remain your tenant of that house. I have not the slightest wish to interfere with any arrangement that may exist between you and Mr. Williams, nor have I written to him on the subject, nor do I intend to do so, if you will kindly acknowledge the receipt of this lease and inform me that I am no longer responsible in any way. I write this as a matter of form and precaution, as I believe all my responsibility has long ago ceased.—Very truly yours,

F. MARRABLE.

The defendant alleged that no answer was ever returned to this letter. The bill was not filed until the 30th November, 1864; it prayed specific performance of the agreement of August, 1856, the execution by the defendant of a proper lease and counterpart, and that he might be decreed to pay all costs of the suit.

The defendant by his answer relied upon the agreement of the 12th October, 1859, as having cancelled the original agreement between himself and the plaintiff; and he insisted that, even if the original agreement had not been cancelled, the plaintiff had lost any right which he might otherwise have had to relief, by lapse of time, and by the determination of the term for which the lease, if it had been granted, would have been good against him.

The evidence in the cause consisted mainly of the affidavits of the plaintiff and the defendant, the necessary parts of which, referred to by Turner, L.J. in his judgment, are as follows:

I met the defendant by appointment on the 12th October, and then agreed with him to grant, at his request, an agreement for a lease to the said Henry Williams; and I say, although it is the fact that the defendant was to guarantee the rent, that being the matter of greatest consequence, yet it was never agreed or understood by me that the defendant was to be released from any of his said obligations under his agreement with me. And at the conclusion of our conversation the defendant wrote down the memorandum of the 12th October, 1859, and requested me to sign the same, which I did without very closely weighing the words of such memorandum. If the construction of such memorandum is, that the defendant was to be released from all his obligations except as to the payment of rent, such agreement does not thereby express what was agreed to by me, and my signature thereto was obtained by surprise; and if such memorandum bears the construction that the defendant puts upon it, then I say it was a memorandum of agreement

between me and the defendant to which the said Henry Williams was no party, and that the defendants never procured the said Henry Williams to take a lease of the said premises for me.

The defendant, however, by his answer, stated as follows :

After some further correspondence and interviews between the plaintiff and me, a clear and distinct arrangement was entered into between us, that, instead of Mr. Williams taking an assignment of the said agreement, he was to become directly the tenant and lessee of the plaintiff in lieu of me, as if the name of Mr. Williams had been inserted in the said memorandum instead of mine; but that I was to give the plaintiff a guarantee for the payment of the rent; and accordingly the plaintiff wrote and gave to me another memorandum or note as follows :

And the defendant then set forth the agreement, dated 12th October, 1859, the full effect of which is stated above. Mr. Williams never executed any lease.

The MASTER OF THE ROLLS (on the 7th July) thought that there had been no privity of any sort between the plaintiff and Williams, and the former could have no right under the agreement of October, 1859, to enforce any contract against the latter. The plaintiff had agreed with the defendant to accept Williams as tenant, provided that he was put in exactly the same situation. This was not done, for Williams was not bound to the same covenants as the defendant was, and the plaintiff was therefore entitled to a decree against the defendant. If the defendant, in putting an end to his own tenancy, had delivered up possession to the plaintiff, it would have appeared that Mr. Williams did not intend to perform the same covenants; and without expressing any opinion upon the defendant's rights against Mr. Williams, his Lordship made a decree according to the prayer of the present bill, with costs.

Against this decree the defendant appealed.

Southgate, Q.C. and *Archibald Smith*, for the plaintiff, supported the decree, contending, first, that the plaintiff had never intended to release the defendant, though he was willing that Mr. Williams should become the tenant; and next, that if the second agreement was a complete substitution for the earlier one, the defendant had never procured Williams to take a lease, and had therefore failed to perform his part of it.

Selwyn, Q.C. and *J. Napier Higgins*, for the appellant, urged that the agreement of the 12th October, 1859 was a complete substitution for that of August, 1856, excepting only the defendant's guarantee of the rents; but if that were not so, the conduct of the plaintiff, his acquiescence, and the great lapse of time, would defeat any right he might have had, notwithstanding the later agreements. The defendant had, moreover, determined his own tenancy by his letter, in March, 1863. The following authorities were cited :

Heaphy v. Hill, 2 S. & St. 29. *Southcomb v. The Bishop of Exeter*, 6 Hare, 213. *Crosbie v. Tooke*, 1 Myl. & K. 431. *Morgan v. Rhodes*, 1 Myl. & K. 435. *Lucas v. Comerford*, 3 Bro. C. C. 166. *Sanders v. Benson*, 4 Beav. 350. *Cox v. Bishop*, 8 De G. M. & G. 815. *Close v. Wilberforce*, 1 Beav. 112.

Southgate, Q.C., having replied.

Judgment was reserved until the 23rd January when

LORD JUSTICE TURNER, after referring to the facts said:—The material question upon this appeal appears to me to be, what was the effect of the agreement of the 12th October, 1859, and how the case is affected by the conduct of the parties since that date. As to the effect of that agreement considered simply with reference to the terms of it, there cannot, I think, be any doubt that under the agreement of the 12th August, 1856, the

defendant would have been liable for the rent, and upon the covenants during the whole term of the lease; but by the agreement of the 12th October, 1859, he was to be liable for the rent only, and not upon the covenants. The two agreements therefore could not stand together, and upon the face of them the latter cannot be considered otherwise than as a substitution for the former. [His Lordship here read the passages from the affidavit of the plaintiff, and the answer of the defendant, and proceeded:] Here then arises a material difference between the parties as to what was intended to be done, but the agreement itself is clear upon the point; it is that the plaintiff is to accept Williams as tenant in lieu of the defendant, and although perhaps there is not much in the conduct of the plaintiff to corroborate this view, what he says in his cross-examination goes far to support it, and there is not, so far as I can find, anything in his conduct which is inconsistent with it. There is nothing therefore, in my opinion, which can countervail the express terms of the agreements. As to the case of surprise which the plaintiff alleges, I can see no foundation for it. The only remaining question then is as to the effect of the defendant not having procured Mr. Williams to take the lease. Upon this I have for some time doubted, and certainly I am not prepared to say that if the plaintiff had, within any reasonable time after the date of the agreement of the 12th October, 1859, called upon the defendant to procure Williams to execute the lease, he might not, upon the defendant's having failed to do so, have insisted upon the performance of the original agreement; but the plaintiff did not do this; he allowed matters to rest as they were until the year 1863, and he did not file this bill until the end of the year 1864, and I do not think that after this lapse of time it was competent to him to treat the agreement of the 12th October, 1859, as a nullity, and revert to his rights under the original agreement. I may add, that the notice contained in the lease of the 9th March, 1863, which, although it is expressed to be for the determination of the tenancy under the original agreement at Lady-day, 1863, must have been intended, and known to have been intended, to be for the determination of it at Michaelmas, 1863, when the first seven years expired, seems to me to furnish very strong, if not conclusive, ground against the plaintiff's right to the specific performance of the original agreement. Upon the whole, therefore, with all respect to the Master of the Rolls, my opinion is that this decree cannot be maintained, and that this bill ought to have been, and ought now to be dismissed; but I think that it should be dismissed without costs, and without prejudice to any remedy at law, and of course there will be no costs of the appeal.

LORD JUSTICE KNIGHT BRUCE declared himself of the same opinion, saying that, with all deference to the Master of the Rolls, the plaintiff had, by his acts and conduct, so complicated and entangled matters in connection with this house as to render a decree for specific performance impossible.

STUART, V.C., Jan. 26, 1866.

Re THOMPSON.

13 L. T. 746: reversed, [1866] E. R. A.; 14 L. T. 6 (L. JJ.).

Practice—Solicitor and client—Taxation of costs—Mortgage.

SOLICITOR.—*Where property was mortgaged to a solicitor by a client, as a security for costs in a pending suit: The Court, on an application by the client's*

assignee in bankruptcy, to set aside the mortgage and obtain taxation of the solicitor's costs, upheld the arrangement between the parties, and dismissed the application with costs.

This was an adjourned summons into court for the purpose of obtaining the taxation of a solicitor's bill of costs under the following circumstances:

The solicitor in question, T. F. Thompson, had been employed by a Mr. Moon to act for him as his solicitor in the cause of *Fisher v. Moon*. During the progress of the suit, sums amounting to about 140*l.* had at different times been paid by Moon in part satisfaction for costs incurred; at length, as the litigation seemed likely to continue, Thompson asked for some security for his costs, and refused to act any longer for Moon unless his request was complied with.

Accordingly, on the 30th June, 1864, Moon, to effect his purpose, mortgaged certain property to Thompson for 550*l.* and interest. By an arrangement between the parties 300*l.* of this sum went to pay off a previous mortgage on the property, and 250*l.* was retained by Thompson in payment of his costs, including certain costs not actually incurred at the date of the mortgage.

It appeared that Moon had acted without any other professional advice, and that no bill of costs had been delivered.

On the 14th February, 1865, Moon was adjudicated bankrupt. The present application was made by his assignee.

F. W. Bush, in support of the summons, contended that the mortgage could not be considered as a payment for the costs. It was incumbent upon the solicitor to show that he had tendered his best advice (as against himself) to his client, and that the client had willingly, after receiving such advice, executed the mortgage. Independently, however, of the special circumstances of the case, the court would be justified in ordering the taxation of the bill of costs. He cited

Re Loughborough, 23 Beav. 439. *Longstaffe v. Fenwick*, 10 Ves. 404. *Cowdry v. Day*, 1 Giff. 316; 1 L. T. Rep. N.S. 88.

The VICE CHANCELLOR.—I consider that a solicitor, for the purpose of avoiding the expense of taxation, is perfectly justified in entering into an arrangement with his client for a certain sum by way of settlement for his costs. At the time of the transaction in question the client was *sui juris*, and quite able to decide what was best for his own interest. The application must be refused with costs.

Wood, V.C., Nov. 6, 7, 8, 1865.

BEARD v. TURNER.

13 L. T. 746.

Trade-mark—Injunction—Fraud—Laches—Use of crest.

TRADE MARK.—A trader may establish a trade-mark by the use of a crest, and anything which amounted to an imitation of the crest as a trade-mark would be restrained by the court. But the use of a different crest by another trader, if not accompanied by other indicia to make it a colourable imitation of the trade-mark of the plaintiff, will not be restrained.

A plaintiff laid by for two years before filing his bill for an injunction, having seen labels of the defendant exhibited publicly, which he now complained of as

being colourable imitations of his labels:—Held, that such laches disentitled the plaintiff to relief.

This was a bill filed by the firm of Beard & Co., the celebrated needle-makers, against the defendant Turner, also a needle manufacturer, of Redditch, and it prayed an injunction to restrain him from selling needles not manufactured by the plaintiffs, in cases or packets having labels which, they alleged, were colourable imitations of their embossed labels; and for an account of the sales and profits made by such sales.

By the bill the plaintiffs alleged that the said firm consisted of Robert Kirby, George Beard (the late father of the plaintiff George Beard), all since deceased, and Peter James Kirby, and they had previously to the year 1835 acquired very great celebrity for improvements invented by them in the manufacture of needles, and which improvements were the result of many years' experience in their aforesaid business, and had been carried out at great expense.

By means of such improvements, not only had the eyes of the needles manufactured by the said firm a peculiar strength, roundness, and polish, whereby they were much less liable to break or cut the material on which they were employed, but the needles themselves, by being made expressly to a scale of thickness, length, taper, and elasticity, were suited to the separate trades and uses for which they were intended, and were capable of being sorted accordingly; that the improvements were so fully recognised that the said Robert Kirby, the head of the firm, was appointed manufacturer of needles to her late Majesty Queen Adelaide; and the superior quality of the needles manufactured by their said firm, according to the aforesaid improvements, was fully admitted both in England and on the Continent, and became a source of great profit.

Such needles were known as Kirby's "Ne plus ultra" needles; the said words, "Ne plus ultra," having been for the first time applied by them to their said needles as a term of distinction whereby they might be known as their own special manufacture.

In the year 1835 the plaintiffs, in order to prevent the possibility of other manufacturers making and selling needles under the representation that they had been manufactured by the said firm, and thereby injuring them in their reputation and business, employed a die-sinker of the name of Whiting, who had obtained letters patent for "embossed labels," to frame a perfectly new embossed label, to be used by the said firm, and to be applied or affixed to the covers of packets containing needles made and sold by them according to the aforesaid improvements, in order to distinguish them from all needles manufactured by other parties, and which label, containing a crest and words, "Ne plus ultra," as the firm's trade-mark and distinguishing characteristic, is of the utmost importance to them, from the fact that the needles could be stamped in any way, and therefore the label was the only guarantee the public could rely upon for the needles being genuine.

For that purpose the firm furnished the said Mr. Whiting with the crest of the Kirby family, consisting of an elephant's head on a coronet, with directions to place underneath it the aforesaid words, "Ne plus ultra," and further to denote on each case or cover the name of each particular class of needles according to their mode of finish, as "diamond-drilled eyes," or "polished eyes."

That Whiting, in accordance with such instructions, invented a perfectly new and original embossed label, containing the aforesaid crest of the Kirby family, with the words, "Kirby's ne plus ultra Needles," immediately beneath such crest, and followed by a description of the sort of needles intended to be contained in the case or cover in which the same were to be placed. The said crest and letters were all embossed in white, and were surrounded by a peculiar fringe or border also in white, on grounds of blue, scarlet, or brown colour, such

several colours being intended to distinguish classes of needles more particularly applicable to the work of some particular trades.

That said embossed label was so invented, composed, and manufactured expressly for the firm of Kirby, Beard & Kirby, and to be used by them as a trade-mark for the purpose of distinguishing the needles manufactured by them from needles manufactured by other parties in the trade.

That said embossed label was accordingly, from the year 1835, used by said firm as their trade-mark, and all the needles manufactured by said firm were sold in packets or cases, of which one side was formed of the said embossed label.

That in the year 1836, said firm, by way of giving full publicity to such trade-mark, and rendering it more effectual to prevent the public being led to purchase needles manufactured by other firms under the impression that they were the needles of the said Kirby, Beard & Kirby, caused to be printed and very generally circulated a printed paper, containing statements of facts relating to the improvements in the manufacture of the needles of the said firm, and giving specimens of the aforesaid different embossed labels.

That by this means the needles manufactured by the firm were easily recognised as a special article of trade, and the demand for needles contained in packets having the aforesaid embossed label thereon became very great, under the impression that all such needles had been manufactured by the said firm.

That said trade-mark having become well recognised, the public considered themselves perfectly secure that, in purchasing packets with the said embossed label thereon, they were purchasing none other than needles manufactured by said firm; and said firm, and plaintiffs as representing the said firm, had, for a series of years, and up to the time that their said label was imitated by the defendant, secured to themselves the particular advantages derived from their aforesaid improvements, insomuch that their customers order their goods of this particular quality, simply by quoting "Ne plus ultra Needles," or "Ne plus Needles," mostly omitting the name Kirby as unnecessary, from the fact of the long-established and acknowledged use of such mark and description.

That for some time past plaintiffs had been aware that large quantities of needles had been sold in the trade under the pretence that the same were the manufacture of the plaintiffs; and such needles being of an inferior quality, and in many respects of a different character, the plaintiffs had suffered materially, not only from the injury done to the repute of their said genuine needles, but also in the loss necessarily arising from the diminished sale thereof. That plaintiffs had discovered that the defendant Turner, carrying on the business of a needle manufacturer, under the style or firm of Turner & Co., had for some time past been using for the sale of his own needles embossed labels, which (with the exception of a very trifling alteration in the crest, consisting of the omission of the trunk of the elephant, which forms the crest of the said Kirby family, and the substitution of the words "Turner & Co." for that of "Kirby & Co.") was a complete facsimile of the label used by and invented for the said firm of Kirby & Co., the plaintiffs.

The bill then alleged that label so used by the defendant not only resembled the label of the plaintiffs in the figures and letters embossed thereon, but it was also embossed in white on the same coloured ground, and was calculated in every way to deceive purchasers, who looked to the general appearance and colour of the packets or cases of the needles, rather than to the name of the manufacturer indorsed thereon.

The bill then went on to allege other circumstances amounting to a fraudulent imitation, and a correspondence between the solicitors.

The defendant, by his answer, generally insisted that the label complained of was not an imitation, but that it contained numerous distinctive differences in form, wording, arrangement, and colour; denying the exclusive use of the plaintiffs' label, or the words "Ne plus ultra," which was a designation well

known, and had been used extensively in the trade by other manufacturers of needles for a number of years; denying any intention to deceive, and stated that he had exhibited the label complained of in the International Exhibition of 1862, in a case next to that of the plaintiffs, which had been seen and examined by them, and that this was two years prior to the filing of the bill.

The cause now came on, on motion for decree. The effect of the evidence on both sides is stated in the Vice Chancellor's judgment.

Daniel, Q.C. and *Druce*, for the plaintiffs, contended at great length that plaintiffs were entitled to the relief prayed.

Rolt, Q.C., *Amphlett, Q.C.*, and *Wickens*, for the defendant, were not called upon.

Nov. 8.—The VICE CHANCELLOR now said :—This is a case in which I think I ought not to call on the defendant. This case is one entirely distinct in character from those that come before me sometimes, and requires a little examination of the exact stages in which the claim to the distinctive trade-mark arises under the circumstances in which the different manufacturers have been in the habit of disposing of the articles and goods in question. There are two or three things sufficiently plain in the case. I am far from adopting, and certainly it would require considerable argument to induce me to adopt, the assertion by some of the defendant's witnesses that there cannot be a trade-mark in this trade; that a man cannot have his crest, or any other distinctive mark, if he chooses to make it; by which he shall assert his claim to designate his goods as goods known by that mark, and shall be entitled to exclude all others from so using the mark, and the insignia he chooses to put on his particular goods. But, in the particular case of these needles, we find how very difficult it was for the plaintiff to correctly frame his case, because his claim was founded on the use of the words "Ne plus ultra." That ground wholly fails. It was, in truth, for the reason at present alleged, a mark that everybody had a right to use, and it became a common mark in the trade; nevertheless, in this bill he states his case in the letters he addressed to the defendant in this way. In the letter of the 8th April, the first letter he addressed to the defendant, he says, "We have been consulted by the plaintiffs about the alleged infringements." And again, "We may mention that Messrs. Kirby, Beard & Co. years back adopted, and have since continually used, their present label, the distinctive features of which are the crest, an elephant's head, and the words 'Ne plus ultra,' Those they give as their trade-mark, and their two marks only—the elephant's head as a crest, and the words 'Ne plus ultra.' The words have been copied and adopted by you, and you have also added a crest which may readily be mistaken for that of our clients; and in fact in all respects your label is such a close imitation of Messrs. Kirby, Beard & Co.'s, that at a little distance it is impossible to distinguish them." Now the first remark I have to make on it is this, that in truth the plaintiff's trade-mark is reduced to this, independently of the white and blue ground, which is a part of the case to be dealt with separately, the distinguishing trade-mark on his label is simply the crest of the elephant's head rising out of the crown, and it is impossible for the plaintiff to claim the "ne plus ultra" alone, as a distinguishing mark, because it has been abundantly proved that that mark was invented long before the plaintiff dreamt of using the term at all. Although that contest was raised by him distinctly, and supported by his witnesses, some of them of the highest character, as to the value and worth of the plaintiff's articles and the general user of them, some of those witnesses did go the whole length of saying, "It is a mistake they have fallen into, that anybody asking for 'Ne plus ultra' needles would get Kirby's;" and they gave as a reason, that they never heard of any other, which explains the evidence. That is to say, those large firms who deal with Kirby do not know of other firms which exist at Redditch. They do not know that a great number of firms exist at Redditch, where, if they ask for "Ne plus ultra" needles, they would have seen other needles, and they therefore have

only seen Kirby's, who furnishes the "Ne plus ultra," and no others. But if they had been down in Redditch, if they had been in communication with those firms (for I have sixteen or eighteen before me), and if they had asked for "Ne plus ultra" needles, they would have been asked whose needles they wanted? Are they to be Kirby's, Milward's, Bolton's, Lock's, Morley's, Baylis's, and so on? Of course, therefore, the "Ne plus ultra" is gone entirely, as to any designation which the plaintiff can claim as to a particular right, or as excluding others from the use of it. In truth, what appears to me now to be the case is this, that in this particular trade it is required to have the qualities of the needles distinguished, no less than the manufacturer's name. You want to know what are the different qualities of the needles, and accordingly it is common ground on both sides that such manufacturer has his own colour and his own envelopes, and his own labels to the extent, the defendant says, of no less than thirty-six by one man to designate the particular qualities of his needles. I apprehend it is difficult for a man to say, "I have established a trade-mark for my quality of needles wholly irrespective of my being a manufacturer," for this simple reason: a man invents "drill-eyed" needles, and has taken out a patent; of course he cannot prevent anybody else from putting "drill-eyed" needles on his packets. It is different, I agree, with regard to the fancy name "Ne plus ultra;" but that very name has become common in the trade, and now having become common anybody may put "Ne plus ultra" to designate any character of needles he pleases.

The next question is about the use of the crest. At present, not having heard the other side, I am not prepared to say or hold that a man putting his crest should not so put it as to establish his right to say, "Nobody else shall use my crest." It is incumbent on him, as on every plaintiff, to show that this crest is an essential part of his trade-mark. I think the plaintiff has gone a long way to do that, although he has not proved that anybody has asked for "Elephant needles" in China, and other places where the Roman character is only understood, and where the mark on the thing sells it. The evidence is strong that the name is the material thing, it is the thing that persons look to, and not any trade-mark. But still I should hesitate very much before allowing the defendant to put the plaintiff's crest on his goods. Then the crest being, as it appears to me, the sole point as far as design is concerned, excepting the blue ground on the border, I will now consider the question upon the embossed ticket or label, with the blue ground or white border, and the appearance presented thereby, and the difference of the label in the one case and the other. Now, as regards the white border or white emblem, it appears that the nature of embossing is such that everything in character, every figure or design, which appears on an embossed article must be white, which I suppose arises from the stamp of the die being formed and the flat part of the die which touches the surface being coloured; the concave part of the die being without colour, that, of course, would leave the white paper, as is the case with every label before me. Everybody, therefore, who attempts to have an embossed label at all must have it in white figures, whatever they are, on some ground or other. That being so, it is abundantly clear that the plaintiff is not the first person who had the blue die, because he went very early to a person who had a patent for embossing. Therefore, it would be quite ridiculous to say that he would have been the person who could alone be entitled to the blue colour with raised figures on white; so far from that being the fact, I have abundant evidence before me that it has been done largely by the trade, and that the plaintiff has never attempted to complain of it; therefore, it is the universal practice of the trade. I have before me labels distinguishing thirty-six kinds of needles; I have every sort and colour I could name, and there is blue among the rest. With regard to the border, there is abundant evidence that that is the design of the pattern maker. I find here a border exactly similar to the plaintiff's border, which when it first came out the defendant thought a pretty thing. Without any intention of imitation, a general border at all events has been adopted. That sort of label with the blue and raised letters has been

adopted by everybody for years; and therefore the plaintiff can raise no ground upon that point. It may be taken as an ingredient in the case to this extent, that all needle labels are very much alike, the packets are all very much of the same size, the form of the labels has been the same from all time, and the colour has been the same from all time. [The V.C. here commented on certain parts of the evidence unnecessary further to advert to.] Then there is only the subject of the crest which remains for a moment to consider. With regard to the crest, undoubtedly the plaintiff has made out a case of having adopted the crest of a former partner of the firm, which was therefore put on the labels. It is of some use to remark this, that here you find another person did use the same crest, but apparently the whole thing being so open to fancy work that the name, and the name only, was the thing principally regarded. [The V.C. again commented at length upon other parts of the evidence as to the use of the crests, the lion and the elephant, and then proceeded:] It is impossible on the evidence for me to say which one is copied from the other, if copying there be, or when the copying took place; but there is no evidence from the beginning to the end of this case that any people have ever asked for the plaintiffs' goods by the crest; there is evidence they asked for "Ne plus ultra," and Kirby's and the defendant's are "Ne plus ultra." But there is no distinguishing mark at all, and that fails him entirely. Now, as regards the honesty of the case, it is to my mind a strong point that the defendant did exhibit this identical label at the Exhibition side by side with the plaintiffs' own stall and division where the plaintiffs had their needles. That is a very strong circumstance as to the *bona fides*. A man who is committing fraud does not do it in daylight and put it under the eyes of the persons whom he is cheating. It was seen by one of the plaintiffs, and that same plaintiff having seen it took counsel's opinion upon it, and the only result is that he did not file his bill for more than two years afterwards. That being so (I am now speaking of the merits of the case and not of the question of acquiescence), it does impress me very strongly with the *bona fides* of the defendant when I find he sends over a label with the white embossed border, a French customer asking him for it. He says "I did not send over the plaintiff's label to him." Then he brings forward the man who makes the die, who explains that this is the man's own crest. He sends out a form identical in every shape with the one used as long ago as 1844, which is Milward's. He does not send the horse, and he does not send the elephant, and the single circumstance of the lion being put on the crown is much too slight for the court to arrive at a conclusion of fraud. The thing has been done for seven years past, but there is not one single tittle of evidence of the plaintiff having lost a sixpence by the user. There is the circumstance of the man no less than three years ago, two years before the filing of the bill, having that very thing which he says was a fraudulent copy of his label in a place where it must have met, as it did in fact meet, the attention of the plaintiffs themselves. With regard to the evidence of fraud, I think those circumstances put together are extremely strong evidence in favour of Turner, as showing that he had no such intention. Then I ought not to omit the strong evidence there is of persons asking, not for "Ne plus ultra," but for "Elephant," needles," or "Kirby's" needles, or "Hemming's" needles, or So-and-so's needles; so much so that one witness speaks of having given three years' purchase for the goodwill and for the use of names like these. I have not a single case before me of needles being sold without a label, and not a witness who says that he looks at the label for any other purpose than the name. It is not a case in which it appears to me that the question of trade-mark can be pressed to anything like the extent which is necessary for maintaining the bill. I am far from adopting, as I have said before, the proposition of the defendant, that he would have the right to take that gentleman's crest and put it on his own labels. I say nothing of the kind. But this I do say, he has not taken anything whatever that was likely to deceive, or has deceived, the public into buying his needles for the plaintiffs' needles. I have one word to say upon acquiescence, because I do conceive that, if I had come to a

different view of this case, I am glad to have heard it out, and because it is important with reference to costs if I had come to a different conclusion, and had misgivings in my mind much stronger than any that arise as to the question about the use of the crown, and as to the *bona fides* of the defendant in this matter, and whether he was contemplating fraud. I confess that, if a person sees the identical thing done of which he complains two years before he files his bill, he places himself in the position, which is fully within the authorities cited. The principles laid down are well known; first, if you induce another to lay out money by keeping back a right, which you intend at some future time to assert, you may induce him to incur serious expenditure. That was the well-known case before Lord Hardwicke. Where I was wrong in the Photograph case, was that in that case there was a slight expenditure. If it had been the building of a house instead of a photographic studio, I have little doubt that the conclusion would have been otherwise. If you allow considerable expenditure to be made, you are not allowed afterwards to question the title of the person who has made that expenditure. But that rule would not apply to the case before me. I should not consider the making of these dies to be an expenditure of that kind. But suppose you wish to profit by that act of which you say you have a right to complain, and shall at some future period complain of, then I apprehend this court will say, you must come here at once: for this reason, that you ask in the bill for an account of the profits made by this gentleman upon the sale of these goods. The plaintiff may say: "It may answer my purpose to let the defendant go on selling four or five years, and then at the end of that time to say he is my salesman, and I come for my account of profits." I know of no instance in which the court has given relief with reference to a trade-mark except on a prompt application. By not complaining at the time when you might complain (I do not say that it is your intention, we must judge of the intention by the necessary result), you are lying by, the man continuing to use your property with the hope (and such is the prayer in your bill filed two or three years afterwards) of obtaining those profits which you stood by allowing him to make under this designation, without apprising him of your intention to make any such use of it. On that ground it falls within the principle enunciated by Lord Sr. Leonards in the Irish case referred to, in which it is stated that it is a fraud to allow a plaintiff to avail himself of delay to obtain benefit for himself. In that case you will not grant him relief. You will assume, when he allows another wrongfully to use that which in the plaintiff's judgment would facilitate a rival in trade, that being so, unless you come quickly, you must make a rival in trade your agent for the purpose of carrying on that business, and for the purpose of getting an account at the end of four years. When it is said that you had no proof, it should be remembered that you had the die, and people do not stamp their needles and not use them, and the stamping was a fraud upon which you could have proceeded. Why not have sent him a letter such as you have sent him now; and the letter now sent I suppose has led to this litigation? If it had been in a milder form, perhaps litigation would never have arisen. When you took counsel's opinion, why not have communicated with him? What right had you to assume, that a person honestly exhibiting his goods at the Exhibition, giving his name and address, coming in the Exhibition with his articles, would not give you an answer? Why not try? I apprehend it will not do for a person to say, "I knew this was done two years ago, but I had not then got up my evidence." What attempt did he make? Whether he wrote to the defendant, or whether the defendant received it, or what was done, we know not. It appears to me, therefore, that if I had come to a different conclusion, it might have affected the question of costs, although it would not have affected the question of relief. I could not give a person an opportunity of lying by, and then asking for an account of the profits made by an injury committed. However, in this case, on the whole of the evidence, having seen what has been done by the plaintiff and what has been done by the defendant, I must come to the conclusion that there is not that case of fraud made out which would justify me in

interfering against the present defendant, therefore I can only dismiss the bill with costs.

Decree accordingly.

STUART, V.C., Jan. 22, Feb. 8, 1866.

EDMUNDS v. LORD BROUGHAM.

13 L. T. 790; 12 Jur. N.S. 156.

Practice—Exceptions—Scandal.

PRACTICE.—*In a foreclosure suit, where for the alleged purpose of showing that the suit had been instituted through a vindictive motive, the defendant introduced into his answer matter injurious to the plaintiff's character, and which had previously been made the subject of a public document.*

The Court, on exceptions for scandal, ordered such matter to be expunged as irrelevant to the question at issue.

This case came before the court upon exceptions by the plaintiff Mr. Leonard Edmunds, to the answer of the defendant Lord Brougham, for scandal.

The suit was in the ordinary form of one by a mortgagee for an account and payment of his mortgage money, or to foreclose the mortgagor's right to redeem the mortgaged property.

By an indenture dated the 1st of March, 1811, Lord Brougham, his late mother, Mrs. Brougham, and the late James Brougham conveyed the manor of Braithwaite, otherwise Little Braithwaite, in the county of Cumberland, and other hereditaments in the same county, to Margaret and Ann Robinson, for the term of 1,000 years, by way of mortgage, to secure repayment by Mrs. Brougham and James Brougham of the sum of 5,000*l.* and interest at five per cent. per annum; and the same indenture contained a joint and several covenant by the defendant and James Brougham for the payment to the Misses Robinson of the sum of 5,000*l.* and interest.

By an indenture, dated the 1st September, 1827, the executrix of Margaret Robinson, who had survived Ann Robinson, assigned the above mortgage to Mr. William Brougham, on payment to him out of moneys belonging to the plaintiff and others of the sum of 5,000*l.* and interest; and by another indenture, dated the 6th September, 1827, William Brougham assigned such mortgage to the plaintiff Leonard Edmunds, and others, in consideration of the payment by them as before mentioned, out of moneys belonging to them on a joint account, of the sum of 5,000*l.* and interest.

The plaintiff was the survivor of the assignees under the deed of the 6th September, 1827, and he alleged that the sum of 5,000*l.*, together with a considerable arrear of interest thereon, was due to him by virtue of that deed.

The defendant, by his answer, stated that the hereditaments comprised in the deed of the 1st March, 1811, formed no part of the Brougham estate, and that he made the same over to his late brother James Brougham, in 1810, and that from that time no part of the rents of such hereditaments had ever been received by him or by any person on his account, or for his benefit. James Brougham was put into possession of that property in 1810, and continued to be the sole beneficial owner thereof until his death in December, 1833, and since his death until the present time, the entire rents of the same had, by the defendant's directions, been applied towards the payment of James Brougham's debts and liabilities. The money borrowed in March, 1811, was

borrowed by James Brougham solely for his own use, and was wholly received and enjoyed by him; but inasmuch as the legal estate in the mortgaged property was at that time in the defendant, he was a necessary party to the mortgage-deed, which, however, he had never seen since the date of that security, nor did he hear of it from that time until October, 1864, when a claim was made upon him in respect of it on behalf of the plaintiff. To that claim the defendant directed his brother, William Brougham, to say that "he (Lord Brougham) knew of no such debt, and that he owed no such sum." Late in October, 1864, the mortgage-deed was found in the muniment room at Brougham. By an agreement of reference, dated the 8th December, 1864, the plaintiff and William Brougham agreed to refer all questions and disputes between them touching the mortgage, the subject of this suit, and all other claims and differences pending between the defendant, William Brougham, and the plaintiff to the award of Lord Cranworth. The defendant was not a party to the agreement of reference, but he consented to be bound by the award to be made in pursuance thereof. Lord Cranworth made his award dated 26th January, 1865, which was in part as follows:

First, as to the said mortgage I decide that Lord Brougham is liable to repay the principal sum of 5,000*l.* thereby secured, with interest thereon, from the 24th June, 1864, up to which time all parties admit that interest has been paid.

The defendant did not admit that Lord Cranworth was by the agreement of reference empowered to award that the mortgage for 5,000*l.* and interest was a subsisting mortgage. Nevertheless, as he had consented to be bound by the above award, his solicitors in August, 1865, by his direction, wrote to the plaintiff's solicitors, offering to pay the sum of 5,000*l.* and interest from the 24th June, 1864, and the costs of this suit up to the date of such letter, all further proceedings therein being stayed. To these terms the plaintiff would not agree. The defendant insisted that as he had never, since March, 1811, directly or indirectly made any payment in support of the above mortgage, nor given to any one any acknowledgment of any liability on his part in respect of the same, the plaintiff's title to recover the mortgage debt and interest was barred by the Statute of Limitations. He consented, however, according to Lord Cranworth's award, to pay the principal sum of 5,000*l.*, but he still insisted on the benefit of the Statute of Limitations so far as the plaintiff's claim to interest prior to 24th June, 1864, was concerned. The part of the defendant's answer which the plaintiff objected to as scandalous was as follows:

I was ultimately compelled to turn him (the plaintiff) out of my house in Grafton Street, under circumstances which fully appear in the report of the Select Committee of the House of Lords appointed to inquire into all the circumstances connected with the resignation by Mr. Edmunds (meaning the plaintiff) of the offices of clerk of the patents and clerk to the commissioners of patents, and with his resignation of the office of reading clerk and clerk of outdoor committees in this House, and also into all the circumstances connected with the grant of a retiring pension to him by this House, and the report to the House, and the proceedings of the committee, minutes of evidence, and appendix, to all which, as contained in a blue-book published by the authority of the House of Lords, I crave leave to refer if and so far as may be necessary. I submit that it thereby appears that I had no alternative but to require the plaintiff to quit my house.

The blue-book referred to by the defendant in the foregoing part of his answer was a folio book of 563 pages, of which about 170 pages were printed in small type in double columns.

The defendant had paid the sum of 5,000*l.* with interest from June, 1864, into court. The plaintiff claimed six years' interest from the time of filing his bill in July, 1865.

Malins, Q. C., and *J. N. Higgins*, for the plaintiff, contended that the effect of the passage excepted to by the plaintiff was to import into the answer the

whole of a ponderous folio; as the report throughout was interspersed with passages introduced for the purpose of showing defendant's reason for turning the plaintiff out of his house, and reflecting on the defendant's character. This had nothing to do with the matter at issue between the parties. The simple question in the case was, what was due in respect of interest on the mortgage-debt, and the plaintiff being turned out of the defendant's house could have no possible bearing upon it. It was the rule of the court always to order such passages in the answer to be expunged which reflected on the plaintiff's character without being material to the question at issue.

His Honour, after looking through the blue-book, said there was one passage at least, which, however, he would not read aloud, but merely point out to the defendant's counsel, which seemed to him open to the plaintiff's objection, and suggested that the obnoxious passage in the answer should be expunged.

Bacon, Q.C., and *E. K. Karlake*, for the defendant, said that they had no instructions upon the matter.

His Honour thereupon directed the case to stand over until the first cause day of the present term, in order that the above suggestion might be communicated to the defendant, who was then residing abroad.

In compliance with the above direction the defendant was accordingly communicated with, but having refused to expunge the passage in question the case came again before the court on the 8th February, when

Malins, Q.C. and *J. N. Higgins* were proceeding with their argument, but were stopped by the Court.

Bacon, Q.C. and *E. K. Karlake*, for the defendant.—The question before the court was, whether the passage complained of was irrelevant. By the present practice all exceptions on the ground of irrelevance could only be determined at the hearing, unless it could be clearly shown that the matter in dispute was *contra bonos mores*, and it could not be pretended that such was the case in the present instance. Before the suit was instituted the defendant had offered to pay the plaintiff the amount of the mortgage and interest from the 24th June, 1864, and having made this offer he had a right to say that the bill had been improperly filed and for vexatious purposes. The propriety of filing the bill was therefore put into issue, and was a question for the hearing. In order to show the spirit which actuated the present proceedings, the defendant had been obliged to refer to the blue-book. The passage complained of was relevant to the question of costs, as explaining the plaintiff's motives, and was, therefore, not scandalous. The fact of the defendant having turned the plaintiff out of his house after he had been offered payment, showed the motive which influenced the defendant in proceeding with the suit. For a knowledge of the circumstances under which the defendant turned the plaintiff out of his house, a reference to the blue-book was necessary. They cited

Earl of Portsmouth v. Fellows, 5 Mad. 450. *Lord St. John v. Lady St. John*, 11 Ves. 525. *Reeves v. Baker*, 13 Beav. 115, 436. *Robson v. Lord Brougham*, 19 L. J., N.S., 465, Ch. *Everett v. Prythergch*, 12 Sim. 363, 464.

The VICE CHANCELLOR.—There is no doubt that the answer and the document to which it refers, contain passages reflecting on the character of the plaintiff in a manner calculated to injure it. Still the plaintiff can have no possible right to ask the court to expunge the passage complained of in the answer if it in any way affects the question to be determined at the hearing. It has been said that the reference to the blue-book as showing the spirit which actuated the present proceedings, is material on the question of costs. The bill, however, has been filed for the legitimate object of determining the plaintiff's

right to recover money advanced on mortgage, or to foreclose the mortgaged property, and the costs cannot be affected by an attempt to prove that an angry feeling on the part of the plaintiff led to the institution of the suit. In no view of the case do I consider that the decision of the court could in the slightest degree be influenced by the passage in question, and I therefore feel it to be my duty to order it to be expunged. The costs, which will be according to the costs in the cause, must be paid by the defendant.

WOOD, V.C., Jan. 13, 1866.

Re 27 & 28 Vict. c. 112, AND THE VENTNOR HARBOUR COMPANY.
FLEMING'S CASE.

13 L. T. 793.

The Judgments Act, 1864 (27 & 28 Vict. c. 112) s. 4 is amended by The Land Charges Act, 1900 (63 & 64 Vict. c. 26).

EXECUTION.—*Judgment Law Amendment Act—Inquiries under sect. 4.*

This was a petition presented by certain persons who had obtained judgments at law against the company amounting to 4,030*l.*, and upon which they had issued writs of *elegit*, and possession of certain lands belonging to the company had been delivered by the sheriff of Hampshire, praying that those lands might be sold under the provisions of the recent Act of the 27 & 28 Vict. c. 112, to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting personal estate.

The clauses bearing upon the question are the following :

Sect. 4: Every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, statute, or recognisance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable.

Sect. 5: If it shall appear on making such inquiries, that any other debt due on any judgment, statute, or recognisance, is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner), shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities.

Sect 6: Every person claiming any interests in such land through or under the debtor, by any means, subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon.

The lands extended and of which possession had been given, were set out

in a schedule to the petition. The vendor of part of the property claimed it, and had filed a bill to establish his lien for purchase-money which had not been paid.

The only question now was, what were the necessary inquiries to be directed by the court with reference to the terms of sect. 4 of the Act?

Roxburgh in support of the petition.

Kekewich for the company.

Cates for the vendor.

The VICE-CHANCELLOR directed the inquiries in the following terms:—Order that the petitioners be at liberty to sell the lands, tenements, and hereditaments belonging to the Ventnor Harbour Company set forth in the schedule to this order, and possession whereof was delivered to the petitioners by the Sheriff of Hampshire under and by virtue of the writs of *elegit* in the petition mentioned. And that the petitioners do within one week after the receipt thereof pay the purchase-money of the said lands and premises or any part thereof (the amount and date of receipt to be verified by affidavit) into the court to the credit of "In the matter of the Act of Parliament of the 27 & 28 Vict. c. 112, intituled, 'An Act to amend the law relating to future judgments, statutes, and recognisances,'" and in the matter of "The Ventnor Harbour Company," "The Ventnor Harbour extended Lands Account;" and that the moneys when paid into the bank be invested in Bank Three per Cent. Annuities in trust in the said matters on the like account; and that the following account be taken: first, an account of what is due to the petitioners for principal, interest, and costs under their judgments in the petition mentioned, and whether there is or are any and what debt or debts other than the debts of the petitioner due from the Ventnor Harbour Company, on any judgment, statute, or recognisance which is or are a charge or charges on the said lands, and to certify the respective priorities of such judgment-creditors; and any of the parties are to be at liberty to apply as they shall be advised; but this order to be without prejudice to any question in the suit in the petition mentioned.

[IN THE COURT OF COMMON PLEAS.]

Feb. 12, 1866.

(Before BYLES, J. and a Common Jury.)

BROOKER v. FLOYD.

13 L. T. 803.

Lord Campbell's Act—Negligent driving—Coroner's inquest—Statement by witness.

CORONER. EVIDENCE.—*In an action brought by a widow under Lord Campbell's Act, to recover compensation for the death of her husband, who was accidentally killed by a brougham on the highway, evidence as to a statement made by F., the driver of the brougham, before the coroner, to the effect that "he had a Russian prince, who did not understand the English language, and that he would not allow him to pull up, as he was in a hurry to go to a wedding, which was the cause of his not stopping at the time of the accident, and that the brougham belonged to the defendant, and that F. was driving it for him," was tendered:—Held, that it was inadmissible.*

This was an action brought by Maria Brooker, a widow, against George Floyd, job-master, of Caroline Street, Pimlico, to recover damages for the death of her husband, caused by the negligent driving of the defendant's servant.

Dr. Kenealy, for the plaintiff.

Besley, for the defendant.

The plaintiff, as stated, is a widow, with one child, James Brooker, aged seven years. Her late husband has been in the employ of Mr. Freak, a builder, of Caroline Street, Brompton. The defendant is a job-master, and lets out livery broughams and vehicles on hire. On the 2nd October last the deceased had been delivering a load of sand at the building in course of construction by his master at the corner of Grosvenor Square and Duke Street, had readjusted the cart, and was removing the nose-bags from the horses, when a brougham, driven by John Lambert, came round the corner, as the plaintiff alleged, at a furious rate. The deceased was knocked down and his forehead cut open. He died at the hospital on the 29th of the same month. An inquest was held at the hospital by Mr. Bedford, the coroner, when Lambert, the driver of the brougham, made the following statement: "He had a Russian prince, who did not understand the English language, and that he would not allow him to pull up, as he was in a hurry to go to a wedding, which was the cause of his not stopping at the time of the accident." He added, "That the brougham belonged to Mr. Floyd, the defendant, and that he was driving it for him."

The defendant pleaded (1), not guilty; (2), that the brougham did not belong to him; (3), denial that the plaintiff was lawfully in the public highway.

On the part of the plaintiff, it was proposed to put William Brooker, brother of the deceased, into the witness-box to prove the statement made by Lambert at the inquest, the defendant having been proved to be present, and to have heard it.

BYLES, J. held that such evidence was inadmissible, it not being competent to Lambert, though he heard it, to offer a contradiction in a public court.

Besley called four witnesses for the defence.

The jury found a verdict for the plaintiff, damages 60*l.*; 40*l.* for the widow, and 20*l.* for the son.

Verdict accordingly.

LORDS JUSTICES, Feb. 22, 1866.

Re THOMPSON (a Solicitor).

14 L. T. 6: reversing, [1866] E. R. A. 3268; 13 L. T. 746 (V.C.).

Solicitor and client—Mortgage as security for costs—Taxation on summons—Waiver of objection.

SOLICITOR.—*Property was mortgaged by a client to his solicitor as security for costs incurred and to be incurred. The client became bankrupt, and his assignee applied by summons to set aside the mortgage, and to have all the bills taxed:*

Wood, V.C., refused the application, on the ground that a solicitor might arrange with his client to accept a stated sum for costs, and so avoid the expense of taxation; but a letter being produced, which was read as a waiver of any objection to a taxation, it was, on appeal,—Held, that that order must be discharged, and general taxation directed.

Per Knight Bruce, L.J.—Semble that, but for the waiver, there would have been no right in the client to procure taxation, except upon a bill filed.

This was an appeal against a decision of Wood, V.C., who had refused, with costs, an application by the assignee in bankruptcy of a person named

Moon for the taxation of the bills of costs of Mr. William Yates Thompson, who had acted as solicitor for the bankrupt, under circumstances which sufficiently appear in 13 L. T. Rep. N.S. 746.

Southgate, Q.C., and *Bush* were for the appeal.

Speed, on behalf of Mr. Thompson, supported his Honour's order, insisting that where there was a settled account there was no jurisdiction upon summons to have the bill taxed, but that a suit was necessary. Where the application was by petition, that had been frequently decided:

Barwell v. Brooks, Re Cattlin, 8 Beav. 121; *Re Whitcombe*, 8 Beav. 140; *Sayer v. Wagstaffe*, 5 Beav. 415;

and the reason would apply *à fortiori* to proceeding by summons.

In the course of the argument a letter, dated 20th May, 1865, written by Mr. Thompson to the solicitor of the assignee, was relied on as showing a submission on Mr. Thompson's part to taxation. It was in these terms:

"Herewith you will receive my bills of costs, and I beg at the same time to intimate to you that their delivery to you on behalf of the assignee is not done as any admission of the assignee's right to them, and that it is to be strictly without prejudice to any of my rights. I have no objection to having the bills taxed, and shall be prepared to meet you before the taxing master at any time you may think fit, as I am advised that I am entitled to hold the mortgage as security for what was justly due to me at its date, and to apply the moneys paid, in pursuance of my agreement with the bankrupt, in satisfaction of the subsequent outlay and costs; and that I insist upon my right to do so without prejudice.—Yours, &c.

"W. Y. THOMPSON.

"To J. H. Taylor, Esq."

The answer to this letter, on the part of the assignee, was in effect an expression of regret that Mr. Thompson had not made any offer.

Southgate, Q.C., having replied,

LORD JUSTICE KNIGHT BRUCE said that the terms of the letter, dated the 20th May, 1865, were certainly doubtful; but, taking the latter part of it together with the former, he was of opinion that the true construction was, that the letter amounted to a waiver of any objection to a taxation of the costs; that it amounted in effect to a submission to have them taxed. It had been said that there was a subsequent letter, retracting or dissenting from that submission, or agreement, or arrangement; but that further letter was not in evidence, and therefore the case must rest upon the letter of the 20th May, 1865. But for the waiver which it contained of the objection to have the bill taxed, he should have been greatly inclined to think that there would have been no right to a taxation, or to have the account taken, upon petition, but that a bill must be filed; but, with the view he had taken of the effect of the letter of May last, it was unnecessary for him to consider that question. With deference, therefore, to the Vice Chancellor, and admitting that the case was one of considerable difficulty, he was of opinion that there must be a taxation, and that that taxation must be general, as sought by the applicant.

LORD JUSTICE TURNER said that he quite agreed with his learned brother. From what he had heard of the further letter, it did not appear to vary the effect of the letter of the 20th May, 1865. He thought that that letter had properly this meaning: "That you and the assignee, your client, have no right whatever to quarrel with these bills; but at the same time I have no objection to your having them taxed, because I am satisfied of my right to hold the security in question for the whole amount which is due to me." That was equivalent to a consent to have the bills taxed. The other points of the case, therefore, did not arise, and it was not necessary to express any opinion upon them. The order of the learned Vice Chancellor would be discharged, and there must be substituted for it an order for the taxation of the bills.

STUART, V.C., Feb. 9, 1866.

PRANKERD v. BAKER.

14 L. T. 11.

Will—Construction—Rents and profits—Special case.

WILL.—Gift “to A. and B. equally for life, and after their death in trust for, and to the use of all and every, the child or children of A. and B., both or either of them, if more than one, share and share alike, and until the youngest should attain twenty-one”—Held, on the death of A. that his children living at his death were entitled in equal shares to his moiety of the rents and profits until the youngest of the children of A. and B. had attained twenty-one.

This was a special case for the opinion of the court under the following circumstances:

John Somers by his will, dated the 25th June, 1847, after various other dispositions of part of his property, gave to his trustees certain real estate in trust for the use of the child or children of his son James, and in default of issue to the use of his son John and daughter Susan Baker equally for life, and after their decease in trust for, and to the use of all and every the child or children of John and Susan, both or either of them, if more than one share and share alike, and until the youngest should attain twenty-one, being a son, or twenty-one or marrying, being a daughter, and when the said event should happen upon trust to sell and divide the proceeds (less expenses) between all and every child and children of John and Susan who should then be living, or have died leaving lawful issue then living, share and share alike, if only one, to one such child, and on failure of all issue, then to the heirs of his son James.

The testator died on the 13th September, 1848, and his son James, without issue, in 1860. John died in 1863, leaving two daughters and several infant grandchildren, the issue of a deceased daughter, surviving him.

Susan Baker, who had several children, was still living, and the question was whether she was entitled to the whole or a moiety of the rents and profits of the testator's estate.

Osler, for Susan Baker, contended that she was entitled to the whole of the rents and profits for life. There was no gift over until after the death of both Susan and John, and the words in the will implied a life-interest in the whole of the estate of the survivor. They cited

Malcolm v. Martin, 3 Bro. C. C. 50. *Begley v. Cook*, 3 Drew. 662. *Pearce v. Edmeades*, 3 Y. & C. Ex. 246.

Graham Hastings, for the daughters and grandchildren of John, claimed a moiety of the rents and profits.

Swanston for trustees.

The VICE CHANCELLOR.—In cases of this description the court must be guided by the will itself, and authority can afford very little assistance. The gift is to “John and Susan equally for life, and after their decease in trust for, and to the use of, all and every the child or children of John and Susan, both or either, if more than one share and share alike, and until the youngest should attain twenty-one.” To my mind the “children of both or either of them” implies the children of each, and in accordance with that construction there must be a declaration that on the death of John such of his children who were living at his death are entitled in equal shares to his moiety of the rents and profits until the youngest of the children of John and Susan shall attain twenty-one. The costs of all parties, as between solicitor and client, must be paid by the trustees out of the rents and profits.

STUART, V.C., Feb. 10, 12, 13, 1866.

FERGUSON v. WILSON.

14 L. T. 12: affirmed, 15 L. T. 230; L. R. 2 Ch. 77; 15 W. R. 80; 12 Jur. N.S. 912 (L. JJ.): on point as to evidence see, [1867] E. R. A. 74; 36 L. J. Ch. 67 (L. JJ.).

Company — Resolution — Loan — Form of payment — Option of lender — Acquiescence — Costs.

COMPANY. PAYMENT.—Where it was optional with the plaintiff to receive payment for an advance to the defendants, a company, either in shares or money, and a cheque was sent to him by the company's secretary in payment thereof, which, after keeping two days, he returned, requesting to be paid in shares; but, in the interim, attended a meeting of the company, where his conduct led to the inference that he accepted the cheque:—Held, that such conduct amounted to an acquiescence in the payment, and debarred him from all further claim to the shares.

This suit was instituted against the Washoe United Consolidated Gold and Silver Mining Company (Limited) and its directors, for the purpose of obtaining a declaration that the plaintiff, George Ferguson, was entitled to certain shares in the company.

The facts were as follows:—

The company was registered on the 17th June, 1864, and two days previously, viz., on the 15th June, at a meeting of its directors, of whom the plaintiff was one, a resolution was passed in these terms: That if any one should make an advance for two months for the purposes of the company, such advance should at any time after the expiration of two months from the period of the loan be repaid upon the application of the lender, with interest at 6 per cent.; and it was further resolved that the lender should have the option at any time while the amount remained unpaid of accepting paid-up shares in the company, or partly paid-up shares to the amount, or for such amount as the lender might desire, or of accepting a deposit receipt of 1l. per share on 500 shares, or any portion thereof, at the lender's discretion.

On the 17th June, 1864, after the registration, the plaintiff advanced 500l. for the purposes of the company upon the terms of the above resolution, and upon the 1st July, 1864, he made a further advance of 200l.

On the 4th October a call of 1l. per share was made, and at a meeting of the directors on the same day it was resolved that the advances which had been made to the company in June and July should be repaid as required, and that cheques for the same should be given on application.

In pursuance of this resolution the plaintiff, on the 11th November, 1864, received from the company's secretary a cheque for 204l. 6s. 2d. and scrip for 100l. fully paid-up shares by way of repayment for his loan; and on the same day he returned to the secretary both the cheque and the scrip as having been sent without authority.

The secretary thereupon, on the 15th November, sent the plaintiff a cheque for the full amount due to him. This cheque the plaintiff kept until the 17th November, when he returned it, requesting at the same time an allotment of 700 shares upon which a deposit of 1l. per share was to be considered as paid. The company, however, refused to comply with his request until they had first taken counsel's opinion as to the construction of the resolution of the 15th June, and subsequently, on such opinion being taken and proving adverse to the plaintiff's claim, the company declined altogether to accede to his demand.

It appeared that on the 16th November, the day before the last-mentioned cheque was returned, the plaintiff at a general meeting of the shareholders proposed a resolution that the unallotted shares in the company should not be disposed of without the consent of the shareholders. To this resolution an

amendment was moved and carried to the effect that the unallotted shares should be offered to the shareholders *pro rata* according to their holdings.

In accordance with the above amendment fifty shares, conditional with his paying 2*l.* per share on an appointed day, were offered to the plaintiff on the 7th December, and on the same day a cheque for the amount of his advances was again sent to him by the secretary.

In December, 1864, the plaintiff ceased to be a director of the company.

The bill prayed that it might be declared that the plaintiff, under the resolution of 15th June, 1864, was entitled to 700 shares, upon each of which 1*l.* had been paid, or to 500 shares and 200 shares, upon each of which 1*l.* and 2*l.* had respectively been paid, and that the directors might be ordered to allot such shares to the plaintiff, or otherwise to pay him damages for the default.

Malins, Q.C., and *E. K. Karlake*, for the plaintiff, contended that it rested with the plaintiff to choose whether his advances should be repaid in shares or money, and he had elected to take shares. There had been no legal tender of the cheque.

Bacon, Q.C., and *Elderton* for the directors.—The demand of shares on the part of the plaintiff was a mere afterthought. He had kept the cheque by him without objecting at the time of its receipt, and had waived any right to election by so doing. The directors had acted throughout with perfect fairness, and had only resisted the plaintiff's claim on discovering that they would not be authorised in acceding to it.

Greene, Q.C., and *W. C. Harvey*, for the company, submitted that the terms of the resolution of the 15th June were not binding upon the company. There could be no borrowing except under the company's seal, and the plaintiff might consider himself fortunate in getting his money returned, with interest. The plaintiff's conduct at the meeting of the 16th November, and his concurrence in the amendment to his own resolution then passed, entirely precluded his present claim.

Malins, Q.C., in reply.—The right of option was with the plaintiff, and he was entitled, on the receipt of the cheque, to a reasonable amount of time before making his choice. This was necessary, in order that he might elect with a full knowledge of the value of the shares. There was no proof that he had received the cheque before the meeting of the 16th November.

The VICE CHANCELLOR, after reviewing the facts of the case, said:—I am of opinion that the plaintiff has precluded himself from sustaining his present claim by the manner in which he acted during the time which intervened between the receipt and return of the cheque sent to him by the company's secretary. In the interval he attended a general meeting of the shareholders, and on that occasion not only refrained from asserting his right to the shares, but acquiesced in a resolution which proceeded on the footing of the debt due to him having been paid. I consider that the plaintiff, when he received the cheque on the 15th November, was entitled to an option; and I have dealt with the case upon the ground that, having that option, he did not exercise it until, by his conduct at the meeting of the 16th November, he had given the company every reason to believe that he concurred in the payment which had been made to him by the cheque. The bill must be dismissed with costs.

STUART, V.C., Feb. 16, 1866.

Re THE VALE OF NEATH RAILWAY ACT 1863.
JERSEY v. JERSEY.

14 L. T. 13.

Practice—Fund in court—Petitioner's title—Affidavit—General Order 34.

COMPULSORY PURCHASE.—*The Court will order a fund in Court to be paid to several petitioners on an affidavit by one of them sufficiently verifying the title of all of the petitioners to such fund.*

This was a petition by the Duke of Richmond and three other petitioners, asking for payment of a sum of 12,000*l.*, which had been paid into court as the purchase-money for certain lands by the Neath Railway Company.

The petitioners were the trustees of the money in question, and the affidavit verifying their title was made by one of them only.

Kekewich, for the petitioners, asked that it might appear in the order that the court was satisfied with the affidavit of the one petitioner, otherwise there might be some difficulty in the registrar's office as to the other petitioners not having made one. He referred to

Morgan's Ch. Acts and Orders, 3rd edit., p. 525.

The VICE CHANCELLOR.—I consider that the affidavit is sufficient, and the order may be drawn up to that effect.

WOOD, V.C., Jan. 13, 1866.

Re THE COMPANIES ACT 1862, AND THE DONCASTER PERMANENT
BENEFIT BUILDING AND INVESTMENT SOCIETY.

14 L. T. 13.

Winding-up—Withdrawal of shareholders from a building society—Rate of interest.

BUILDING SOCIETY.—*Where by the rules of a benefit building society it was provided that shareholders might withdraw on giving one month's notice of their intention so to do, and should be entitled to receive back the subscriptions paid, with interest thereon at the rate of 5 per cent. per annum:—Held, that under a winding-up order of such society those shareholders who had duly given such notice were entitled to compound interest on their subscriptions.*

This was a claim under an order to wind-up the Doncaster Permanent Benefit Building and Investment Society adjourned into court.

Seventy-one of the shareholders of the society had succeeded in getting their names removed from the list of contributories on the ground that they had more than one month prior to the petition for winding-up given notice of their intention to withdraw in accordance with the 17th rule of the society. This rule was headed "Shareholders withdrawing," and provided that any shareholder who should be desirous of withdrawing from the society any share or shares on which an advance had been made might do so on giving one month's notice in writing to the directors at any monthly meeting of the society, and such shareholder should receive back the subscriptions then paid, with interest thereon at the rate of 5 per cent. per annum, as shown by Jones's tables (being compound interest), but all fines incurred previously to such application should be deducted therefrom.

If more than one shareholder should give notice to withdraw at one time,

they should be paid in rotation according to priority of notice, but widows and children of deceased shareholders should always have priority.

The date of the winding-up order was the 11th March, 1863.

The official liquidator objected to the payment of any interest at all, or of anything beyond simple interest at most.

It was arranged that the decision of the Vice Chancellor should be taken on the claim of a Mr. W. C. Clark.

W. A. Clark appeared for the withdrawing shareholder, and contended that he was entitled to interest at the rate prescribed by the rule as given above, being compound interest from the 13th March, 1863.

Wickens, for the official liquidator, argued that a withdrawing shareholder must be considered in the light of an outgoing partner, or as a member of a dissolved partnership, and was not, as such, entitled to interest. But, even, if he were a creditor, inasmuch as the partnership was dissolved, and the contract had come to an end, simple interest at 5 per cent. could only be allowed.

The VICE CHANCELLOR said, that the contention of the official liquidator could not be supported, and would be contrary to the whole scheme of the contract as defined by the rules of the society. The provision respecting repayment of subscriptions with compound interest was perfectly legal. There was another clause in the contract, providing that if more than one shareholder had given notice to withdraw, they were to be paid in rotation according to priority of notice, but widows and children of deceased shareholders were always to have priority. Nothing could be clearer than these provisions. The order, therefore, would be, that the claim for interest should be allowed, *i.e.*, for interest at 5 per cent., with annual rests. The claimant to be at liberty to add the amount of his costs to the debt.

Order accordingly.

Wood, V.C., Jan. 13, 1866.

BERNDSTON v. CHURCHILL. ,

14 L. T. 14.

Practice—Costs—Dismissal of parties.

This was a motion *ex parte* on behalf of the plaintiff to dismiss three of the defendants (trustees), with their costs, without prejudice to the question by whom, or out of what fund, such costs should eventually be paid.

Kay, in support of the motion, said that the addition of the qualification as to the ultimate payment of the costs prevented the order being drawn up as a matter-of-course order.

The VICE CHANCELLOR made the order.

[IN THE COURT OF EXCHEQUER.]

Feb. 8, 1866.

BRYANT v. RICHARDSON.

14 L. T. 25; 14 W. R. 401; 12 Jur. N.S. 300.

Followed, *Ryder v. Wombwell*, [1868] E. R. A.; 37 L. J. Ex. 48; L. R. 3 Ex. 90; 17 L. T. 609; 16 W. R. 515 (Ex.): reversed, [1869] E. R. A.; 38 L. J. Ex. 8; L. R. 4 Ex. 32; 19 L. T. 491; 17 W. R. 167 (Ex. Ch.).

Infancy — Plea of — Necessaries — Cigars and tobacco — Province of the Judge and the jury—Special circumstances.

INFANT.—*Cigars and tobacco cannot, under ordinary circumstances, and in the absence of evidence of any special circumstances rendering them necessary medicinally or otherwise, be considered "necessaries" for an infant.*

In such a case the proper course is for the judge to withdraw the case from the consideration of the jury; but where there are such special circumstances it is a mixed question of law and fact, and must be left to the jury with proper directions.

The cases of Peters v. Fleming, Brooker v. Scott, Wharton v. Mackenzie, and Harrison v. Fane, approved and followed.

This was an action by the plaintiff, a tobacconist in Regent Street, to recover, in goods sold and delivered, the amount of a bill for cigars, tobacco, and pipes; to which defendant having pleaded infancy, the plaintiff replied that "the said goods were necessaries suitable to the degree, estate, and condition of the defendant"; whereupon issue was joined.

At the trial before Bramwell, B., at the Middlesex sittings in Hilary Term last, the following appeared to be the facts of the case:

The defendant is the youngest son of Major Richardson, a gentleman of moderate fortune, residing in Portland Place. At the time of contracting the debt defendant was preparing for his examination for a commission in the army, and was entirely dependent upon his father and was under twenty-one years of age, having been born on the 2nd June, 1844. His account with the plaintiff, as appeared by the particulars delivered, commenced on the 13th July, 1864, and between that date and the 2nd February, 1865, which was the date of the last supply of goods, cigars, tobacco, and pipes had been furnished by plaintiff to the defendant to the amount in value of 44*l.* 14*s.*

In the same month of July, 1864, a box of 100 cigars at 2*l.* 10*s.* was delivered by the plaintiff for the defendant at his father's house, and coming to the latter's hands, who it seemed had a great aversion to smoking, was immediately sent back by him to the plaintiff's shop, with a message that he would not permit goods of any description to be received in his house for his son on credit, and that if plaintiff supplied defendant with cigars or aught else on credit, he would never be paid, and he forbade plaintiff to send anything more to his house. Thereupon the plaintiff's manager wrote to defendant informing him of what had taken place, and declining to supply any further goods, and requiring payment for those already furnished, to which, on the 30th August, 1864, the defendant wrote in reply, complaining of his father's "unwarranted interference," and saying that if the plaintiff declined trusting him with any more goods and would send his account, he (defendant) would settle it, but that if plaintiff would continue to supply him he pledged himself only to order "such goods as were *necessities*, according to his station, and would pay him as soon as he came of age;" and he added in a postscript that he had "passed 79 in his examination for a commission."

The plaintiff appeared to have been satisfied with that letter, for he continued to supply goods to the defendant, which were thereafter sent to defendant, by his direction, at an address in Brighton. In September, 1864, defendant obtained a commission as ensign in the 7th Fusiliers, and is now with his regiment in India. It appeared that the defendant up to the time of obtaining his commission was entirely dependent upon his father for support, who supplied him with all necessities and made him a yearly allowance for pocket-money and personal expenses. That the father disapproved of smoking generally, and never allowed his son to smoke in his house, and never saw him smoking. The defendant had attained his majority before the action was brought, but had no means whatever beyond his ensign's pay and such allowance as his father thought proper to make him, and so he placed himself, of necessity, in the hands of his father, by whom the action was defended.

The learned Baron left it to the jury to say whether, looking at all the circumstances of the case, the goods in question were necessities such as are requisite for a young man under age in the defendant's position in life, telling them that they were not bound to accept or reject the plaintiff's claim as a whole, they might take the bill in their hands, and reject some and allow other portions of it. The jury found a verdict for plaintiff for 20*l.*, and the learned Judge gave leave to defendant to move to set it aside on the ground that there was no evidence to go to the jury. Accordingly in the same term *H. T. Cole*, for defendant, obtained a rule to set aside the verdict, and for a new trial on the ground—first, that the verdict was against evidence; and secondly, on the ground of misdirection in this, that the learned judge ought to have told the jury that the goods supplied to the defendant were not necessities, and against that rule.

Willoughby, for plaintiff, now shewed cause.—There were three points. First, that cigars were *necessaries* within the principle and meaning of the decided cases. Secondly, that it was a question for the jury and not for the court. Thirdly, that there was sufficient evidence to justify the verdict. In *Smith on Contracts*, 3rd edit. by Malcolm, p. 260, the rule was thus stated: "It is well established by the decisions that, under the denomination *necessaries*, fall not only the food, clothes, and lodging necessary to the actual support of life but, likewise, means of education suitable to the infant's degree, and all those accommodations, conveniences, and matters of taste which the usages of society for the time being render proper and conformable to a person in the rank of life in which the infant moves. The question what is, in the legal sense of the word, *necessary* is, in each case, to be decided by a jury; but these are the principles by which the judge ought to direct the jury that their decision should in each case be guided." *Peters v. Fleming* (6 M. & W. 42; 9 L. J. (N.S.) 81, Ex.), was a leading case, and there Parke, B., laid down what was the true rule in the matter. It was on defendant to show that cigars were not necessities for a young man in defendant's position, an officer in the army and twenty years of age. [CHANNELL, B.—Is that so? It is rather for the plaintiff to show that they are necessities for such a person.] Wine has been held to be a necessary, and why not cigars? Smoking was now a general habit in all ranks of life, and more particularly in the army. But, secondly, it was for the jury and not for the court. In *Burghart v. Angertein* (6 C. & P. 690), Alderson, B., left it to the jury to say whether the goods supplied were suitable to the defendant's condition in life. So a gold latch-key has been left to the jury, and found necessary for an officer in the guards. In *Com. Dig. "Enfant"* B. 5, where the cases were collected, it was said the question of what was necessary was to be left to the jury. To the same effect also was 4 Bac. Abr. 355; "Infancy" I. He cited also—

Charters v. Bayntun, 7 C. & P. 52. *Steedman v. Rose*, 1 Car. & M. 432; and the note to *Manby v. Scott*, 1 Sm. L.C. 394.

In all the cases it had been left to the jury. [MARTIN, B., refers to *Wharton*

v. *Mackenzie*, and *Cripps v. Hill* (5 Q.B. 606; 13 L. J. (N.S.) 180 Q.B.), and the judgment of Coleridge, J., pointing out the distinction between the province of the judge and the jury in such cases. FIGOTT, B., refers to *Harrison v. Fane* (1 M. & G. 550), and the judgment of Tindal, C.J.] As to the jury finding a verdict for part only, see per Lord Denman, C.J., in—

Tapley v. Wainwright, 5 B. & Ad. 399.

H. T. Cole contra, for defendant, was not called on to support his rule.

POLLOCK, C.B.—We are all of opinion that there ought to be a new trial in this case. For myself I am rather inclined to agree with my brother Martin, that the matter might well have been withdrawn from the consideration of the jury altogether, and that too according to the authority cited by Mr. Willoughby himself from Comyn's Digest, where no doubt it is said that the question must be left to the jury; but this qualification is added, namely, "unless it clearly appear that the articles furnished are not necessities." It is not needful now to discuss the merits of the case, as there will be a new trial. It is sufficient to say that none of the cases which have been mentioned show tobacco to be a necessary for a young man under ordinary circumstances, and there is an entire absence in the present case of any *special* circumstances which could bring it within that category. The case ought to be re-considered, and it seems that the learned Judge before whom it was tried is himself of that opinion. The rule therefore for a new trial will be made absolute.

MARTIN, B.—My brother Bramwell has expressly directed me to say that he is of opinion that he ought to have stopped this case, and that there was no evidence to go to the jury, and I must say that I think his opinion is quite right. I have three authorities now before me in which the law on the matter is, in my judgment, correctly stated. In *Peters v. Fleming* (6 M. & W. 42; 9 L. J. (N.S.) 81 Ex.), which was an action by a jeweller to recover the price of two breast-pins and a gold watch-chain, furnished to the defendant, an undergraduate at the University, of eighteen or nineteen years old, Parke, B., says: "It is perfectly clear that from the earliest time down to the present the word *necessaries* was not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree of life in which he is, and therefore we must take the word '*necessaries*' in its unqualified sense, but with the qualification above pointed out;" and he adds: "The true rule I take to be, that all such articles as are *purely* ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one, and for such matters, therefore, an infant cannot be made responsible." No doubt that is correct. A coat of superfine broad-cloth may be a *necessary* for the son of a nobleman, although it is impossible not to say that the coarser material of a ploughman's coat would be sufficient to keep a nobleman's body warm. The same view of the matter is distinctly held also in *Brooker v. Scott* (11 M. & W. 67), in which case the judgment of Parke, B., in *Peters v. Fleming* having been cited by the plaintiff's counsel as an authority for holding confectionery to be necessary for a youth at college, Alderson, B., distinctly points out that that judgment "is to be understood with a qualification that the articles must be *useful*; but," he adds, "these are articles merely useless and luxurious;" and the Court there acted upon that view, and gave judgment for the defendant, without hearing my brother Byles for him; Lord Abinger, C.B., saying: "The question is, whether "on the face of this bill, we see any articles that we think should have been considered by the jury under all the circumstances of the case as necessities; and we think there are none." But it does not rest on these cases alone. In *Wharton v. Mackenzie* and *Cripps v. Hill* (5 Q.B. 606; 13 L. J. (N.S.) 180 Q.B.), Coleridge, J., points out the distinction between the province of the judge and of the jury in such cases, and correctly defines

the duty of each. "In some cases," he says, "the question must be for the judge. Suppose the son of the richest man in the kingdom to have been supplied with diamonds and racehorses, the judge ought to tell the jury that such articles cannot possibly be necessities. In *Wharton v. Mackenzie* the defendant's illness was proved in order to explain the supply of some of the articles. In such a case the question is a mixed one of law and fact, and must go with proper directions to the jury. Without any explanation the court will decide the question. . . . It is said we must look at the circumstances of each defendant. True; we must do so. But the articles supplied must be necessities, and not merely comforts or conveniences." Now, I do not think that any one can doubt that cigars and tobacco are articles of luxury and not of utility; and there was no evidence of any special circumstances rendering them necessary, medicinally or otherwise, in the present case. My view of the matter entirely corresponds with the views expressed by the courts in the cases to which I have particularly referred, and I agree with the Lord Chief Baron that the rule must be made absolute.

CHANNELL, B.—I am entirely of the same opinion.

PIGOTT, B.—I also am of the same opinion. No doubt, if there be evidence to show that the articles supplied are necessities, and to take them out of the category of articles of mere luxury and ornament, then the case must be left to the jury. But here, though there may have been some, there was not *sufficient* evidence for that purpose. Now, as was said by Tindal, C.J., in *Harrison v. Fane* (*ubi sup*), "it is a question of fact for the jury, subject to the control of the court as to the manner in which the jury have exercised their discretion." If, therefore, the jury have found a verdict on what the court clearly conceives to be insufficient evidence, the court will, in the words of Tindal, C.J., "control" it; and it seems to me to be much the same thing, in the result, whether a case is withdrawn altogether from the consideration of the jury, or whether the verdict, when it is founded on insufficient evidence, be subsequently subjected to the control of the court.

Rule absolute for a new trial.

STUART, V.C., Jan. 27, 29, Feb. 9, 1866.

HOMFRAY v. FOTHERGILL.

14 L. T. 49; L. R. 1 Eq. 567.

Partnership—Construction of deed—Sale of shares—Pre-emption.

PARTNERSHIP.—Where by articles of partnership it was provided that whenever any partner should be desirous of selling his shares in the partnership property he should give notice to the other partners of such his intention, and on a day fixed should offer such shares to the other partners collectively; and if such partners should collectively decline to purchase, then the partner selling should offer the shares to the partners desirous of collectively purchasing (if any), and if they should decline, then the offer should be made to the partners individually; and the defendant, a partner, gave notice to all of the partners of his intention to sell his shares, and on the day appointed offered them to such partners, and upon their collectively declining refused to offer them to the plaintiffs, the remaining partners:—Held, that the defendant was not at liberty to recede from his offer, and that the plaintiffs were entitled to be considered as purchasers of the shares.

This bill was filed for an injunction to restrain the defendants from selling certain shares in the Tredegar Iron Company before first offering them to the

plaintiffs, and also for enforcing an offer made on the part of one of the defendants to sell such of the shares as belonged to him.

The facts of the case were shortly as follows:—

The plaintiffs and the defendants were partners in the above company, the capital of which was divided into twenty-four shares. Eight of these shares were held by the plaintiffs, Samuel and Watkin Homfray, five and a half by the defendant Fothergill, and the remaining ten and a half by the defendant Forman.

By the articles of partnership it was provided that, whenever any partner should be desirous of selling one or more share or shares held by him in the concern, he should give notice to the other partners of such his intention at least two calendar months before the next ensuing annual meeting, and should at such annual meeting offer such share or shares as he might be desirous of selling to the other partners collectively; and if all the said partners should collectively decline to purchase, then the partner desirous of selling should offer such share or shares to be sold to the partners desirous of collectively purchasing (if any), and if no two partners should be desirous of purchasing jointly, then the partner or partners desirous of selling should offer such share or shares to any individual partner; and if the partners should individually decline to purchase, the partner desirous of selling should be at liberty to sell his share or shares to any person not a partner in the concern.

On the 11th May, 1865, the defendant Forman being desirous of selling his shares, sent the following notice to the other three partners:

Dear Sirs,—I beg to inform you that I am desirous of selling the ten and a half shares at present held by me in the Tredegar Iron Company, and that it is my intention to offer them at our next meeting at the works, on the 17th inst., to you as my partners in the concern, in accordance with the articles of partnership, at the price of 16,375*l*. I beg to add that I give you this intimation of my desire and intention with reference to my shares, that my offer to sell them may not take any of you by surprise, but without prejudice to the resolution passed and entered into between us in March, 1864, and without acknowledging that I am under any obligation to give you any notice or intimation of my desire to sell.

The meeting accordingly took place on the day mentioned in the notice, when the shares having been offered to the partners collectively at the price named, the plaintiffs expressed their willingness to take them, but Fothergill declined to join in the purchase. The plaintiffs thereupon offered to purchase them jointly, but to this proposal Forman refused to accede.

The question, which mainly turned upon the construction of the deed of partnership, was, whether the plaintiffs could compel Forman to repeat to them the offer which had been refused by the partners collectively. It appeared that at the time of the offer it was well known to all the partners that Fothergill had no intention of purchasing.

The allegation against Fothergill was, that he was about to sell his shares to a stranger without first offering them to his co-partners. This, however, he positively denied.

The bill prayed that the defendant Fothergill might be restrained from selling his shares to any person until he had first offered them to the plaintiffs, and they had declined to take them. And that the defendant Forman might also be restrained from selling his shares to any one but the plaintiffs, and that it might be declared that on the 17th May, 1865, the plaintiffs were entitled to exercise the option of purchasing the ten and a half shares held by Forman for 16,375*l*. per share.

The *Attorney-General* (Sir R. Palmer), *Bacon*, *Q.C.*, and *Darby*, for the plaintiffs, submitted that, as the offer had been made to the three partners, the plaintiffs were entitled to accept it.

Rolt, *Q.C.*, *W. A. Collins*, and *Bedwell*, for the defendants, contended

that no offer had ever been definitely made by Forman. The effect of his notice merely amounted to an intention to sell his shares, and he was perfectly at liberty to change his mind between the date of the notice and the day fixed for carrying his intention into effect. The offer made at the meeting of the 17th May was altogether informal, moreover it had been declined by the partners collectively, and could not be enforced by the plaintiffs.

February 9.—The VICE CHANCELLOR.—This suit is instituted to obtain the assistance of the court to restrain an alleged violation of an important clause in a deed of partnership. The true construction of this clause, as applied to the acts and conduct of the parties, is very difficult, and the duty of the court is to construe it with a proper regard to the rights and benefits which it gives to each and all of the contracting parties. In cases of private partnership composed of a few individuals, as distinguished from joint-stock companies, clauses relating to a partial dissolution by a sale or transfer of shares are of vital importance. The introduction of any stranger to whom the caprice of one partner may sell and transfer his share, might not only produce disagreeable consequences by a compulsory association with a stranger, but might disconcert and perhaps destroy a successful business. To the retiring partner, who wishes to sell his shares, the principal, if not the only, matter of importance is the price which he is to obtain. But if, by contract, the continuing partners have a right of pre-emption, the great value and importance of that right must be recognised, and the court will restrain by injunction the violation of it, and will, in a proper case, enforce its performance by decree. For the defendants, the question in this case has been argued as if the jurisdiction of this court to enforce the performance of such a clause was as much a discretionary jurisdiction as the performance of an ordinary contract between vendor and purchaser. That cannot be a correct view, because the rights of the parties under a clause of pre-emption in partnership articles is not, generally speaking, the subject of cognisance in a court of law. This court cannot say, as in the ordinary contract between vendor and purchaser, that it will leave the parties to the legal remedy. Nor can this court say, where there is a right of pre-emption, that the person desirous of selling may choose to which of his partners he will offer to sell, and that he may choose to exclude some from the offer unless on the true construction of the clause such a choice is clearly given. Exclusion of all choice to the vendor, and an absolute right to the continuing partners, is the great object of such a clause. As soon as the character of vendor is assumed, the right of pre-emption is an absolute right, excluding choice by the vendor. How far there may be a right to retract an offer before acceptance, and to what extent the *locus pœnitentiæ* may be permitted, must depend on a fair consideration of the terms of the clauses and the conduct of the parties. Where, as is usual, and as occurs in this case, a preliminary notice is necessary, and a day is fixed when the offer is to be accepted or rejected, if a question arises whether the offer might be retracted at any time between the notice and the day fixed for acceptance or rejection, although on the first impression there might seem to be a right to retract, still that may be modified by acts fairly done by the continuing partners on the faith of and in reliance on the *bona fides* of the notice. In the present case no difficulty arises on the question of notice. Both plaintiffs and defendants admit the sufficiency of the notice. The question which occurs in the pleadings as to the waiver of the notice seems not of much importance. If it was necessary to decide it, there would be no difficulty in holding that there was a permanent and complete waiver of that notice which is required by the deed. As to the offer, the clause seems compulsory in its terms. On an offer being made, first to all the other partners collectively, if that offer be declined the language of the clause is clear and positive that there shall be an offer to the other partners desirous of collectively purchasing. As to this second offer, the language might have been such as to leave it to the will and discretion of the vendor, whether he should go on and make any further offer

than the first offer. There might have been the words "may if he shall think fit," or other words giving an option not to go further than the first offer. But the words of this clause are so clear as to exclude any such option. The words are, "and if all the said partners shall collectively decline to purchase, then he or she so desirous of selling shall offer such share or shares to be sold to the said partners desirous of collectively purchasing, if any." This language is clear and peremptory. After the first offer the other partners desirous of purchasing collectively are persons whose desire to purchase is protected by imperative words requiring that the shares shall be offered to them. If this right is conferred upon them by the words of the contract the court has no warrant for refusing to enforce it, and no warrant for giving to the person desirous of selling an option or a power to recede from the rights conferred by a clause which he has advisedly and upon notice brought into operation. The right arises and comes into active operation as soon as the notice is given. There is a great difference between a clause framed so as to make the second offer compulsory, and a clause which should give to the person desirous of selling an option to stop after the first offer. The notice of the offer is required in order to give time for consideration and preparation. So large a sum as the purchase-money in this case probably requires efforts, and perhaps expenses and collateral arrangements, which, when once made for the acceptance of the offer, might make the exercise at the last moment of an option to stop at the first offer an intolerable hardship. This was probably the reason for the clear and positive language of the clause that after the first offer to all there shall then be an offer to the other partners desirous of purchasing. The notice is in fact the offer, and the day named for the formal offer is only named for the purpose of fixing the last moment for acceptance. Unless then accepted, the vendor's important right of selling to a stranger comes into immediate operation. The conduct of the defendants shews the importance of having had the clause so framed as to give the plaintiffs the right to have and accept the next offer. A benefit so important as the right of pre-emption which is secured by this clause is not to be taken away by any illusory proceeding, or by evading the language of the contract. But the struggle of the defendants is, in fact, to evade the operation of the clause. Before the notice of the 11th May, 1865, there had been on four occasions negotiations by the defendants for the sale of their shares. When the offer of 11th May, 1865, was sent to the plaintiffs, it was a matter of certainty that the defendant Fothergill did not intend to purchase, and, therefore, that the only offer which the defendant Forman could make in good faith was an offer to sell to the plaintiffs. Accordingly the notice contains no limitation or reservation. It contains no intimation confining it to all the other partners collectively, to the exclusion of the two plaintiffs collectively. It was well known that Fothergill would not purchase, and that an offer which included him must be refused. Nevertheless, the defendant Forman might have worded his notice so as to restrict the offer to the others, including Fothergill, and might have stated that there was no offer to the plaintiffs collectively, unless in conjunction with Fothergill. But the notice of the offer not being so expressed, and being read as an offer in compliance with the clause, no honest interpretation can be put upon it other than that it was an offer to the plaintiffs. Moreover, the language of the notice of 11th May, 1865, is such that, unless the plaintiffs had insisted on accepting, and if they had been silent at the meeting, the defendant Forman would have been entitled to sell to a stranger. According to the defendants' construction, the notice and the meeting were for a purpose illusory and absurd. But if the notice is to be construed according to the imperative language of the clause, and the plaintiffs, believing that the defendants were acting in good faith, came to the meeting to accept an offer which the defendants had given them notice would be made, and at the meeting stated their acceptance of the offer which the defendants were bound to make,

their right to compel the defendants to sell to them must be complete, unless the court is authorized to construe words which are imperative as giving an option which it is the object of the clause to exclude. Looking at the answer of the defendants, and the evidence, it is plain that they have two objects in view—one is to sell to a stranger; the other is to evade the plaintiffs' positive right of pre-emption. The meeting of the 17th May, 1865, at which they set up the pretence of refusing to make any offer to the plaintiffs, was immediately followed by an attempt to persuade the plaintiffs to consent to a sale to a stranger. According to the defendants' own statement of their case the only reason for refusing to the plaintiffs their right of pre-emption is that they have not money to complete the purchase. But as this is a matter easily brought to the test, and the defendants refuse to bring it to the test, it bears the appearance of a mere pretext. The right to limit a time for payment of the purchase-money affords a sufficient protection. To refuse to give to the plaintiffs that to which they have a right, on the pretext that they are not able to exercise the right, and at the same time to refuse to employ the obvious means of putting the alleged inability to the test, is an injustice which this court ought not to permit. No question arises as to the price, for it has been fixed by the defendant Forman himself. It seems unnecessary to consider the attempt of the defendants to embarrass the plaintiffs in their right to the specific performance of the contract for pre-emption of the repeated proposal to impose a condition as to the purchase of the Sirhowy Railway. In the 27th and 35th paragraphs of the answer the account which the defendants give of their conduct and motives manifests a settled disposition to deprive the plaintiffs of the benefit of pre-emption. Therefore, unless the clear and positive words of the clause, unqualified as they are, can be read as giving to the defendants an option and a discretion which seems to have been carefully and intentionally excluded, the court is bound to protect and enforce by its decree the plaintiffs' right of pre-emption. For this purpose there must be a declaration that according to the true construction of the clause of pre-emption in the pleadings mentioned, and having regard to the notice of the defendant Forman, of the 11th May, 1865, and the proceedings at the meeting on the 17th May, 1865, the plaintiffs are entitled to be considered and declared the purchasers of the shares of the said defendant Forman, at the price of 16,375*l.* per share, and decree the same accordingly.

His Honour subsequently ordered that, the principal and interest, at the rate of 5 per cent. from the 11th May, 1865, must be paid in two months, the plaintiffs taking the profits since that time. An injunction was granted against the defendant Fothergill, and the defendants were ordered to pay all the costs.

STUART, V.C., Feb. 22, 1866.

LILLEY v. ALLEN.

14 L. T. 52.

Vendor and purchaser—Contract—Non-completion—Possession before signing—Payment of purchase-money into court.

VENDOR AND PURCHASER.—*The Court, on motion in a bill for specific performance, ordered the purchaser, who had been let into possession previously to signing the contract, to pay the purchase-money, with interest from the day fixed by the contract for such payment, into court.*

This was a motion for the payment of purchase-money into court to the credit of the above cause, and for the appointment of a receiver in the meantime.

The facts, as stated by the bill, were shortly these :

By an agreement dated the 6th September, 1865, and made between the plaintiff and the defendant, who were clergymen of the Church of England, the former agreed to sell to the latter a freehold chapel called Peckham Chapel, with the furniture, fittings, and all other appurtenances, together with the advowson or right of presentation thereto, for the sum of 2,500*l*. The agreement provided that the purchase was to be completed on the 30th October, 1865, and, if not then completed, that the defendant was to pay interest at the rate of 5 per cent. on the purchase-money from that day until completion, and that the defendant was to take the rents and profits of the chapel from the 29th September, up to which time the outgoings were to be paid to the plaintiff. The agreement also provided that the defendant was to accept such title as the plaintiff had received from his vendors, and that the costs incident to the conveyance and assignment thereof should be borne by the defendant.

The chapel in question was a proprietary chapel, held by the plaintiff under a deed of settlement dated 16th March, 1814.

Before the date of the agreement, namely, on the 3rd September, 1865, the defendant with the plaintiff's consent commenced the performance of regular duty at the chapel. On the 21st September, the plaintiff received a letter from the defendant, in which he said, " I look upon our agreement as settled, as I know of nothing at present to prevent it, even supposing you could not make a title." Further correspondence took place between the parties, in which the importance of being prepared for the completion of the purchase by the day named in the agreement was urged upon the defendant.

In the meantime the defendant proceeded to certain acts of ownership, such as issuing notices to the congregation, in which he spoke of himself as the minister, and the plaintiff as the late proprietor of the chapel, directing the pulpit and the reading-desk to be removed, and part of the chapel to be painted, and receiving the rents and emoluments arising from the chapel.

Subsequently disputes arose as to the nature of the title to be produced by the plaintiff, and a good deal of correspondence both by letter and verbally took place upon the subject, in the course of which the defendant's solicitor insisted that the defendant was entitled to a sixty years' title, and to an abstract at the plaintiff's expense.

Ultimately, on the 7th February, 1866, this bill was filed, praying that the agreement of the 6th September, 1865, might be specifically performed; that it might be declared that the defendant had waived all (if any) his right to call for the further production or investigation of the plaintiff's title to the chapel, and that the agreement might be ordered to be specifically performed upon the footing of such waiver; that the defendant might be ordered to pay to the plaintiff the purchase-money, with interest thereon at the rate of 5 per cent. from the 30th October, 1865, according to the agreement; that a receiver might be appointed; that the defendant might be restrained from receiving the rents and emoluments; that it might be declared that the plaintiff was entitled to a lien for the purchase-money and interest, and for the costs of the suit upon the property agreed to be purchased by the defendant, that the lien might be enforced by the resale of the property, and that the defendant might be ordered to make good any deficiency in the proceeds of such resale as compared with the amount of such lien; that damages might be awarded to the plaintiff against the defendant for his wrongful conduct upon the property; that all necessary accounts and inquiries might be taken; and that the defendant might pay the costs of the suit.

Greene, Q.C., and *A. G. Marten*, in support of the motion, submitted that there had been already an acceptance of the plaintiff's title. The defendant had failed to carry out his part of the contract by paying the purchase-money on the day named in the agreement, and ought to be compelled now to pay it into court with interest at 5 per cent. They cited

Simpson v. Sadd, 2 Sm. & G. 469. *Osborne v. Harvey*, 1 Y. & C. Ch. 116.
Clarke v. Wilson, 15 Beav. 317.

Malins, Q.C., and *Fischer*, for the defendant, contended that he was entitled to a reasonable time to consider whether he would give up possession or not. The defendant was perfectly willing and able to pay the purchase-money as soon as he was satisfied with the title. There was a marked distinction between the cases cited where possession was taken without the vendor's consent, and the present case where the defendant had been willingly permitted to enter upon the property. No waste had been committed, but on the contrary the value of the property had been greatly improved. In the cases of *Tindal v. Cobham* (2 Myl. & K. 385); *Clarke v. Elliott* (1 Mad. 606), the Court refused to order the purchase-money to be paid into court.

Marten here stated that Lord Eldon, in *Clarke v. Elliott*, had made an order for payment into court, but the case had not been reported on appeal.

His HONOUR thereupon directed a search to be made in the registrar's office, when the order of Lord Eldon reversing that of the Master of the Rolls in the case referred to, was found in book A. 1815, folio 1323.

The VICE CHANCELLOR.—Although the contract in the present case is of an unusual kind, still it is quite intelligible. It contemplates the completion of the purchase and the payment of the money on the 30th October. It appears that the defendant was let into possession three days before he signed the contract, and although this is a case which had much better have been arranged by the parties themselves, yet, as it has come before me, I feel it my duty to say that the purchaser being in possession must pay the purchase-money, with interest at 5 per cent. from the 30th October, into court, on or before the 31st March. The motion for a receiver may stand over until that day.

Jan. 27, 1866.

GAUTER v. MEINERTSHAAGEN.

14 L. T. 56.

PRACTICE.—*Substituted service.*

This was a motion *ex parte* that service of the bill, which related to a cargo on board ship in this country, might be made on Messrs. Thompson, Bonar, and Co., merchants in the City, as agents of the defendants. It appeared by affidavit that a correspondence relating to the suit had been had, and that a letter from the defendant, who was abroad, had been written, requesting "that steps might be taken by Messrs. Thompson, Bonar, and Co., to defend for him any suit which might be instituted with reference to the cargo in question." A bill had now been filed with reference thereto.

Druce, in support of the application, referred to

Henderson v. Campbell, before the L.JJ., on application from the Rolls, 34 L. J. N.S. 666.

The VICE-CHANCELLOR made the order.

[IN THE QUEEN'S BENCH.]

Nov. 21, 1866.

JOSEPH GEORGE CHURCHWARD v. THE QUEEN (*Petition of Right*).

14 L. T. 57; L. R. 1 Q.B. 173.

Referred to, *Midland Railway v. London and North-Western Railway*, [1866] E. R. A. 913; 35 L. J. Ch. 831; L. R. 2 Eq. 524; 15 L. T. 264; 15 W. R. 34 (V.C.). Dicta observed upon, *Moon v. Camberwell Borough Council*, 1903, 89 L. T. 595 (C. A.).

Petition of right—Admiralty contract for postal mail service—Nature of.

CROWN.—*The suppliant contracted with Her Majesty's Commissioners of the Admiralty to convey Her Majesty's mails from C. to D., during the continuance of the contract, and the commissioners for and on behalf of Her Majesty agreed to pay the suppliant from and out of the moneys to be provided by Parliament 18,000l. per year; the contract to continue from the date until A.D. 1870:—Held, that there was no obligation on the part of the commissioners to employ the suppliant under the contract, Parliament not having provided moneys for the payment.*

This was a petition of right.

The petition stated that by articles of agreement made the 26th April, 1859, between the Admiralty of the first part, and the suppliant J. G. Churchward of the second part, it was, among other things, witnessed that, in consideration of the payments thereafter stipulated to be made to the petitioner, he did, for himself, &c., covenant, &c., with the said commissioners (of the Admiralty), that he would, during the continuance of the said contract, diligently and faithfully, and to the satisfaction of the said commissioners for the time being, convey in the manner in the said agreement specified, Her Majesty's mails, which should at any time or times, and from time to time by the said commissioners, or Her Majesty's Postmaster-General, or any of the officers or agents of the said commissioners, &c., be required to be conveyed from Dover to Calais, and from Calais to Dover, and from Dover to Ostend, and from Ostend to Dover, as thereafter mentioned, and the said commissioners, in consideration of the premises, &c., did, for and on behalf of Her Majesty, agree with him that they, on behalf of Her Majesty, would pay, or cause to be paid to him, by bills, payable by Her Majesty's Postmaster-General, in seven days from and after the respective dates thereof, a sum out of moneys to be provided by Parliament, after the rate of 18,000l. per annum, by quarterly payments, &c., and that it was further agreed that the said contract should commence on the day of the date thereof, and should continue in force until the 26th April, 1870, and should then determine if either of the parties should have given the other of them twelve months' previous notice in writing of its being their intention that the same should so determine, &c. The petitioner then averred that he entered upon the performance of the said agreement, and did convey Her Majesty's mails in accordance with the said agreement until the breach of covenant hereinafter mentioned, and that, although he, his officers, servants, and agents, have at all times strictly and punctually performed the covenants, &c., and he has always been ready and willing to perform the said agreement, yet the said commissioners did not nor would allow or permit, and did not nor would observe or perform the said agreement on their part, and have broken the same in this: that they have omitted, neglected, and refused to employ the petitioner to carry the said mails, and did not nor would permit him to continue to perform the said agreement, &c., and have thereby prevented him from earning, and deprived him of the moneys, gains, and profits which he would otherwise have derived

and acquired therefrom, and by reason of the premises he has been deprived of the benefits, while he remains subject to the burden, of a certain lease of certain premises situate at Dover, dated the 2nd July, 1859, granted to him by the said commissioners, and which were with the knowledge of the commissioners taken by him for the purpose of carrying out the said agreement. The petition stated other losses as consequent upon the nonfulfilment by the commissioners of their agreement, and he therefore humbly prayed that the sum of 126,000*l.* may be paid to him as compensation for the damages and losses he has sustained, and that Her Majesty would be pleased to indorse upon the petition "Let right be done."

To this petition the *Attorney-General* pleaded on behalf of the Crown.

The second plea (which is the material one) set out the articles of agreement *verbatim*, the only material portion of which, as far as concerns the present question, was a portion of the ninth paragraph, which ran as follows:

"And the said commissioners, in consideration of the premises and of the contractor, his officers, servants, and agents, at all times strictly and punctually performing the covenants and agreements hereby entered into by the contractor, do for and on behalf of Her Majesty, her heirs and successors, agree with the contractor that they, the said commissioners, on behalf of Her Majesty, will pay or cause to be paid to the contractor, by bills payable by Her Majesty's Postmaster-General in seven days from and after the respective dates thereof, a sum out of moneys to be provided by Parliament, after the rate of 18,000*l.* per annum, by quarterly payments, and with a proportionate part thereof should this contract terminate on any other day than a day of payment, &c."

The third plea stated that the said articles of agreement were in the foregoing words, and that the breaches in the said petition mentioned were committed after the 2nd June, 1863, and that the claim made by the suppliant is by virtue of the said articles of the 26th April, 1859, and that the suppliant is the same Joseph George Churchward, and the articles of the 26th April, 1859, are respectively the same as Joseph George Churchward and the contract bearing date the 26th April, 1859, in the statute of the 26 & 27 Vict. c. 99, and the statute 27 & 28 Vict. c. 73, and that no moneys were ever provided by Parliament for the payment of the suppliant for or out of which the suppliant could be paid for the performance of the said contract for any part of the said period subsequent to the 20th June, 1863, or for the payment to the suppliant for or in respect of or out of which the suppliant could be paid or compensated for or in respect of any damages sustained by the suppliant by reason of any of the breaches of the said contract committed subsequent to the said 20th June, 1863.

There was also a demurrer to the petition as being bad in substance.

The suppliant also demurred to the second and third pleas.

By section 15 of the 26 & 27 Vict. c. 99 (the Appropriation Act of 1863), there is this provision:

"And any sum or sums of money, not exceeding 950,000*l.*, to defray the charge of the Post-office packet service, which will come in course of payment during the year ending on the 31st March 1864, which sum includes provision for payments to Mr. Joseph George Churchward for the conveyance of mails between Dover and Calais, and Dover and Ostend, from the 1st April 1863 to the 20th June 1863, but no part of which sum is to be applicable or applied in or towards making any payment in respect of the period subsequent to the 20th June 1863 to the said Mr. Joseph George Churchward, or to any person claiming through or under him by virtue of a certain contract, bearing date the 26th April, 1859, made between the Lords Commissioners of Her Majesty's Admiralty (for and on behalf of Her Majesty of the first part, and the said Joseph George Churchward of the second part, or in or towards the satisfaction of any claim whatsoever of the said Joseph George Churchward by virtue of that contract, so far as relates to any period subsequent to the 20th June 1863."

By section 17 of the 27 & 28 Vict. c. 73 (the Consolidation Fund Appropriation Act of 1864), there is another grant for the Post-office packet service, with

a similar restriction against applying any part thereof to any payment to Mr. Joseph George Churchward in respect of any period subsequent to the 20th June, 1863.

Sir Hugh Cairns, Q.C. (*Bovill, Q.C.* and *Hannen* with him), now appeared for the suppliant; and

The *Attorney-General* (the *Solicitor-General* and *Poulden* with him) for the Crown.

The following cases and statutes were cited :

Cordage v. Pole, 1 Wms. Saund. 119. *Wood v. The Copper Miners' Company*, 2 C. B. 906. ——— *v. Elderton*, 4 H. of L. Cas. 625. *Tobin v. The Queen*, 16 C. B. (N.S.) 355; 10 L. T. (N.S.) 762. *Feathers v. The Queen*, 12 L. T. (N.S.) 114. *Dunn v. Sayles*, 5 Q.B. 685. *Macbeath v. Haldimand*, 1 T. R. 172. *Scott v. Avery*, 5 H. of L. Cas. 811, 823, 837, 853. *Clark v. Watson*, 18 C. B. (N.S.) 278. 26 & 27 Vict. c. 99, s. 15. 27 & 28 Vict. c. 73, s. 17. 23 & 24 Vict. c. 34, ss. 13, 14.

As the judgments of the learned Judges go very fully into all the disputed points, it is unnecessary to give the arguments of counsel.

COCKBURN, C.J.—The discussion which has taken place, and the elaborate and able arguments which we have had the advantage of hearing, have thrown so much light upon the case, and have tended so completely to dissipate any difficulty or doubt which at one time may have weighed upon my mind, that, however great may be the interests concerned, and whatever may be the importance of the case, we should gain nothing by taking further time to consider it; and we shall probably best consult the general convenience by at once giving our judgment upon it. It is necessary at the outset to look carefully to see what is the true substance of this petition. I take it that the real matter of complaint is the breach by the Lords of the Admiralty of an alleged contract to employ the suppliant, Mr. Churchward, to carry the mails between Dover and the ports of Calais and Ostend, and also to do certain services connected with, and subordinate to, that which was the main and principal contract. When we come to consider the contract, in order to see whether it involves an obligation, on which the petition mainly rests, to employ Mr. Churchward in the manner mentioned, we shall find that the contractor, in consideration of certain sums to be paid to him, in the first place the subsidy of 18,000*l.* a-year, and other minor sums, stipulated for incidental services, bound himself to the commissioners to provide and maintain certain steam-vessels of a certain tonnage and power, and cause them to make certain specific voyages between the ports referred to, and to convey in those vessels the mails which the Commissioners of the Admiralty or the Post-office might require to be carried; and he engaged, also, to do certain other things in connection with, and in subordination to, the main matter of the contracts. In the first place, he is to provide vessels when required for the passage of distinguished persons, and also to provide vessels specially for the transmission of the Bombay and China mails, when they happen to be too late for the ordinary mails. He is also to keep in readiness steamers at Calais to land the mails when the state of the tide does not allow of communication with the harbour. All these matters, however, are subordinate to the main subject of the contract. On the other hand, the Commissioners of the Admiralty, in consideration of the services thus to be rendered by Mr. Churchward, the contractor, engaged to pay him a subsidy of 18,000*l.* a-year out of funds to be provided by Parliament. The petitioner alleges in his petition that the Lords Commissioners of the Admiralty have broken their contract in respect of this, that they have not employed him to carry the mails or to perform these other services, whereby he alleges he has been prevented from earning the reward which otherwise would have accrued to him by the performance of the contract on his part. Now, on the part of the Crown, this obligation of the commissioners to employ Mr. Churchward for the purposes of the services in

question (on which obligation the petition rests) is denied, and we are to determine whether there is in this contract, either by express provision or by necessary implication, any such obligation on the part of the Commissioners of the Admiralty, who for this purpose must be deemed to be the agents of the Crown. I have stated the substance of the contract, and it appears clearly that there is no such express covenant. But then, on the part of the petitioner it is alleged it must be necessarily implied. And that is the question—the only question—which we are called upon to determine. Sir H. Cairns has, indeed, in his able argument pressed it upon us that the complaint was not founded only upon the refusal to employ the petitioner in carrying the mails, but also in respect of the other matters. But the larger and more general complaint appears to be only an amplification of the main and more material one—the refusal to allow him to carry the mails. But, taking it in its larger sense and giving it the full construction for which Sir H. Cairns contends, it can amount to no more than this, that, whereas the petitioner, the contractor, has undertaken to perform certain services in respect of which he is to be employed by the Admiralty, and in consequence of which employment he is to claim certain remuneration, the Admiralty have not employed him in respect of every one of these services. Therefore that brings us back to the question whether there is any obligation on the part of the Admiralty to deliver the mails to Mr. Churchward, and to convey them and do all the other services which in the aggregate make up the consideration for the contract on the part of the Crown. Now, that being so, we come to the question whether in this contract, there being no such term expressed, it can be properly and reasonably implied; for, if it cannot, there is no obligation on the commissioners to employ Mr. Churchward in respect of these services which he bound himself by his covenants to perform; and then this petition, which is based entirely upon the assumption of that obligation, of necessity fails. Now, in considering this question, I entirely concur in the proposition laid down by Sir H. Cairns, that although the contract may appear upon the face of it to be obligatory only on one party—there are occasions on which we must imply, though the contract is silent about it, a corresponding and correlative obligation on the part of the other party in whose favour alone it may appear on the face of it to be drawn. No doubt, where the act to be done by the party binding himself can only be done by something of a corresponding character being done by the opposite party, a corresponding obligation to do the thing necessary for the completion of the contract can be implied. Thus, if a man engages to do work and render service which necessitates a great outlay of money and time and trouble, and he is only to be paid by the measure of the work which he has performed, it necessarily pre-supposes an obligation on the part of the person to whom he engages to do the work or render the service to allow it to be done, for otherwise the other party could not earn his remuneration. But in all such cases we must take care not to make a contract speak where it is intentionally silent, and, above all, not to make it speak contrary to what appears from the whole tenor and terms of the contract to be its real meaning. Taking this as the sound and safe rule of construction, I will proceed to consider how far, upon the contract, we are at liberty to imply that covenant on the part of the Admiralty on which the petition necessarily rests. The case may be looked at in two points of view; either with the addition of the condition that the payments under the contract are to be made out of funds provided by Parliament; or without the addition of that condition. The way in which the case was put, apart from that condition, was this,—The contractor has engaged to prepare and provide vessels at a great expense, and he cannot be paid unless he actually performs his contract by conveying the mails, and that although there is no express stipulation by the commissioners to employ him it must be implied. At first sight there is something very striking in this view, but I think, when we come to consider the terms of the contract, we shall see that it is founded on an hypothesis altogether fallacious, and upon a reading which appears to me to be inadmissible. The way

in which Sir H. Cairns invites us to read the contract is, not that the contractor is bound to convey all the mails which he may be required to convey, but all the mails which the Admiralty or the Post-office may require to be conveyed between the ports mentioned. But I think that is altogether a mistake in the reading of the contract. It would involve this extraordinary consequence, that if a war arose in which it was expedient to send no mails except in vessels of war, that would be a breach of the contract. Or that, if it were thought more convenient to send the mails by some other route there would be a violation of the contract. But I cannot think that a true construction of the contract. The true construction of it is this, that the Post-office or the Admiralty are entitled to exact from the contractor that he shall have his vessels in readiness according to the terms of the contract, and shall carry all the mails which they may require him to carry between the ports in question. If that be so, the argument as to the necessity for implying this covenant, and that otherwise the contractor would not be entitled to any remuneration, wholly fails. If, indeed the contract had been that the contractor should be paid not by way of annual subsidy, but according to the number of mails carried, then we might have implied the covenant which is contended for. But, according to my view, the meaning of the contract is, that so long as Mr. Churchward was prepared to carry out the contract, and had his vessels ready (supposing there was no question as to the funds out of which he was to be paid), he would be entitled to his remuneration, so that it is unnecessary to imply the covenant in question. Then arises the second view of the case, whether it makes any difference that there is that condition that the payments shall be out of funds to be provided by Parliament. Both sides relied upon it. Sir H. Cairns put the case thus:—That the contractor has relied upon the good faith of Parliament, and the high sense of national honour upon which Parliament always acts in making good the engagements which the Ministers of the Crown, or the heads of public departments, may have entered into. And that if this service had been allowed to be rendered Parliament would have found the funds, and that, therefore, an obligation on the part of the Admiralty was to be implied to allow him to render the service. That argument to some extent is met by the construction I feel myself bound to put upon the contract. For, if I am right in supposing that the contractor fulfils all that is required of him when he has his vessels ready to carry the mails, then he would have a good case to submit to Parliament. It may be said, however, that he would have a better and stronger claim when he has done the work. And therefore it may be that, if there were no other answer to the argument on the part of the suppliant, he might be entitled to succeed. But then we must look, on the other hand, to the consequences which would follow from the implication of such an obligation upon the Admiralty. These consequences were pointed out by the Attorney-General in the course of his powerful address, and were well worthy the most serious consideration. We start with this, that there is involved in the contract the possibility of Parliament refusing to find the funds. The Commissioners do not make themselves, or their department, or the Crown, answerable for default in payment of the 18,000*l.* a year. It is left to Parliament to find the funds, and in that is necessarily involved the possibility of Parliament, in the exercise of its high powers and its wisdom, refusing so to do. And, in point of fact, we cannot shut our eyes to the fact (for it is sufficiently apparent on the face of the record and the Acts of Parliament) that Parliament has refused to find the funds for two successive years. From the Appropriation Acts we find not merely that Parliament has omitted to find the funds, but that Parliament has had the case before it, and has carefully provided for the exclusion of the claim from the funds it provided; and when we come to consider how far there was in this contract an intention on the part of the commissioners—to be implied from the other terms of the contract—to bind the Crown even in the event of Parliament not providing the funds, let us see what would be the position of all parties concerned if after Parliament refusing to find funds, the commissioners

should have nevertheless continued to employ the contractor. First, the Government would have put itself in a position of antagonism with Parliament, and have virtually set at naught its authority. Secondly, a great public department would have continued to employ a public contractor in the public service without the means of paying him; for, though we are told that possibly in the course of future years Parliament might find the funds, we can hardly suppose that a Minister would be warranted in assuming such a possibility when, so far as experience has gone, Parliament has refused to find the funds; and it appears to me that to employ a public contractor without the means of payment (even if he were willing so to be employed, would be a course of proceeding altogether derogatory to the dignity of the Crown and the honour of the country. Thirdly, the contract certainly could not be enforced under those circumstances by the public department; for, supposing that Parliament refused to find the funds to pay the contractor, he would surely be entitled to resist the enforcement of the contract. A court of equity would probably relieve him against it if it were attempted to enforce it under such circumstances, and probably even a court of law might deem the provision of the funds by Parliament a "condition precedent" to the obligation; and at all events, it is impossible to suppose that a jury would give more than nominal damages. Therefore the practical result would be that, upon Parliament refusing to find the funds, the Admiralty would not be in a position to enforce the contract. Could, then, the contractor enforce it? Such a state of things we cannot suppose to have been intended, and we cannot therefore, imply a covenant which should have such consequences. I am far from saying that if, by express terms, the Admiralty had engaged, whether Parliament provided the funds or not, to employ Mr. Churchward to perform these services, a petition of right would not lie if that contract were broken. In this case, however, there is, it is clear, no such express contract, and we are called upon to imply it. I have described the consequences which would follow from such a contract if it were express, and cannot suppose that a public department, representing the Crown, and entering into such a contract, and knowing that they could only pay the contractor out of the funds provided by Parliament, would, nevertheless, bind themselves to employ him notwithstanding that they had no funds out of which to pay him. Such a course would be clearly inconsistent with the dignity of the Crown or the honour of the country, and it would involve the department in the greatest difficulty with Parliament, if, notwithstanding the refusal of Parliament to find the funds, they should persist in employing the contractor. Looking at these considerations, and also to the fact that another department, the Post-office, had control over the mails, it is unreasonable to suppose that the Admiralty could ever have intended to enter into any such engagement. Let us put the matter to this plain and practical test. Suppose the Admiralty had been required to insert such a stipulation in express terms, that they would continue to employ the contractor notwithstanding that Parliament should refuse to find the funds. Can any reasonable person suppose that the Admiralty, with the startling and anomalous consequences which must ensue thus brought before them, would have assented to such a covenant? And if every one's own good sense must tell him that they would not, how can we imply a covenant on their part which we are morally certain they would never have agreed to? If we were to introduce this term into the contract, we should be violating the sound rule of construction—not to make a contract speak where it is intentionally silent; and still less, to make it say that which it is manifest, from the whole tenor of the contract, the parties never intended to say. I think, therefore, that as the whole case turns upon whether there was this engagement on the part of the Admiralty—that this petition of right fails, and that there must be judgment for the Crown. I agree that if there were no question as to the fund, or if there had been a fund provided applicable to the contract, and if the petitioner, being ready to perform his contract, had been prevented from doing so by the Admiralty, then he would have been entitled

to sustain a claim for remuneration. But then it must have been one quite different from the present, and founded on his right to receive the subsidy. But that is not so. Parliament having refused to provide the funds, he is not in a position to claim the subsidy, and is compelled to base his complaint upon a covenant supposed to be implied, and on which he claims damages. For the reason I have stated I am of opinion that no such covenant can be implied, and that, therefore, as that is the basis of the claim, there must be judgment for the Crown.

MELLOR, J. said he was of the same opinion. It was not contended, he said, that the petitioner, without alleging that Parliament had provided funds, could sustain a claim for nonpayment of the subsidy; but his case was that there was an implied covenant to let him convey the mails, and that he was entitled to damages for its breach. But it could not be conceived that the Admiralty intended, whatever might be the change of circumstances, and the discoveries or improvements in science, to bind themselves, for ten years to come, to send these mails by the vessels of Mr. Churchward. And in considering a question of implication, it was very material to bear in mind the nature of the contract and the position of the contracting party. It was not reasonable to imply such a covenant on the part of a great public department with reference to a great branch of the public service. In any point of view the petition must rest upon such an implication, and as he was unable to draw that implication, he thought there must be judgment for the Crown.

SHEE, J.—The claim, in substance, is that the Admiralty have broken their covenant by not allowing the contractor to carry the mails. But there is no such covenant in terms, and it cannot be reasonably implied. This case stands upon a very different footing from those cited—cases of mere private contracts; and the Appropriation Acts afforded a defence. It was notorious that the Crown could only contract for payment subject to funds being found by Parliament. The condition of Parliamentary sanction was usually imposed upon Government contractors by some such condition as contained in this contract, and such was the reliance upon the justice and honour of Parliament, that the Queen's subjects were not prevented by that condition from entering into such contracts. The inconvenience, such as it was, attached to matters of far more importance than Post-office contracts. Treaties with foreign powers, involving the honour and liability of the Crown, are often dependent upon the acceptance by Parliament of the obligations contracted and the provision of the requisite funds. And a few years ago the fulfilment by the Crown of a treaty between Her Majesty and a co-belligerent—containing a pecuniary guarantee by the Crown—was imperilled by some opposition in the House of Commons and only saved by a majority of three. It was beyond the power of the Admiralty, as the contractor must have known, to contract on behalf of the Crown on any terms but those on which this contract is limited; and I am clearly of opinion that the provision of funds by Parliament would be a condition precedent. The most important department of the public service would be entirely free from the control of Parliament, if this condition were not given effect to. And I am, moreover, of opinion that the direct enactments in these two Appropriation Acts afford a defence to the suit, and that a judgment for the petitioner would be an express violation of those enactments. On these grounds I am of opinion that there must be judgment for the Crown.

LUSH, J. said he also was of the same opinion. The question was whether there was a contract on the part of the Crown, absolute and without any qualification or condition, to employ the contractor for eleven years in the carrying of these mails. It was admitted that there was no express contract to that effect, and the question is whether it can be implied. He was clear that it could not, and that therefore there must be judgment for the Crown.

Judgment for the Crown.

[ADMIRALTY.]

The Right Hon. Dr. LUSHINGTON, Nov. 16, 1866.

THE NORTH AMERICAN v. THE WILD ROSE.

14 L. T. 68.

Collision—Fog signals.

SHIPPING.—Although it is incumbent on steamships (notwithstanding their desire to make all progress) to slacken speed so as to avoid every possible collision; yet this necessity does not in any way relieve sailing ships from the duty of keeping a sharp look out, and sounding such fog signals and bells as the provisions of the statute direct.

Deane, Q.C., and Vernon Lushington for the *North American*.

Brett, Q.C., and Cohen, for the *Wild Rose*.

DR. LUSHINGTON gave judgment in this case, which was an action brought by the sailing ship *North America*, 1,333 tons register, against the British steamship *Wild Rose*, to obtain compensation for damage sustained by reason of the ship's coming into collision, in the river Mersey, about six a.m. on the 23rd May last. The wind was stated as from S.E. to S.S.E., and the weather as calm, but misty. The case for the *North American* was, that while at anchor, with her proper anchor lights exhibited, she having been anchored under the directions of a duly licensed pilot off Seacombe-ferry in about mid-river, the tide being about two hours flood, running from four to five knots; and those on board her being engaged in getting out her jibboom, the *Wild Rose*, which is one of the Seacombe-ferry boats, was observed about two ships' lengths distant coming on at great speed, and that shortly after, the steamer, notwithstanding hailing from the *North American*, ran on into her with great violence, the steamer's stern striking into her port side, before the mainmast, and doing great damage. It was then alleged that the collision was wholly occasioned by the improper navigation of the *Wild Rose* and by the negligence of those on board her, and that it was not caused by the negligence of those on board the *North American*, but was, so far as they were concerned, an inevitable accident. The defence for the *Wild Rose* represented that she is employed for the purpose of plying between Seacombe-ferry and the Liverpool landing-stage, and conveying passengers and goods between those two stations; that about 4.15 on the morning in question she left the Egremont-ferry, where she had been coaling for the Liverpool landing-stage, and that while so proceeding the master of the *Wild Rose* saw the *North American* lying athwart the tide, swinging to her anchor nearly in mid-river, but 'somewhat closer to the Cheshire side; that she reached the Liverpool landing-stage, and while remaining there the fog commenced and gradually increased and extended; that about 5.30 a.m., having left the landing-stage for Seacombe-ferry, she started from Seacombe-ferry for Liverpool, and the fog had then extended, and the *North American* was not visible to those on board the steamer; that on leaving Seacombe-ferry the master of the steamer took his station on the bridge between the two paddle-boxes, and the engineer and helmsman were at their respective posts; that the master of the steamer shaped his course so as to go south of the place where he had previously as aforesaid, on his passage from Egremont-ferry to the Liverpool landing-stage, observed the *North American* lying, and north of another vessel at anchor higher up the river; that from the time when the *Wild Rose* left Seacombe up to the time of the collision, her steam whistle was kept continually sounding, and a good look-out was maintained; that soon after the *Wild Rose* left Seacombe, the fog became suddenly exceedingly dense, and thereupon her engines were immediately slowed; that some short time afterwards the *North American* first became visible to those on board the *Wild Rose*, but at that time the two vessels were so near to one another that it was then quite impossible for the *Wild Rose* to

avoid the collision; that her engines were, however, stopped at once, and were immediately afterwards reversed full speed, and her helm was put hard a-port; but, notwithstanding these precautions, the *Wild Rose* came into collision with the *North American*. The statements in the case of the *North American* were then denied, except those to which the defendants referred; and it was contended that a proper look-out was not kept on board the *North American*, that those on board that vessel did not duly hail the *Wild Rose* at a sufficiently early period; and that they improperly neglected to take any steps to avoid the collision; that, although there was a fog, they did not use and sound her bells, in accordance with the provisions of the Merchant Shipping Act Amendment Act 1862, but wholly made default in so doing; that the place where the *North American* was lying was opposite to a public ferry, and was such as to make it peculiarly incumbent on the *North American* to use all precautions for the purpose of warning other vessels of her position in the river; and that the collision was neither the fault of the *North American* nor the result of inevitable accident. Now, that there was on the morning of the 23rd May, that which any rational man would have termed to have been a fog existing at some time or other in the river Mersey, there cannot be a shadow of doubt, because there is evidence of facts from which that inference must necessarily be drawn: these are the entries from three of the landing places, and the fact that vessels had crossed backwards and forwards, and all of them had used the whistle. Assuming that to be a proved circumstance, but at what particular time the fog prevailed, and at what particular part of the river it was so dense as has been represented, is another and a very different question, upon which there is much contradictory evidence. Here is a vessel of 1,300 tons lying in the river Mersey at anchor, and she is run into almost, if not quite, in a straight line, by a steamer whose custom and habit it was to cross the river plying for passengers. Under these circumstances there is no doubt what is the law, viz., that the steamer must show that that collision was occasioned by inevitable accident, and circumstances she could not control, or that it was exclusively the fault of the *North American*, since it is manifest that a vessel lying at anchor is incapable of getting out of the way, or of adopting any measure which might prevent a collision, at least to some extent. In the course of the argument it was suggested, but not argued, that the fog might have been so dense that it would have been incumbent on the steamer not to have proceeded on her usual occupation because of the danger she might incur. Had the circumstances given in evidence produced such a case, the court would not, for a moment, have hesitated in saying that it would have been the duty of the court, upon these pleadings, to have taken cognisance of it, and to have considered the case upon the fact, proved or not proved. I wish to make a reference, as it is a matter of great importance, whether steamers are at liberty to follow their avocation in a thick fog, when following that avocation might produce damage to property, goods, or loss of life, to the case of the *Giralamo*, decided by Sir John Nicholl. In that case the vessel was going down the river Thames in tow of a steamer, and having a pilot on board. When she started there was no fog, but a fog came on, and the learned judge laid it down in very strong terms, that it would have been the duty of the master to have superseded the pilot, and to have caused the vessel to come to anchor, rather than incur the risk of collision with other vessels. I, perhaps, might not go quite the whole length that Sir J. Nicholl went on that occasion, but the general principle I should adopt, viz., that if there be an opportunity of stopping, attempting to follow a course which would produce possible injury to life, and certainly to property, it is the duty of those who have the control of steamers, notwithstanding the state of convenience and urgency of passengers, to hold their hand. Looking at the steamer's own description of the state of the morning, and the density of the fog almost immediately after she quitted Seacombe, it was a case in which the utmost vigilance was requisite and necessary, and she ought to have had the very best look-out; and not only so, but to have gone at that

rate which would have enabled her, if taken by surprise, or coming in contact, or apparently in contact, with another vessel, to avoid collision. Taking into consideration the nature of the morning and the risk run, were all proper measures of precaution adopted on board the steamer, and, having regard to the size of the *North American*, was that ship descried by the steamer in due time, and whether or not, despite no bell having been rung on board the *North American*, might she not have been seen in time so as to avoid the collision? If so, the steamer is wholly to blame. If, on the other hand, the weather was so foggy that the *North American* ought to have rung a bell according to the statute, and did not, the *North American* would be in default. Upon the whole of the evidence the court was of the latter opinion, and must hold that the *Wild Rose* was not to blame for the collision, and there must be a decree accordingly.

The Court was assisted by Capt. Redman and Capt. Nesbitt.

KINDERSLEY, V.C., January 31, February 8, 1866.

THE FREEHOLD GENERAL LAND INVESTMENT COMPANY
(LIMITED) v. THE METROPOLITAN DISTRICT RAILWAY
COMPANY.

14 L. T. 96.

Railway—Works—Injury to adjacent property—Compensation—Prescription—Lateral support—Railways Clauses Act, sects. 6, 16.

RAILWAY.—Where the Legislature has authorised a railway to be made, by means of a tunnel or otherwise, through a town or close, to houses or buildings, the railway company are bound, not only to make compensation for any damage which the making of their railway may occasion to adjacent erections, but also, where there may be two modes of constructing their works, to adopt that course which would do the least amount of injury to the neighbouring property.

Motion by the plaintiffs for an injunction to restrain the defendants from further continuing to move or disturb the soil in the space between the wall of the plaintiffs' house and the line of the defendants' railway, until, by underpinning or some other means, they should have made secure the plaintiffs' building from further subsidence or other injury.

The plaintiffs' buildings were situate in Victoria Street, Westminster, and a tunnel, being part of the defendants' line of railway, was in course of construction at the distance of twelve feet from the back of these buildings. Numerous affidavits were filed on each side as to the extent of the danger and of the injury which had been done to the plaintiffs' premises. The affidavits on behalf of the defendants stated that the mode adopted by the defendants in the construction of their railway was the one which was the best calculated to secure the plaintiffs' building from injury. The plaintiffs alleged that the safety of their premises would be more effectually secured by the process of underpinning.

The motion being only part heard on the 31st January the last day of term, it stood over, in consequence of the adjournment of the court till that day, to the 8th February, when evidence was adduced to show that during the interval the works connected with the railway had been almost completed, and that no further subsidence of the plaintiffs' buildings had occurred.

Baily, Q.C. and Waller, for the plaintiffs, in support of the motion, relied upon the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), ss. 6, 16, as showing that the defendants were bound to adopt the best means in their

power to avoid injury to their neighbours' premises, which they were not doing.

The *Attorney-General*, *Glasse*, *Q.C.*, and *Speed*, for the defendants, maintained that they had done everything that lay in their power to avoid injury to the plaintiffs' premises, and that they were not authorised by their Act of Parliament to adopt the process of underpinning. Moreover, the plaintiffs' buildings had not been erected twenty years, and they had not, therefore, obtained a prescriptive right to lateral support for the additional weight caused by the buildings. If any injury had been sustained, it was a case for compensation under the Lands Clauses Act.

Baily, *Q.C.* in reply.

Cases and authorities cited :

Coats v. The Clarence Railway Company, 1 R. & M. 181. *Attorney-General v. London and South-Western Railway Company*, 3 De G. & Sm. 439; *Stainton v. Woolrych*, 23 Beav. 225; Gale on Easements, 3rd ed. 323. *Bonomi v. Backhouse*, E. B. & E. 655; *Hunt v. Peake*, Johns. 705.

The VICE CHANCELLOR said that the Legislature having given power to the railway company to make their works by means of a tunnel close to and through the midst of valuable houses, had of course foreseen that some damage would occasionally be done to the houses near which the railway would pass. But, notwithstanding this, it had conferred upon the company a right to make such a tunnel, even though the making of it should inflict serious injury upon the owners and occupiers of adjacent houses. The company were, however, bound not only to make compensation for the damage sustained, but also, in case there were two ways of constructing the works, to take that course which would do the least amount of injury. That was the effect of the decisions which had been referred to, and he was of opinion that this protection was intended by the Legislature to be given, irrespective of the question whether the owners and occupiers of houses had acquired prescriptive rights. The rule applied as much to an owner for twelve months, as to an owner for twenty-five years. In the present case it appeared that the defendants' works had been practically completed without any serious damage to the plaintiffs' premises having actually accrued. He should therefore make no order upon the motion, and without assuming that the course pursued by the defendants was the best course to avoid injury to the plaintiffs' building, he would allow the question of costs to stand over till the hearing.

KINDERSLEY, V.C., March 1, 1866.

MCLACHLAN v. LORD.

14 L. T. 98.

Practice—*Affidavit verifying extracts from register of foreign court.*

EVIDENCE.—*Leave granted, after time for closing evidence had passed, to file affidavits verifying extracts from a register of a Scotch court of law.*

This was a motion by the defendants for leave, notwithstanding the time fixed for closing the evidence had passed, to file affidavits verifying extracts from the register of a Scotch court, as that court had refused production of the original documents.

The suit had been instituted by one claiming to be next-of-kin of Peter Cochrane the younger, the son of the Peter Cochrane, the administration of whose estate had been the subject of the suit of *Lord v. Colvin*.

The defendants maintained that the extracts in question would completely disprove the plaintiff's case.

Baily, Q.C. and W. Pearson in support of the motion.

Glasse, Q.C. and W. Morris, for the plaintiff, opposed the application.

E. F. Smith, Q.C. and L. Mackeson appeared for different parties in the suit.

Baily, Q.C. in reply.

The VICE-CHANCELLOR said that he was of opinion that the application ought to be granted, for it would be a denial of justice to refuse it. In many cases there were documents in public deposits in a foreign country, which therefore could not be parted with, and consequently secondary evidence was all that could be obtained. Take the ordinary case on petition, where proof of death was necessary, perhaps in France, and an extract from the French registry must be produced and verified. It was true that it might have been tampered with, but the court did not refuse to receive that evidence as an examined copy. Of course the original document was best, but that could not be had; as to the genuineness of the extracts, that would be a separate question. Saving just exceptions, there must be a reasonable time to file the affidavits, say twenty-one days. As to the costs, there being no laches, they must be costs in the cause.

STUART, V.C., February 22, 1866.

COOKES v. COOKES.

14 L. T. 98: affirmed, [1866] E. R. A. 3323; 14 L. T. 157 (L. JJ.).

Order by consent—Motion to vary refused.

PRACTICE.—*Motion to vary an order consented to upon the faith of a statement honestly, though erroneously, made at the bar, and where no evidence of unfairness or surprise was adduced, refused with costs.*

This was a motion to vary an order in the above cause, dated 16th December, 1865.

It appeared that at the hearing, in consequence of a statement honestly, though erroneously, made at the bar, that the income of the estate in dispute was only 500l., the plaintiff had consented to an order then made which directed that the defendant, who was the receiver, and who had not passed his accounts, should continue in receipt of the rents and profits.

The plaintiff, however, had since ascertained that the income amounted to 1,000l., and he now moved to have the words "by consent" omitted from the order on the ground of misrepresentation.

Fischer appeared in support of the motion.

C. Hall and Martineau, contra, were not called upon.

The VICE-CHANCELLOR.—The plaintiff has deliberately consented to the order, and as there is no evidence of either unfairness or surprise I cannot allow the alteration asked for. The motion must be dismissed with costs.

STUART, V.C., March 3, 1866.

DICKINS v. HARRIS.

14 L. T. 98.

Practice—Sole executor abroad—Appointment of receiver.

EXECUTOR AND ADMINISTRATOR.—Where a sole executor was abroad, and the beneficiaries under the will were unable to obtain an account from the person left in control of the property during the executor's absence.

The Court sanctioned the appointment of a receiver.

This was an *ex parte* motion for the appointment of a receiver under the following circumstances:

William Harris, by his will dated 30th May, 1861, after making certain dispositions of his property for the benefit of the plaintiffs, appointed G. M. Harris and the defendant Frederick Willoughby Harris the guardians of his infant children and the executors of his will.

The testator died in 1861, possessed of real and personal estate of considerable value. His will was proved on the 30th September, 1862, by the defendant alone, the other executor having renounced probate. The estate was subsequently realised, and after satisfying all debts, there remained a large surplus.

The defendant was an officer in the army, and it appeared that in 1864, being obliged to join his regiment in the East Indies, he left the management of the trusts of the estate in the hands of a Mr. Hester, who now had the residuary personalty under his control.

The plaintiffs alleged that, although they had frequently applied, they had been unable to obtain an account of the property from Mr. Hester. Hence these proceedings.

E. K. Karlake appeared in support of the motion, and referred to *Faith v. Dunbar*, G. Coop. 200.

The VICE-CHANCELLOR.—I think I shall be justified in granting the order asked for.

[HOUSE OF LORDS.]

Feb. 23, 1866.

HILLS v. PARKER.

14 L. T. 107.

Debt—Mortgage—Money lent—Bills of exchange to secure advances—Redeemable at any time.

BILLS OF EXCHANGE. MORTGAGE.—H. advanced money to P., and by agreement was to receive the whole amount due from P. in acceptances of the D. Company to C.'s drafts at six, twelve, and eighteen months, "but if not sufficient bills at such dates are received from the D. Company, then the balance to be made up in similar bills at twelve, twenty-four, and thirty-six months, upon which 10 per cent. interest shall be payable, such last-mentioned bills to be redeemable at any time":—Held (affirming the judgment of Westbury, L.C.), that the word *redeemable* implied that the debtor P. might take up the last-mentioned bills at any time, irrespective of the other debts due by him to H.

Semble, P. might take up any one or more of the bills at any time: (per Cranworth, L.C.).

Bills of exchange are not proper subjects of mortgage, and are prima facie presumed to be given in part payment as they become due.

The principal question upon this appeal was, whether the respondent was entitled on the 23rd March, 1858, the date of the tender hereafter mentioned, to redeem three bills of exchange, dated respectively the 25th February, 1858, for the several sums of 2,800*l.*, 2,933*l.* 6*s.* 8*d.*, and 3,066*l.* 13*s.* 4*d.*, and payable at twelve, twenty-four, and thirty-six months, upon payment or tender to the appellant Frank Clarke Hills, of the sums of 8,000*l.* (the amount of the principal monies comprised in the said bills), and 61*l.* 15*s.* 9*d.* (the amount of the interest due on the said principal sum of 8,000*l.*, at the rate of 10 per cent. per annum from the date of the said bills to the date of the said tender), making together 8,061*l.* 15*s.* 9*d.*; or whether the said bills were not redeemable upon payment or tender of any sum less than the amount of the balance then due to the said Frank Clarke Hills from the respondent and his late co-partner, the appellant Henry Hills. The rest of the appeal related to questions of costs entirely.

In May, 1856, the respondent, Richard Parker, agreed to enter into partnership with Henry Hills, brother of Frank Clarke Hills, in the business of salt manufacturers. Henry Hills possessed no capital, but F. C. Hills agreed to furnish it, and was a party to the indenture of copartnership, agreeing substance to find money for the working of the partnership, receiving 10 per cent. interest on his advances, and stipulating for repayment of the principal by certain annual instalments.

Afterwards Mr. Parker contracted to sell the Imperial Salt Works to Mr. Corbett, and after some negotiation, an agreement in writing, dated the 15th January, 1858, was made and signed between and by the appellants and respondent. Such agreement was in the following terms:

Proposals.—Mr. F. C. Hills to purchase of Scott's representatives the freehold estate called the Imperial Salt Works at Stoke Prior, Worcestershire, and with the concurrence of Mr. Richard Parker and Mr. Henry Hills hereby expressed to carry out the contract for sale made by Mr. Parker with Mr. Corbett. Mr. F. C. Hills to receive the whole of the amount due to him from Parker and Hills by acceptances of the Droitwich Company to Mr. Corbett's drafts at six, twelve, and eighteen months, but if not sufficient bills at such dates are received from the Droitwich Company, then the balance to be made up in similar bills at twelve, twenty-four, and thirty-six months, upon which 10 per cent. interest shall be payable, such last-mentioned bills to be redeemable at any time, the balance of the purchase-money to be paid into Parker and Hills' banking account with the Stourbridge and Kidderminster Bank at Bromsgrove, out of which the debts of Parker and Hills are to be paid, and the balance held by them as stakeholders. The annuity to be granted by Mr. Corbett to Mr. Parker to be deposited with the said bank as stakeholders. The time for completion to be the 1st February, 1858. This arrangement to be without prejudice to the rights of the parties hereto independently of this agreement. These proposals and terms agreed upon the 15th January, 1858, by us the undersigned.

(Signed)

F. C. HILLS.

HENRY HILLS.

RICHD. PARKER.

After the execution of the said agreement, Mr. F. C. Hills contracted to purchase from Scott's representatives the reversion of the said salt works for 22,500*l.* At that time F. C. Hills claimed as owing from Hills and Parker to him the sum of 15,059*l.* In pursuance of the agreement three bills for 2,800*l.*, 2,933*l.*, and 3,066*l.*, drawn by Corbett, and accepted by the Droitwich Salt Company, were received by F. C. Hills. Each of those bills was dated

25th February, 1858, and was for the principal sum of 2,666*l.*, with interest at 5 per cent. for twelve, twenty-four, and thirty-six months respectively. On the 23rd March, 1858, the respondent Parker, after three days' notice of his intention to redeem the bills, tendered the appellant F. C. Hills the principal sum of 8,000*l.*, and interest at 10 per cent. from the date of the bills till the day of tender, being 6*l.* The tender was refused by F. C. Hills, unless he received from Parker and Hills the whole of the balance due to him, which he said was about 15,143*l.*

The respondent Parker then filed his bill in the Court of Chancery, claiming to be entitled to redeem these bills.

Wood, V.C., by his decree, declared that the respondent Parker was not entitled to redeem the three bills, except on payment of the whole balance of debt.

On appeal to the Lord Chancellor, the decree was reversed, the following being the material part of the judgment of

LORD WESTBURY, L.C.—We then come to the consideration of the next point, and here I have at once to consider the propriety of the decree. Now, the Vice Chancellor has held, in dealing with the matter upon principles applicable to mortgages, that the latter part of the agreement is to be understood as giving to Mr. Parker the right to redeem the second set of bills, not upon payment of such sum only as they represented, but upon payment of that sum, whatever it be, which, after deducting what Mr. Hills was bound to deduct in respect of the first set of bills, might have remained due to him; and the Vice Chancellor has accordingly, in his order, embodied that declaration. Now, this is a very material point, because it is one of the principal issues raised in the cause; and the first clause of the prayer of the bill is directed to the determination of that issue. Mr. Parker insists that the object of the second part of the agreement was this. He says: "I shall receive under my contract with Mr. Corbett a second set of bills, bearing interest only at 5 per cent.; but you, Mr. Frank Clarke Hills, chose to impose upon me a continuance of my original liability, under the deed of May, 1856, and as long as those bills are current, you require interest at 10 per cent. upon those bills, instead of being content with the interest which it is provided they shall bear." Accordingly, these bills during their currency, which was a protracted period, became a considerable onus upon the shoulders of Mr. Parker, and Mr. Parker therefore stipulated, "I shall be at liberty to redeem these bills, on payment of Hills' debts; I shall thereby exonerate myself from the obligation of paying 10 per cent. in respect of a sum which, as between me and my debtor, carries only 5 per cent." Now, I cannot for a moment mistake the meaning of this agreement, or the interpretation of the words. What is redeemable? The second set of bills. In what sense were they redeemable? They were redeemable by payment of the money due thereon. They never are treated by this agreement as anything else than a payment *pro tanto* to Mr. Hills of what was due to him after deducting the first set of bills. I think, therefore, it is perfectly clear that Mr. Parker has a right at any time to go to Mr. Hills, and say to him: these bills represent so much of your debt; here is that sum which they represent; and after deducting from the amount for which they were drawn, the interest at 5 per cent. in respect of the period they had to run, Mr. Parker was entitled to reclaim possession and the ownership of those bills. Surely that was the meaning of the agreement. It is the common sense of the agreement; and when you look at the relation between the parties, and the interest that Mr. Parker had to relieve himself from the additional onus placed upon him, no man can mistake that it is the true and rightful meaning of the words. At least, when I say "no man can mistake," I must be understood as speaking with the utmost possible deference to the Vice Chancellor, from whom I may truly say I always differ with a considerable amount of distrust; but in this particular case I am bound to act upon my own opinion of what was the

intention of the parties, and what is, consistently with that intention, the meaning of the words which they have used. I am compelled, therefore, to reverse that part of the declaration in this decree which declares that the plaintiff was not entitled to redeem the three bills, on payment or tender of any sum less than the amount of the balance due on the 23rd March, 1858, the date of the tender. I am not of that opinion. I think it was a separate and independent right, wholly regardless of the position of the parties in respect of the rest of the debt; and that upon payment of what was due on the bills, and confining it with regard to the bills alone, he was entitled, as I have already said, to re-possess himself of those bills. Well, that brings us to the inquiry as to the fact, Was that tender made? The parties acted with great good sense. They did not require the tender to be made in actual money number when spread upon the table, but the agent of one went to the agent or solicitor of the other, and said, "I have so much money ready, wherewith to pay you the sum due upon the bills; deliver me over the second set of bills, and receive that sum of money." It is admitted, in point of fact, that the representation that they had that money ready to be paid by cheque over the counter to the defendant was a true representation. The opposite party said, "I do not put that interpretation upon the agreement, and I must retain this second set of bills until the whole account is cleared." I think that was an erroneous view of the matter, and I am, therefore, of opinion that the view taken by the plaintiff of his position in that particular was the true one. Now, that is a wholly independent issue. It is, in truth, according to my view of the agreement, unconnected with the rest. It was a particular stipulation, generated by that stipulation on the part of Mr. Frank Clarke Hills that those bills should bear 10 per cent. interest, of which one part would not be payable by Mr. Corbett or the Salt Company, but would have to be paid by Mr. Parker personally. Now, that being so, I find, according to my view of the case, that the plaintiff was entitled to have had a declaration and a decree in conformity with the first part of the prayer; and I am obliged to decree—I do not mean to give any order for payment—but I must declare that, being entitled to that relief, he is entitled to so much of the costs of the suit as are incidental to the issue raised in the first clause of the prayer. I have said that I do not mean to direct payment of those costs now, but I make that declaration, and, therefore, the costs will come to be finally disposed of, in point of payment, when the rest of the costs of the suit come to be disposed of. But there remains this, what operation on the rest of the account, and the rest of the claims of the plaintiff, ought the fact of tender, and the fact of its being a rightful tender, to have? Mr. Rolt has very correctly and properly drawn this to my attention, and says to the court, "Do you mean to say that it stopped thenceforth all interest upon the bills? Do you mean to declare that the tender shall be equivalent to the actual payment of so much money at the time of the tender?" I think I must so declare. I am bound to say that, in my view of the case, the tender was made upon a just ground. I am bound to say, consistently with the agreement, the tender ought to have been accepted; and, therefore, I must declare that the tender so made ought to have been accepted by Mr. Frank Clarke Hills, and that the money at that time due upon the bills—that expression will not be mistaken: by the money at that time due upon the bills I mean the nominal amount *minus* the interest in respect of the time that the bills had to run—that the money at that time due upon the bills ought to be regarded in the accounts hereinafter directed, as having been, on that day, paid by Mr. Parker to the defendant, Mr. Frank Clarke Hills.

The defendant now appealed against the decree of the Lord Chancellor.

Rolt, Q.C. and *Marten*, for the appellant, contended that the respondent could only redeem the bills on payment of all the debt for which they were a security, and that the tender was insufficient and was properly refused.

Daniel, Q.C. and *Fischer*, for the respondent, contended that the

respondent was entitled to redeem the bills at any time on paying the principal debt appertaining to each, and the interest at 10 per cent. thereof, and the tender being of the proper amount, it ought to have been accepted.

The LORD CHANCELLOR.—My Lords, although this is a case upon which a great deal of pains has been spent, the point, when it comes to be closely examined, is as short a point as ever was argued at your Lordships' bar. It is whether, according to the true construction of an agreement which bears date the 15th January, 1858, certain bills of exchange that were put into the hands of Mr. Frank Hills, who was one of the defendants in this case, and is now one of the appellants were put into his hands so that he should hold them with the ordinary incidents of a mortgage, or whether they were put into his hands in order that he might apply the money secured by those bills, either by holding them till they became due, or by negotiating them previously, or by having them taken out of his hands by the persons who had put them into his hands in part payment of the money which was due to him from the persons by whom they were deposited. Now the first question, as I ventured to put it in the course of the argument, is this, Is there any mortgage at all? I do not say that there might not be such a thing as a mortgage of bills of exchange, but it has not happened to me in the course of a pretty long familiarity with legal proceedings ever to have heard of such a case. I do not know whether my noble and learned friends can assist me from their recollection, but for my own part I do not remember ever to have met with such a thing as a mortgage of bills of exchange. And there is no wonder that it would be very rare if it ever does happen, because, when a bill of exchange becomes due, it cannot be treated as a mere mortgage security, for the holder of it must then get the acceptor to pay it, and apply it in part or in full discharge of his debt. Therefore it differs in its character essentially from any other kind of mortgage. The question here is, whether there is anything on the face of these proceedings to induce your Lordships to come to a conclusion contrary to that at which the Lord Chancellor arrived, that these bills were put into the hands of Mr. Frank Clarke Hills, in whose hands they were placed by Mr. Parker, in order that he should hold them merely as a security. The reason relied upon for that is derived from the language of the agreement between the parties. I do not go into the facts of the case, because they have been occupying your Lordships all to-day and some portion of yesterday, and your Lordships are all so familiar with them that it is useless to go over them again. The agreement I have referred to is an agreement of the 15th January, 1858. I will not read the first sentence, but the effect of it is that Mr. Frank Clarke Hills was to purchase the fee-simple of certain salt works, and to carry out a certain contract of sale, which had been made with Mr. Corbett, for the purchase of plant and stock, and so forth. The agreement goes on: "Mr. Frank Clarke Hills" (who was a creditor, to whom the firm of Parker and Hills was largely indebted) "to receive the whole of the amount due to him from Parker and Hills, in acceptances of the Droitwich Company to Mr. Corbett's drafts at six, twelve, and eighteen months." These were drafts which were to be given by Mr. Corbett, in order to pay for what have been called the stock and plant, and so forth. It had been represented to Mr. Hill, so he says, and I dare say truly, that this was a very large sum, and probably would cover the whole, or more than the whole, amount due to him. The amount due to Mr. Hills I may state, in a round way, at 13,000*l.* or 14,000*l.*, and it was thought that the stock would eventually produce more, and much more than sufficient to satisfy that demand. But it was possible that that might not be the case, therefore the agreement goes on: "but, if not sufficient bills at such dates are received from the Droitwich Company, then the balance to be made up in similar bills at twelve, twenty-four, and thirty-six months, upon which 10 per cent. interest shall be payable, such last-mentioned bills to be redeemable at any time." Now, what is said on the part of the applicants is, that the expression "such last-mentioned bills

to be redeemable at any time" must be read with the expression (a line or two above) "the balance to be made up in similar bills," and so on, and that it must mean that the balance is to be redeemable, and to be redeemable with the ordinary incidents of a mortgage, which we all know can only be redeemed by the mortgagor paying all that is due. The question is, whether that is a fair construction of this agreement. I confess that I think it is not. I concur with the Lord Chancellor in his opinion, that the meaning of the word "redeemable" in the agreement was that the person who was to pay this debt, namely, Mr. Parker, might take up these bills at any time he thought fit. And I am not at all prepared to say, although such a question is not raised here, that he might not take up any one or more of them. I do not know how that would be. No such question has been raised, and it is not necessary to embarrass ourselves with it. There are several reasons which seem to me to lead to this conclusion, but the one which has satisfied me (for I confess that, in the course of the discussion, I have had considerable doubts upon the subject) is this: it is quite certain that the bills to be given for the stock were to be taken in payment of the debt; that is quite clear. The expression is, "Mr. Frank Clarke Hills to receive the whole of the accounts due to him from Parker and Hills in acceptances of the Droitwich Company to Mr. Corbett's drafts, at six, twelve, and eighteen months." It is not disputed that that meant "to be taken in payment." But what reason is there for imagining that that which was not covered by these bills was to be taken by bills with any other incidents attached to these which were to be taken clearly as payment. The agreement goes on to say, "If not sufficient bills at such dates;" that is to say, if it turns out that the stock does not realise sufficient to pay the whole account that was owing, then "the balance to be made up in similar bills at twelve, twenty-four, and thirty-six months." Supposing there was nothing further, could anybody doubt that those bills were to be taken upon the same footing as the bills which were taken in respect of the stock? There is nothing to indicate any sort of difference in the mode in which they were to be applied. The words following are these: "upon which 10 per cent. shall be payable" (that we understand, because the debt was a debt carrying interest at 10 per cent.), such last-mentioned bills to be redeemable at any time; that is to say, if Mr. Parker, instead of letting these bills run their course, when of course no question could arise upon the word "redeemable," and the money that would be paid upon them would go in liquidation of so much of his debt, chooses to say, "I will pay them off at once as if they were due," he shall be at liberty to do so. That is the view which the Lord Chancellor took of the case, and I quite agree with his Lordship that it is the common sense view of the case, and that which I cannot but think the parties intended. Therefore, without troubling your Lordships at greater length, I shall move your Lordships that the judgment of the Lord Chancellor be affirmed, and in so doing I am quite satisfied that I am doing that which is consistent with justice as well as law.

LORD CHELMSFORD.—My Lords, I entirely agree with the view taken of this case by my noble and learned friend on the woolsack. The point is really one of the shortest kind. Originally the firm of Parker and Hills were indebted to Mr. Frank Clarke Hills for advances made by him bearing interest at 10 per cent. Mr. Frank Clarke Hills wished to call in his money. There had been an agreement at that time entered into between Mr. Corbett, who was going to take a lease of the salt works, and Mr. Parker, that Corbett should pay for the lease and for the stock by certain bills of exchange. In respect of the amount of the valuation of the stock, he was to pay by three equal instalments, by drafts accepted by the Droitwich Salt Company at six, twelve, and eighteen months after date, bearing 10 per cent. interest. Then, for the lease, he was to pay a sum of 10,000*l.* by drafts on the Droitwich Salt

Company, at twelve, twenty-four, and thirty-six months after date, and also by an acceptance by himself for the sum of 2,000*l.*, in that way making up the sum of 10,000*l.* The agreement that was entered into of the 15th January, 1858, upon which (and, indeed, upon a very few words of it) the whole question turns, has reference to the agreement which I have mentioned between Mr. Corbett and Mr. Parker; and, in fact, the bills which were to be received by Mr. Frank Clarke Hills were the bills which were to be obtained from the Droitwich Salt Company by Mr. Corbett, in respect of the agreement of the 9th December, 1857. Now it is observable, in construing the agreement of the 15th January, that the words are not, "Mr. Frank Clarke Hills shall receive as security for the whole of the amount which is due to him from Parker and Hills these acceptances;" but the words are, "Mr. Frank Clarke Hills to receive the whole of the amount due to him from Parker and Hills in acceptances of the Droitwich Company." So that it was clearly contemplated that Mr. Frank Clarke Hills was to receive these acceptances of the Droitwich Salt Company, not as security, but in payment of the balance which was due to him. But although it was expected that the valuation would cover the whole amount which was due to Mr. Frank Clarke Hills from the firm of Parker and Hills, yet it was anticipated that possibly it might not amount to that sum, and therefore it was further provided that, "If not sufficient bills at such dates," that is to say, not sufficient bills to cover the amount that was due, "are received from the Droitwich Company, then the balance to be made up in similar bills at twelve, twenty-four, and thirty-six months, upon which 10 per cent. shall be payable, such last-mentioned bills to be redeemable at any time." Now, those bills at twelve, twenty-four and thirty-six months were bills which were to be taken for the balance of the whole amount which the former bills did not satisfy, which former bills, by the very terms of the agreement, were bills which were to be accepted in payment, and not as security. It appears then that the object of the parties with regard to this agreement was this: Mr. Frank Clarke Hills was a creditor for advances made to the firm of Parker and Hills, which advances were bearing interest at 10 per cent., and it is admitted that Parker and Hills, although the advances were stipulated by the agreement to be paid at definite periods, might, before those periods arrived, have paid the amount, and so have stopped the payment of the 10 per cent. interest of so much of the advances. Looking to that it appears very clearly that the object of the parties with regard to these other bills which were to be taken, supposing that the bills for the valuation were not sufficient, was, that these bills should represent the credit which Mr. Frank Clarke Hills had upon the firm for his advances with sums which he was entitled to receive for interest at 10 per cent. upon them; and that being so, that Mr. Parker should in the same way, by redeeming these bills from time to time, stop the payment of the 10 per cent. interest, which would otherwise be chargeable upon him. This being the case the whole agreement is perfectly clear, because, if it appears from the very terms of the agreement that the original bills, which were the bills to be taken under the valuation, were not to be taken as security, but to be taken as payment, and if the balance was to stand exactly upon the same footing as the original bills, and if those represented, and were, in fact, in payment of moneys which were due to Mr. Frank Clarke Hills bearing 10 per cent. interest; then there is no other proper, or reasonable or common sense construction, as my noble and learned friend has said, with reference to the words of the agreement "to be redeemable at any time," than that before the bills had run their period the interest of 10 per cent. might be stopped by redeeming those bills; that is to say, paying the bills with 10 per cent. interest up to the time of payment. That is the situation of things. There is no doubt whatever that Mr. Frank Clarke Hills might have negotiated these bills, and if he had negotiated the bills he would only have obtained from third persons 5 per cent. But he might have kept the bills in his hands until Mr. Parker thought proper to

redeem them, and if he thought proper to redeem them then Mr. Hills would obtain his 10 per cent. With these few observations it appears to me that the case is perfectly clear, and I agree entirely with the views which my noble and learned friend has taken, and with the decree of the Lord Chancellor.

LORD KINGSDOWN.—I am of the same opinion.

Decree or order affirmed with costs.

[HOUSE OF LORDS.]

Feb. 26, 1866.

PRICE v. SALUSBURY.

14 L. T. 111: affirming, 32 L. J. Ch. 411; 8 L. T. 810; 9 Jur. N.S. 838 (L. JJ.): and 32 Beav. 446; 55 E. R. 175 (M.R.).

Contract—Specific performance—Certainty of terms—Fairness—Contract partly. parol.

SPECIFIC PERFORMANCE.—*A court of equity will enforce an agreement in writing modified by parol, and partly performed, if the terms of the contract can be established with sufficient certainty, if the part performance is clearly referable to the contract proved, if the plaintiff's conduct throughout has been perfectly correct, and if the contract is fair and honest.*

APPEAL.—*A judge who differs from the opinion of the majority of a court from which an appeal lies should always state fully the grounds of his dissent, in order to guide the unsuccessful party as to the propriety of an appeal.*

The object of the present appeal was to obtain specific performance of an agreement, partly in writing and partly parol, entered into by the appellant, a tenant farmer, with his landlord the respondent.

This agreement was to the effect that the respondent should assign to the appellant all his, the respondent's estate and interest in certain lands and hereditaments in the county of Monmouth, held by the respondent as lessee under the Bishop of Llandaff, and also grant to the appellant a lease for three lives of certain freehold lands in the parish of Bishton in the said county, which belong to the respondent in fee, in consideration of a large rent to be paid by the appellant to the respondent.

The defendant (the now respondent) was, in the year 1859, possessed of considerable property, consisting of between twenty and thirty different holdings, besides many cottages and some chief rents, in the parishes of Bishton, Llanmartin, Llandevaud, and Llandewi, in the county of Monmouth. Much of this was held under the diocese of Llandaff, partly on leases for years, which would expire in 1866, and partly on leases for lives, and the rest was freehold land, held by the defendant in fee simple. In 1859, and in the early part of that year, there had been much negotiation and talk between the defendant and the plaintiff respecting these lands, and a proposal was made to the plaintiff by the defendant more than once to take them all at a fixed rent, to be paid in advance. Ultimately, in June, 1859, an agreement was come to which was to this effect:

Be it remembered that the defendant hereby agrees to let, and the plaintiff to take, all and every the leasehold farms, farmhouses, lands, hereditaments, and premises held by him, the said defendant, under the Lord Bishop of the diocese of Llandaff, situate in the respective parishes of Bishton, Llanmartin, Llandevaud, and Llandewi, in the said county of

Monmouth, and the rights, easements, and appurtenances therewith held, used, or enjoyed for and during all the rest, residue and remainders now to come and unexpired of and in the several term and terms of years in the same several and respective premises from the 25th day of December now next ensuing, at the yearly rent of 739*l.* 19*s.* 9*d.*, clear of all existing and future taxes, rates, and outgoings (except property tax), and to be payable by yearly payments on the 28th of December in every year; the said plaintiff to pay to the said defendant one whole year's rent in advance on the 25th of December next, for which the said defendant agrees to allow him interest thereon at the rate of 5 per cent. per annum; and the said plaintiff is to be entitled to the full benefit and advantage of him, the said defendant, of and in all and every the leases of the said premises so granted to the said defendant by the said Lord Bishop of the diocese of Llandaff as aforesaid. And the said defendant hereby further agrees to execute proper assignments of such leases to him, the said plaintiff, when required so to do; provided that, if the said plaintiff shall fail to pay to the said defendant the said whole year's rent in advance as aforesaid, the assignment of the premises shall be forfeited.

That was dated the 23rd June, 1859. The amount of 739*l.* 19*s.* 9*d.* was arrived at by referring to a list of tenants' names, with the sums they paid set opposite to their names, amounting in the whole to 639*l.* 19*s.* 9*d.*, with an addition of 100*l.* per annum.

Immediately after the agreement was executed the defendant signed printed notices to the tenants to quit on the 25th December, 1859, and then he gave these to the plaintiff to deliver to the tenants, which he accordingly did.

In this way notices to quit were signed by the defendant, and were delivered to all the tenants holding under him except the plaintiff himself.

On serving these notices, the plaintiff discovered from the inquiries which he made from the tenants, that the list above referred to was very imperfect.

In one case the sum set against the name was 16*l.* instead of 53*l.*, as it ought to have been; and, in three other instances, no figures at all were inserted, but blanks were left opposite the names of the tenants, which ought to have been filled up with 5*l.*, 25*l.*, and 4*l.* These, added to the 37*l.* deficiency already mentioned, amounted together to 71*l.*, which, added to the 639*l.* 19*s.* 9*d.*, would make the total rental 710*l.* 19*s.* 9*d.* The plaintiff says this error being discovered early in December, 1859, he went through a list with the defendant, and made up the amount of the rent previously paid to be 710*l.* 19*s.* 9*d.*, the sum already mentioned, and that with the 100*l.* agreed upon as the addition to be paid by the plaintiff made up the 810*l.* 19*s.* 9*d.*, which sum was paid by the plaintiff to the defendant, who gave him a receipt for that amount on the 19th December, 1859.

The imperfection of the statement of the amount of rent paid by the defendant's tenants was discovered between June and December by the plaintiff. By his inquiries from the tenants, he discovered that a portion of their holdings were held by them for lives under the see of Llandaff, and also that of a portion of the lands the defendant was seised in fee simple. He also discovered that the boundaries were confused and difficult to be distinguished.

Having ascertained all these facts, on the 26th December the plaintiff called on the defendant and obtained from him a consent to sign a memorandum modifying the first agreement.

Accordingly the plaintiff went away, caused such a memorandum to be prepared, and brought it back to the defendant, who signed it. This second document was in these terms, and was dated 26th December, 1859:

This is to certify that the lifehold property in different parishes, and the freehold property in the parish of Bishton, belonging to me, is to be held by William Price at the same rent per acre per year in proportion of the present rental of the whole after the term of years lease is expired until the longest liver that is in the life lease is expired.

There were still further modifications of the alleged agreement which the plaintiff sought to establish by parol evidence.

The defendant in his answer denied the alleged agreement; said that the terms of agreement were never settled or defined; that he was acting throughout without professional advice, and having regard to the impaired state of his memory, of which the plaintiff was well aware, it would be contrary to equity that specific performance of an agreement so obtained should be decreed.

The Master of the Rolls dismissed the bill without costs. On appeal the Lords Justices differed in opinion, and therefore the decree of the Master of the Rolls was affirmed. The present appeal was then brought.

The *Attorney-General* and *Jessel, Q.C.*, for the appellants, contended that the agreement was fully established, and had sufficient certainty and fairness to justify specific performance being decreed.

Baggallay, Q.C. and *Whitbread* for the respondent.

Cur. adv. vult.

The LORD CHANCELLOR.—My Lords, when this case came to be heard before the Master of the Rolls, his Lordship held that the whole was too vague and uncertain an agreement to be enforced, that the evidence was wholly insufficient to support it, and therefore dismissed the bill without costs. From that decree of dismissal the plaintiff appealed to the Lords Justices. The Lords Justices differed; *Turner, L.J.* thinking that there was an agreement asserted and made out in point of fact, though not reduced to writing, but part performed, and which therefore ought to be enforced; *Knight Bruce, L.J.* thinking that it ought not to be enforced. It was suggested at the bar that his Lordship concurred with *Turner, L.J.* as to the agreement having been made out, but that he thought it ought not to be enforced, by reason of the want of competence of mind of the defendant. I cannot say that that is the way in which I interpret the language of *Knight Bruce, L.J.* I think his Lordship certainly thought that the absence of professional advice, and the evidence that there was (so far as there was any evidence) of imbecility of mind and want of memory on the part of the defendant, presented an insuperable bar. But I do not find that *Knight Bruce, L.J.* at all expressed an opinion that he thought that the agreement was made out if the defendant had been a man of competent mind. But be that as it may, the Lords Justices differed, and the result necessarily was, that the decree of the court below was affirmed. From that decree the plaintiff has appealed to your Lordships' House, and the question is, whether that dismissal was right. I have no hesitation in saying that, in my opinion, I think it was, and I will proceed to state why. In the first place, this agreement is certainly an agreement of a very complicated nature. The first agreement of the 23rd June was in writing, and read *per se* it is perfectly clear and admitted of no doubt whatever as to its construction. That agreement, however, certainly never was put in force, but subsequently it was modified by parol, and I do not at all question the position of the law that in the same way as a court of equity can enforce an agreement wholly in parol but partly performed, so a court of equity will enforce an agreement in writing modified by parol partly performed, if the Court of Equity can arrive at a satisfactory conclusion as to what it was that the parties really agreed to. Now, here the whole appears to depend upon that document of the 26th December, 1859. In the first place, I think that I thus far coincide with *Knight Bruce, L.J.* in his view; that it is not a matter to be left wholly out of our consideration, that in no one of the agreements entered into, or alleged to be entered into, had the defendant the benefit of any professional advice, though this fact, I think, would not, in the circumstances of this case, be sufficient to invalidate the agreement. The evidence satisfies me that

the defendant was (as he swears) a person of infirm memory; but I do not think there is sufficient evidence upon that subject to justify the court in refusing specific performance on that ground alone. I also think that, if there is evidence to satisfy the House that the plaintiff truly represents what passed on 26th December, then he would be entitled to a decree. I agree with Turner, L.J., in thinking that the agreement, though very complicated, is certain; and therefore, if the agreement was made out, and if possession was taken by virtue of it, then I think the plaintiff would be entitled. But I am bound to say that I am not satisfied of this. I think that the very utmost suspicion attaches to the paper of the 26th December. In the first place, your Lordships saw the document itself—a more suspicious instrument has hardly ever been presented to a court of justice. Its execution is denied by the defendant, though averred by the plaintiff in his bill, in his affidavit in support of his bill, and in his parol evidence. [His Lordship then examined the evidence in detail, and concluded as follows:] In these circumstances I have no hesitation in saying that I think the plaintiff's bill was rightly dismissed. Where the Court of Chancery decrees specific performance of an agreement not fully reduced into writing and signed by the party charged, but which has been in part performed, it is essential, first, that the terms on which the parties really contracted should be fully and clearly established; and, secondly, that the part performance is clearly referable to the contract proved. Here I own that I cannot honestly say that I am satisfied that the paper dated on the 26th December, 1859, was really signed by the defendant, or, at all events, signed in circumstances which would warrant any court in acting upon it as expressing what was really agreed between him and the plaintiff; and further, I am not satisfied that when the plaintiff obtained possession of the property in dispute he did so in performance of any other contract than that of the 23rd June, 1859, modified only by the correction of the rent. If in arriving at this conclusion any hardship is imposed on the plaintiff I regret it. But he has no one to blame but himself and his advisers. If he and his solicitors had disclosed and produced without reserve or hesitation the paper of the 26th December, it is possible that the suspicions now attached to it might never have arisen, or might have been removed. So far from that having been the case, his solicitors are challenged several times to produce all the documents, and the defendant in his cross-examination says something to this effect: "We were not so foolish as to go and produce papers that might turn against us." Under these circumstances I think it my duty to move your Lordships to affirm the decree of dismissal already made, and to dismiss this appeal with costs.

LORD CHELMSFORD.—My Lords, the agreement stated in the plaintiff's bill, and of which he prays the specific performance, is formed partly on written and partly on parol evidence, and is sought to be enforced on the ground of part performance. A court of equity in exercising its jurisdiction as to the specific performance of agreements has, as Lord Eldon said in *White v. Dawson* (7 Ves. 35), "a discretion regulated upon grounds that will make it judicial." In every case of this description a party seeking the interference of the court must show that his conduct throughout the transaction in which he invokes its aid has been perfectly correct; that the agreement is in all respects fair and honest, and that it has not been obtained in any manner which would render it improper that it should be enforced. These well-known principles applied to the present case will render a decision upon it comparatively easy. In considering the transactions between the parties which led to the institution of the suit, it is not unimportant to remark their different capacities for conducting business. The plaintiff, though an illiterate man, appears to possess considerable shrewdness, and to be thoroughly capable of taking care of his own interests. The defendant, though not in such a state of mental incapacity as to prevent his management of his own affairs, yet is represented by witnesses who have known him familiarly to have had a very

weak and defective memory, which appears to have been the result of an attack of paralysis. [His Lordship then examined the evidence in detail, and concluded:] Under these circumstances it seems to me unnecessary to consider other parts of the case which present difficulties in the way of the plaintiff's obtaining a specific performance of the alleged agreement. I have great doubt whether there was ever any concluded agreement, and whether there is sufficient evidence of the part performance of the entire agreement which the plaintiff seeks to enforce. But I prefer to rest my opinion upon the ground that the plaintiff has left his case in so unsatisfactory a state, and his conduct in some part of the transactions which are open to much observation has been so entirely unexplained, that upon the principle on which equity proceeds in decreeing specific performance of agreements, he is not entitled to the interposition of the court in his favour, and his bill was therefore rightly dismissed with costs.

LORD KINGSDOWN.—My Lords, I entirely agree with the conclusion at which your Lordships have arrived, and I only wish to say a few words as to the opinion of Turner, L.J. I observe that Turner, L.J., states that he has arrived at a conclusion different from that at which your Lordships have arrived, and I confess that I very much regret that his lordship did not explain more fully the grounds of that opinion. Where the judgment which a court pronounces in any case is final there may be no great use in expressing the reasons for which any particular judge dissents from the majority, because they will not in any decree affect the ultimate decision of the case; but where the judgment is not final, the case seems to me to be quite otherwise. The parties there have a great interest in knowing the ground upon which the dissenting judge proceeds, in order that they may judge of the propriety of appealing, and the appellate court has a great interest also in knowing those grounds in order that it may form a better opinion of the matter submitted to its judgment. I entertain so very high and so sincere a respect for the opinion of Turner, L.J., that I confess I regret exceedingly that we have not the assistance of his observations in dealing with the difficulties and intricacies of this case. But having to deal with the case without that assistance, I confess there seems to me to be an insuperable barrier to the relief which is sought by the bill.

Decree affirmed with costs.

STUART, V.C., March 2, 1866.

Re THE SETTLED ESTATES ACT AND HILTON'S TRUSTS.

14 L. T. 129.

Practice—Trust-estate—Purchase without auction—Settled Estates Act, 19 & 20 Vict. c. 120.

SETTLED LAND.—*On a petition for the purchase of a trust-estate without the necessity of a sale by auction,*

The Court referred the matter to chambers, and directed that, if it should appear by the certificate, that it was fit and proper, and for the benefit of all parties interested, that the petitioner should be the purchaser of the property, a conveyance should be made to that effect.

This petition was presented for the purpose of obtaining the court's sanction to the purchase of trust property without the necessity of a sale by auction.

The facts were these:—

William Hilton, by his will dated in January, 1855, devised to trustees certain real estate in Essex in trust for his eldest son, the petitioner, William Hilton, for life, with remainder to his children, and, in default, as to one-third, for his, the testator's, son George and his children; as to another third, for his daughter Elizabeth Sarah and her children; and as to the remaining third, for his daughter Ellen and her children, with remainder over.

The testator directed that the residue of his real and personal estate should be divided equally amongst his above-mentioned children. The will contained provisions against anticipation, and for cesser of the life-estate in the event of alienation, and clauses of survivorship and accruer.

All of the testator's children were of mature age, and all, with the exception of Ellen, who had one son aged twenty-seven, were unmarried.

The petitioner was desirous of purchasing the property left by the testator, and as all parties interested were willing, a valuation at 2,500*l.* had consequently been made, but the petitioner, in order to avoid the expense and delay of a sale by auction, was willing to give 3,115*l.* It was proposed that the purchase-money should be invested in other freeholds, subject to the same trusts.

The petition prayed that the petitioner's offer might receive the sanction of the court, and that the trustees might be directed to convey the property upon payment of the sum of 3,115*l.*

Malins, Q.C., and *J. Napier Higgins*, for the petitioner, submitted that, as the application was one in which all parties concurred, an order might be made at once without any reference to chambers.

Lindley, for parties in remainder, offered no opposition.

Greene, Q.C., for the trustees.

The VICE CHANCELLOR.—I cannot make the order required without referring the matter to chambers, but I will now direct that, if it shall appear by the certificate that it is fit and proper, and for the benefit of all parties interested under the will, that the petitioner should be the purchaser of this property, a conveyance may be made to that effect.

[PROBATE.]

Feb. 13, 1866.

HARRELL v. WILTS AND HUMBLEY.

14 L. T. 137; 12 Jur. N.S. 673.

Testamentary suit—Partnership—Refusal to appoint an administrator pendente lite.

WILL.—*The court will not, in the absence of very strong circumstances to justify its interference, appoint an administrator pendente lite in the case of partnership property.*

The plaintiff propounded the will of Humphrey Whittaker Flower, deceased, dated the 6th January, 1862. The defendants pleaded that the execution of such will had been obtained by the fraud of the plaintiff and another; and the defendant Wilts also propounded a will of an earlier date, in

which the plaintiff was named executor. In the year 1850 the plaintiff and deceased became joint tenants of a farm called Cocum, at Barton Stacey, Hampshire, on a lease for seven years, at the expiration of which they continued yearly tenants of the same farm. In 1856 they became joint tenants of another farm at Barton Stacey, and this joint tenancy continued until the death of the deceased. The plaintiff had advanced two-thirds and the deceased one-third of the capital for the stocking and carrying on of this farm. On the suggestion that the plaintiff was selling the stock and produce of the farm unnecessarily and unduly,

Dr. Wambey, on behalf of the defendants, moved for the appointment of an administrator *pendente lite*, and relied on

Bellew v. Bellew, 34 L. J. 125; 13 L. T. (N.S.) 247.

Dr. Spinks, for the plaintiff, resisted the application.—The court never granted a joint administration, and still less would it force on the plaintiff a hostile administrator to administer his property.

Sir J. P. WILDE.—I think the general rule laid down in the case of *Bellew v. Bellew* by no means applies to cases of this kind. When a man dies, the court confides the administration of his property to some person's hands where there is no one already entitled to take possession of it, to bring in the estate, and to make demand of payment of debts due to it. But when a man dies who is in partnership with another person, the case is obviously different. In this case the plaintiff and deceased were joint tenants in the same property; and as, until an account is taken in equity, there is no portion of the property which belongs to one more than to another of them, there is therefore nothing for an administrator *pendente lite* to lay his hand upon. To appoint an administrator under these circumstances would be to appoint some third person to wrangle, I may say, with the remaining partner as to the mode of carrying on the business, and the mode in which the partnership property should be disposed. Such an arrangement would not at all conduce to beneficial results to either party. If I were to adopt such a doctrine in the case of partners in commerce, and say that when one partner died a third party—a stranger to the business—should be appointed to watch over the estate of the deceased, it would be productive of more injury than benefit. I do not say that a case may not be made out to justify the interference of the court even in such an instance; but, in the absence of very strong circumstances, the court will not so interfere. Is this a case of that kind? I am of opinion that it is not; but if the parties still think that they can establish a case strong enough to induce the court to interfere, they can make application on a future occasion. At present the application must be refused.

Motion refused.

LORDS JUSTICES, March 6, 1866.

COOKES v. COOKES.

14 L. T. 157: affirming, [1866] E. R. A. 3309; 14 L. T. 98 (V.C.).

Practice—Order “by consent”—Motion to omit those words—Bill.

PRACTICE.—In reliance upon a misrepresentation made *bonâ fide* at the bar as to the yearly returns of an estate, the plaintiff by his counsel consented to an order, which was drawn up as made “by consent.” The error was afterwards discovered, and the plaintiff moved to omit those words. The motion was refused by Stuart, V.C., and

The Lords Justices affirmed the order, *sed dissentiente* Knight Bruce, L.J.

This was a motion to discharge an order of Stuart, V.C., which is reported 14 L. T. 98. It is unnecessary to repeat the circumstances as there stated.

Fischer supported the motion on behalf of the plaintiff the applicant.

Bacon, Q.C., Charles Hall and Martineau opposed it on behalf of various parties to the suit.

LORD JUSTICE KNIGHT BRUCE said that his learned brother and himself did not take altogether the same view of this case. His own impression was that a binding consent had not been given; it was not a free and spontaneous exercise of will accompanied by an adequate knowledge of the facts. The order should, therefore, not be drawn up as having been made "by consent." As to the particular form of order which it would be proper to make, he would say nothing. On this he intimated no opinion whatever, and only said that whatever its terms might be, the words "by consent" ought to be omitted.

LORD JUSTICE TURNER said that he confessed he could not think that any order ought to be made upon the present motion. Upon the facts and especially considering that the applicant's solicitor had all the accounts, that his client had advised him, and also with his counsel, by whom, as his Lordship believed, this very consent was given, he was of opinion that the applicant could not relieve himself from the consent unless by a bill; and certainly that on a common application with affidavits this court was not justified in relieving him. The motion must be refused with costs.

STUART, V.C., March 16, 1866.

KNIGHT v. KNIGHT.

14 L. T. 161.

Practice—Trustee Extension Act, 1852—Assignment—Vesting order.

TRUST AND TRUSTEE.—*On the refusal of a trustee to comply with an order directing the assignment of trust property, the Court, after a lapse of twenty-eight days, and on an ex parte application, made an order vesting the property in the person entitled to it.*

This was an *ex parte* application on the part of the plaintiff in the above suit for a vesting order.

It appeared that in 1862 a sum of money to which the plaintiff Mrs. Esther Knight was entitled, for her sole and separate use, was advanced on a mortgage on certain leasehold property assigned to the plaintiff, and her husband, the defendant, William Knight, and the survivor, and their executors, &c. Subsequently to this arrangement, on a petition by the plaintiff, the marriage between Mr. and Mrs. Knight was dissolved.

The plaintiff afterwards filed a bill for the purpose of securing the mortgaged property for her own benefit, and obtained an order requiring the defendant as her trustee to assign the premises to her forthwith.

The defendant, however, refused to comply with this order, and the plaintiff was under the necessity of moving the court to effect her purpose. There had been great difficulty in serving the defendant with notice of motion; this, however, was eventually accomplished, but on his not putting in an appearance an order was drawn up to the effect that in the event of his not executing the necessary deed of assignment within four days, a vesting order should be made.

The motion was ordered to stand over for twenty-eight days under the provisions of 15 & 16 Vict. c. 55, s. 2, which enacts, that

In every case where any person is or shall be jointly or solely seised or possessed of any lands, or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned person requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person, in such manner, and for such estate as the court shall direct, or restraining such contingent right in such manner as the court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate.

R. W. E. Forster now asked that, as the twenty-eight days had expired, and the defendant still refused to execute the deed, an order might be made in accordance with the Act vesting the property in the plaintiff.

The VICE CHANCELLOR.—I consider that the plaintiff is entitled to the order.

Wood, V.C., Jan. 26, 27, 1866.

HANSLEY v. WILLS.

14 L. T. 162.

Will—Construction—Word “heirs”—Tenants in common and joint tenants.

WILL.—The testator, by his will, gave a legacy of 2,000*l.* stock to his two daughters, each of them 1,000*l.*, the interest to be paid to them in equal shares for life; the rest of his property to his said children in equal proportions.

By a codicil he directed that, after the decease of his said two daughters, “the property for which they are to receive during their lives the interest which is hereby to be for their sole and separate use, independent of any connections they may form, the said stock shall become the joint property of the lawful heirs of my said children and executors in equal proportions, viz., one-fourth part to the heirs of daughter Nancy; one-fourth part to the heirs of my daughter Lydia; one-fourth part to the heirs of my son John; one-fourth part to the heirs of my daughter Sarah.”—Held, that the gift was a tenancy in common, and that on the death of Sarah the moiety of the legacy became distributable in four equal shares to the “heirs” of the parties named as personæ designatæ.

This was a bill filed for the purpose of obtaining the decision of the court upon the construction of the will of a testator, and that the rights of all parties thereunder might be ascertained and declared.

John Mills made his last will and testament dated 7th July, 1814, and two codicils thereto, as follows:

The last will and testament of me John Mills, of Walcot Place, in the parish of Lambeth, and county of Surrey, written with my own hand this 7th day of July, A.D. 1814, is as follows:—First, I direct that I may be buried in the same manner and in the same grave wherein is deposited the remains of my dear wife, should it be so convenient, and that all the expenses attending the

same be paid within one month after my decease from the ready cash I may die possessed of. Secondly, I give and bequeath unto my daughter Nancy Mills and unto my daughter Sarah Mills 2,000*l.* stock in the Three per Cent. Consols, viz., to each of them 1,000*l.* stock, the same as I have before given to my daughter Lydia and my son John on their settling in life when they left my family. And I likewise give to my said daughters Nancy and Sarah Mills the interest of 2,000*l.* Three per Cent. Consols to be paid to them in equal shares for and during the term of their natural lives, if I die possessed of such stock; and if I should not, then I will that it may be purchased with the other property I die possessed of, and the said 2,000*l.* Three per Cent. Consols to be placed in the joint names of my executors which I hereby appoint, namely, my daughter Nancy Mills, my daughter Lydia Hensley (or Mr. Thos. Hensley acting for her), my son John Mills, and my daughter Sarah Mills, to be paid to them by equal half-yearly payments. The rest of my property, whether of money, goods, or houses, or of any other description which I may die possessed of, I give and bequeath unto my said children and executors in equal proportions share and share alike. This is my last and only will and testament, written with my own hand this 7th day of July, A.D. 1814, and signed this 7th of July, 1814.

JOHN MILLS.

It is likewise my will that after the decease of my said daughters Nancy Mills or Sarah Mills, the property for which they are to receive during their lives the interest which is hereby to be for their sole and separate use, independent of any connections they may form, the said stock shall become the joint property of the lawful heirs of my said children and executors in equal proportions, viz., one-fourth part to the heirs of daughter Nancy Mills, one other fourth part to the heirs of my daughter Lydia Hensley, one other fourth part to the heirs of my son John Mills, and one other fourth part to the heirs of my daughter Sarah Mills.

N.B.—The property in houses I am now possessed of is three small houses, situate in Meeting House Court, Miles Lane, Cannon Street, in the city of London (which I bought by public auction), and which, although freehold, I have had conveyed to me so as to have them entirely at my disposal after my decease. The interest in the lease of one house situate in East Street, Red Lion Square, in the county of Middlesex (left by me at this time to Mr. Bellingham), and the interest in the two leases granted to me by Henry Doughty, Esq., situate in Bedford Street and Brownlow Street, Bedford Row, in the county of Middlesex.

JOHN MILLS.

John Mills, the son, died in 1837 without leaving any issue surviving, and leaving his three sisters his co-heiresses-at-law and sole next-of-kin.

Lydia Hensley survived her husband, and died on the 3rd April, 1862, leaving several children, of whom the plaintiff was the firstborn son, and her heir-at-law.

Nancy Mills died shortly after Lydia Hensley, in April, 1862, having never been married, and leaving the plaintiff and Sarah Wills her co-heiresses-at-law.

Sarah Mills, now Sarah Wills, widow, the survivor, claimed the interest of the whole of the 2,000*l.* Consols for her life.

The plaintiff disputed that any, or at most no more than a moiety, of the interest of the 2,000*l.* Consols was payable to Sarah, and claimed, as heir-at-law of Lydia Hensley, one-fourth, and as one of the two co-heirs of Nancy Mills a moiety of another fourth of the same Consols, subject to Sarah Wills's life-interest, if any.

Giffard, Q.C., and Ramadge, for the plaintiff.—The gift of income is a tenancy in common. The word "heir" as applied to personalty of late has been held to mean heir strictly, as *persona designata*. They cited

De Beauvoir v. De Beauvoir, 3 H. of L. Cas. 524. *Hamilton v. Mills*, 29 Beav. 193.

Cecil Russell (Rolt, Q.C., with him), for Mrs. Wills.—The gift of income is a joint tenancy, and she is entitled to the whole income for her life. The words “after the decease of my daughter Nancy or Sarah Mills,” relate only to the mode of payment. The disposition over is on the happening of a single event; that event must be the death of the survivor. They referred to

M'Dermott v. Wallace, 5 Beav. 142. *Moffat v. Burnie*, 18 Beav. 211. *Smith v. Oakes*, 14 Sim. 122.

The VICE CHANCELLOR, after stating the terms of the will and the events which had happened, said:—The authorities showed that where a gift was to two persons in equal shares, it was a tenancy in common. If the gift over had been to the “heirs” of these two ladies only, it might have been otherwise, but it was given in fourths to the heirs of each of the children, including those two ladies. He considered the intention of the testator was, that each daughter should enjoy the interest of a moiety for her life, and then that it should go over in fourths to the persons answering the description of heirs of each child.

Minutes of decree:—The 2,000*l.* Bank Three per Cent. Annuities to be transferred into the name of Attorney-General by a short day.

Costs of plaintiffs and defendant, as between solicitor and client to be paid out of a moiety of the dividends whereof Nancy Mills was entitled during her life.

Declare that on the death of said Nancy Mills the aforesaid moiety of the 2,000*l.* stock became distributable in four equal shares, and that one of such fourth shares became transferable to the plaintiff as heir of said testator's daughter Lydia Hensley, another fourth share became transferable in moieties to the plaintiff and defendant Sarah Mills, as co-heirs of the said testator's daughter Nancy Mills; another of such fourth shares became transferable in equal thirds to the defendant Sarah Wills, as one of the co-heiresses, and to the respective personal representatives of the said Lydia Hensley and Nancy Mills, and the remaining two co-heiresses of the said testator's son John Mills; and that the remaining one fourth share is by said testator's will bequeathed to or for the benefit of such person or persons as shall be the heir or heirs of the defendant Sarah Wills at the time of her decease.

Consequential directions as to those four shares.

Liberty to apply in chambers.

Decree accordingly.

[COURT OF EXCHEQUER.]

Jan. 12, 18, 29, 1866.

WOODALL v. HINGLEY AND ANOTHER.

14 L. T. 167.

Mines—Injury to adjacent houses by working of—Right to lateral support—Adjacent and subjacent soil—Negligence—Knowledge—Misdirection—New Trial.

MINES AND MINERALS.—*Plaintiff's houses were built more than twenty years ago upon honeycombed land, that is, land underneath and in the neighbourhood of which coal-mines had been worked. In 1862 defendants became the lessees of an adjacent coal-mine and worked it, and in 1864 G., the owner of land adjoining to and immediately intervening between plaintiff's said land and defendants' mine, recovered damages from the defendants in an action for an injury accruing from the sinking of his land by reason of their workings. In an*

action for damage to plaintiff's houses by their sinking in consequence of the mining operations of defendants under G.'s land, the jury, in answer to four distinct questions by the learned Judge, found: 1st, that defendants' working caused the injury complained of; 2nd, that such workings would not have caused it, or any part of it, if the intervening ground and the ground on which plaintiff's houses stood had been left in the solid; 3rd, that the defendants so far knew the ground had not been left in the solid that they ought to have concluded that their operations would be dangerous to the houses; 4th, that plaintiff's land and the adjoining and intervening land had been mined for more than twenty years, so as to make defendants' operations dangerous; and a verdict was thereupon directed for plaintiff. Upon a rule for a new trial, as the ground of misdirection in telling the jury to consider whether the ground under plaintiff's land and under G.'s land was in the solid, instead of putting each point to them separately, and in not asking them to find whether defendants or the owners of the land knew of the excavations for twenty years; it was Held: by the Exchequer (Pollock, C.B., Martin and Channell, B.B.), that the findings of the jury in answer to the questions put to them did not amount to establishing the fact of negligence on the part of the defendants, which was necessary in order to sustain the plaintiff's verdict, and therefore, as the question of negligence had not been distinctly put and answered by the jury, the rule for a new trial must be made absolute.

Quære, per Martin B., whether the existence of an excavation beneath land for twenty years is to cast upon the adjoining owner absolutely the support of the land as if it were unworked land.

The first count of the declaration stated:

That the plaintiff was possessed of land, with houses and other buildings erected and standing thereon, and was entitled to have said land, houses, and buildings supported by the land adjacent thereto, and defendants wrongfully excavated and worked certain coal-mines under the said adjacent land, and dug for and got, and took away coals and earth out of the said mines, without leaving proper and sufficient support for the said land, houses, and buildings of the plaintiff, whereby the same sank and gave way, and the said houses and buildings were weakened, cracked, and injured.

Second count:

For that certain land, with houses and other buildings erected and standing thereon, was in the possession of, &c. (naming several persons), as tenants thereof to plaintiff, the reversion thereof then belonging to plaintiff, who was entitled to have the said land, houses, and buildings supported by the land adjacent thereto, and defendants injured plaintiff's said reversion in the said land, houses, and buildings, by wrongfully excavating and working certain coal-mines under the said adjacent land, and digging for and getting, and taking away certain coals and earth out of the said mines without leaving proper and sufficient support for the said land, houses, and buildings of the plaintiff, whereby (allegation of injury as before), and plaintiff's reversion in the said land, &c., was thereby injured.

Pleas:—1. Not guilty (to the whole declaration). 2. To the first count, that the land, houses, &c., were not the land, &c., of plaintiff, as in the first count alleged. 3. To the first and second counts, that plaintiff was not entitled to have the said land, &c., supported by the land adjacent, as in the first and second counts alleged. 4. To the second count, that the said land, &c., were not in the possession of the said persons in that count mentioned, as tenants thereof to plaintiff, as in the said second count alleged. 5. To the said second count, that the reversion of the said land, &c., did not belong to plaintiff, as in said second count alleged.

The declaration contained also two counts in trespass, but no evidence was offered in support of them, and they were abandoned at the trial.

The plaintiff, who was the widow and devisee of Thomas Woodall, deceased, brought this action against defendants, who were ironmasters and coal-mine

owners at Netherton, to recover damages occasioned to a block of houses belonging to plaintiff by the working of defendants' coal-mines.

At the trial before Byles, J. and a special jury, at the last Worcester summer assizes, it appeared that Thomas Woodall, the plaintiff's deceased husband, bought the ground on which the houses stood between thirty and forty years ago, and some of the present houses were then in existence, and the rest were subsequently built by him on the same piece of ground. At the time of the purchase the British Iron Company (who succeeded Mr. Attwood, ironmaster, who had also worked the mines there) were in possession of the Netherton coal-mines, and it seemed that in 1846 there were complaints of injuries to the property adjacent to plaintiff's houses, arising from the working of the mines, and in 1847 the company paid a sum of money to the plaintiff's husband, the said Thomas Woodall, as compensation for damage done thereby to a portion of his property other than that which was the subject of the present action. In 1862 the defendants became the lessees of the mines and worked them. The land adjoining plaintiff's land and intervening immediately between her land and the defendants' mines belonged to a Mr. Gill, and in 1864 Gill brought an action against, and recovered damages from, the defendants for the sinking of his houses by reason of the defendants' workings.

The plaintiff contended that she had sustained similar injury in various parts of her premises. It was admitted that all the plaintiff's houses and Gill's houses were built on honeycombed land; that is, on land which had been undermined. The witnesses for the defendants stated that the plaintiff's houses were in a cracking and falling condition thirty or forty years ago, when her husband bought them, and they spoke of the various repairs and patchings up of cracks, &c., in them by Woodall from time to time; showing, as defendants contended, that the injury complained of was not the result of their workings. On the other hand, the plaintiff's witnesses corroborated her statement of recent injury from the defendants' workings; and, indeed, two or three of the defendants' own witnesses admitted, on cross-examination, that within the last two years, while defendants had been working the mines, other and new injuries had become apparent in plaintiff's houses, and that injuries had occurred more rapidly than heretofore. It seemed also that props had been very recently put to some of the houses for the first time. The nearest point of the defendants' workings to the nearest part of the injury to plaintiff's property was from twenty-seven to thirty yards, and the depth of the workings from the surface of the ground, from eighty-five to one hundred yards.

The questions put by the learned Judge to the jury, and the answers of the jury thereto, were as follows:

1. Did the defendants' workings cause the injury complained of, or any part of it. *Answer*, Yes.
2. Would these workings of the defendants have caused the injury, or any part of it, if the intervening ground and the ground on which the houses stood had been left in the solid? *Answer*, No.
3. Did the defendants so far know that the ground had not been left in the solid as that they ought to have concluded that their operations would be dangerous to the houses? *Answer*, Yes.
4. Had the land of plaintiff and the adjoining and intervening land been mined for more than twenty years so as to make the defendants' operations dangerous? *Answer*, Yes.

Thereupon Byles, J. directed the verdict to be entered for the plaintiff, the jury finding 100*l.* damages, not including therein anything in respect of that part of plaintiff's property for which compensation was paid in 1847. The learned Judge refused leave to move to enter the verdict for defendants, unless they would consent to be bound by the judgment of the Exchequer, which defendants declined to be; but he stayed execution, that they might move for a new trial on misdirection if they chose so to do.

Subsequently, during the course of the assizes, the learned Judge, upon

ascertaining that the defendants' reason for declining to be limited to the Court of Exchequer was that the case of *Brown v. Robins*, on which the plaintiff relied, was a case in that court, suggested that, subject to the consent of the plaintiff, the defendants should have leave to move without that restriction, and it was so left, no precise understanding being come to between the parties, and nothing more passing on the subject.

Huddleston, Q.C., for defendants, in Michaelmas Term last, obtained a rule to set aside the verdict and enter it for the defendants on the ground that on the finding of the jury the defendants were entitled to have the verdict entered for them pursuant to leave reserved; or for a new trial on the ground that the learned Judge misdirected the jury in directing them to find a verdict for plaintiff, and in putting to them that they were to consider whether the ground the plaintiff's land, and under Gill's land, was in the solid, instead of telling them to consider each point separately, and in telling them they were to consider whether, at the time of the defendants' working, they knew of the excavation, whereas he ought to have asked them to find whether the defendants or the owners of the land knew of them for twenty years. Against which rule

Powell, Q.C., and *H. James*, for plaintiff, now showed cause.¹—As to the alleged misdirection, the Judge was not bound to put the several questions separately. If he put the proper questions it was no misdirection. But here he was not even asked to do so. [POLLOCK, C.B.—How can these things constitute misdirection? The practice of asking the jury to state their opinion on particular questions is of modern origin. It is sometimes very convenient to divide matters on which the jury are to decide, but it would be very pernicious if the Judge were obliged to say. Here are points A, B, C, D, &c. It is clear constitutional law that the jury are entitled to find generally, for the plaintiff or defendant, upon the issue, and cannot be compelled to answer upon particular questions, thus getting from them the reasons for their verdict, which we have no right to know.] Had they been asked, as suggested, they would no doubt have found that defendants knew the state of the land for twenty years. [MARTIN, B.—Is not this the proper question, "Would the damage have happened if plaintiff or the previous occupier had not thought fit to undermine his own land?"] Not if the jury found that the houses had stood on such ground for twenty years. If A.'s house had stood on honeycombed land for twenty years, B. would have no right to come and damage him. There was the additional fact in plaintiff's favour of knowledge found by the jury. The following propositions were contended for: 1. That land had a natural right to support from the subjacent and adjacent land. 2. That buildings so far differed in having no natural right to support; but, after twenty years from their erection, they acquired a right. [MARTIN, B.—That is to say, a man choosing to build a house on excavated ground can, after it has stood for twenty years, prevent his neighbour from working his minerals?]

Stunsell v. Jollard, cited 1 Selw. N. P. 441, 9th edit. *Dodd v. Holme*, 4 Ad. & El. 393. *Hide v. Thornborough*, 2 Car & Kir. 250.

[MARTIN, B.—Those cases do not apply. Here the land under plaintiff's house is honeycombed. There it was solid.] The jury found defendants' knowledge of the state of the ground. [CHANNELL, B.—That finding may mean either knowledge for twenty years, or merely at the time of their operations.] It was enough if they knew at the time. [PIGGOTT, B. referred to *Rowbotham v. Wilson*, in the Exchequer Chamber (8 E. & B. 128; 27 L. J. 61, Q.B.), and the judgment of Bramwell, B., therein. The judgment of the Exchequer Chamber was affirmed in the House of Lords (8 H. of L. Cas. 348; 30 L. J. 49, Q.B.)]

(1) It appeared that the rule was moved to enter the verdict under the supposition that the plaintiff's consent had been given, which was not the case, and therefore, and as Byles J. had not reported that he had reserved the point, the court confined the arguments on each side to the question of misdirection.

Knowledge was shewn to be immaterial in *Bonomi v. Backhouse* (27 L. J. 378; 1 E. & B. 622); that case was reversed by the Exchequer Chamber (28 L. J. 378, Q.B.; 2 E. & B. 646), and that reversal was affirmed by the House of Lords (34 L. J. 181 Q.B.); but the judgment of the House of Lords was upon the question of the Statute of Limitations only, and therefore, the judgment of the Queen's Bench was still applicable to the general law and to the question of knowledge. [MARTIN, B. refers to *Fletcher v. Rylands* (13 L. T. (N.S.) 121 Ex.; 3 H. & C. 774; 34 L. J. 177 Ex.).] There it was expressly stated that there was no knowledge of coal being worked. [CHANNELL, B.—So long as land remains in its natural state the question of knowledge is not material, as a man is entitled to the support of the adjoining land; but when land has been mined and so brought into an artificial condition, as it were, then the question of knowledge may become material.] The moment plaintiff was shown in possession of the houses for twenty years, it was on defendants to show something contrary to the acquisition of the right:

Rogers v. Taylor, 2 H. & N. 828; 27 L. J. 173 Ex. *Solomon v. The Vintners Company*, 28 L. J. 370 Ex.; 2 H. & N. 585. *Webb v. Bird and others*, in the Exchequer Chamber, 4 L. T. (N.S.) 445; 31 L. J. 335, C.P.; 13 C. B. N.S. 84;

and particularly the judgment of Blackburn, J. in the latter case. [MARTIN, B.—Every man has a perfect right to build on his own land, but if he builds on a sandy, loose soil, and the jury find that the house fell in consequence partly of the bad soil on which it was built, and partly in consequence of an act done by a neighbour on his own land adjoining, is there any case to shew that an action is maintainable under such circumstances against the neighbour? It would be contrary to all law.] The character of the soil made no difference:

Brown v. Robins, 4 H. & N. 186; 28 L. J. 250, Ex. *Harris v. Ryding*, 5 M. & W. 60; 8 L. J. (N.S.) 181 Ex. *Humphries v. Brogden*, 12 Q.B. 739; 20 L. J. (N.S.) 10 Q.B.

[CHANNELL, B. refers to *Hamer v. Knowles* (3 L. T. N.S. 746; 6 H. & N. 454; 30 L. J. 102 Ex.).] *Brown v. Robins* was on all fours with the present case, and the judgment of the Lord Chief Baron there was *ad rem* here. A house might have no natural right to support, but after twenty years would acquire it by virtue of an implied grant. An express grant could not be derogated from by the grantor, and an implied grant was not different in that respect. The case of lights was analogous, and there was no more hardship in preventing a man from mining close up to his neighbour's land than in preventing him from building out his neighbour's light:

Palmer v. Fletcher, 1 Sid. 167; 1 Lev. 122. *Partridge v. Scott*, 3 M. & W. 220; 7 L. J. (N.S.) 101 Ex.

A twenty years' user being found, the grant would be presumed as a matter of law. [CHANNELL, B.—Can you apply the same reasoning to a house built on undermined land as to one built on solid land?] There was no difference in principle, only in degree. In both cases a burden was thrown on a neighbour, and in both an implied grant arose from user. It was on defendants to show want of knowledge. They cited also

Pyer v. Carter, 26 L. J. 258 Ex. *Clayton v. Corby*, 2 Q.B. 813; and *Gale on Easements*, p. 206.

Huddleston, Q.C., and *Dowdeswell*, for defendants contra, in support of the rule.—On the finding of the jury that the injury would not have occurred if the ground on which plaintiff's houses were built and the intervening land had been in the solid, defendants were entitled to the verdict. Having incautiously built on an unsound foundation plaintiff cannot lie by for twenty years, and then throw a liability on his neighbours far and near. He must take the consequences of his own act as a contributory. The natural right to support for the houses was given up by plaintiff; but even assuming knowledge for

twenty years on the part of defendants, the court would not assume a grant. The cases of lights and ways were not analogous or in point. The user must be "*nec vi, nec clam, nec precario*;" and at any time during the twenty years the right is being acquired, a neighbour may build up against him. To sustain a presumed grant for the artificial right he claimed, plaintiff must show that defendants knew the liability that was being imposed on them. No case had been cited showing a right, by building on excavated ground, to impose on a neighbour this additional liability to support the building. There were authorities to the contrary:

Wyatt v. Harrison, 3 B. & A. 871; 10 L. J. (N.S.) 237 K.B. *Partridge v. Scott*, 3 M. & W. 220; 7 L. J. (N.S.) 101 Ex.

In Gale on Easements, 3rd edit., p. 323, it is said that, "It was laid down in the judgment of the Exchequer Chamber, in *Bonomi v. Backhouse* (*ubi sup.*), that the right of support for buildings, when acquired, was similar in character to the natural right of support for the soil, already explained at p. 310. This right of support is, therefore, a *negative* easement, and does not come within Lord Tenterden's Act, but can only be acquired by the common law modes of acquiring such rights." Now that could only be by grant, there being no other mode of acquiring a right over another's land. [MARTIN, B.—What do you mean by a *negative* easement?] Not a *positive* one, but an easement not to do something to alter the condition of the property. Mr. Gale describes it, at p. 310, as "not a right to have the whole or any part of the adjacent or subjacent soil left in their natural state, but simply a right not to have the land injured by anything done, however carefully, in the adjoining soil, subjacent or adjacent." Negligence was not alleged in the declaration. It was a relative term with reference to right. Defendants might have done an act negligently with reference to themselves, but not negligently with reference to plaintiff, unless the latter had a right to support from defendants' mine. There were two objections to the acquisition of the right here: first, it was *clam*; secondly, there was no patience, because there was no power of interruption from the adjoining proprietor. There was no evidence that defendants were aware of the state of things twenty years ago, and no onus on them to ask to have the question put to the jury. They cited also

Acton v. Blundell, 9 M. & W. 324; 13 L. J. (N.S.) 289 Ex.; and referred to Gale on Easements, pp. 249 to 269; 2 Roll. Abr. 564, "*Trespass*;" Rogers on Mines, p. 456.

Cur. adv. vult.

CHANNEL, B.—In this case, which was tried before my brother Byles at the summer assizes for Worcester, an application was made by Mr. Huddleston for a rule to set aside the verdict which had been found for the plaintiff for the sum of 100*l.*, and to enter the same for the defendants, or for a new trial. The court is not in a position to give any judgment upon the first part of the rule, but we are of opinion that the case should go down for a new trial. The action was brought by the plaintiff to recover damages sustained by her to certain houses she had built, the land on which they were built having fallen, which the plaintiff attributed to the way in which the defendants had undermined some adjoining land or land very close. There were many points raised in the course of the argument, but one point was stated which, if it had been established in favour of the plaintiff, would have relieved the court from any difficulty in sustaining the verdict that has been found for the plaintiff. That point so in dispute was, whether it could be considered that the finding of the jury had established the fact of negligence on the part of the defendants. The report sent to us by the learned Judge gave the findings of the jury, but did not present to us very clearly the questions which the learned Judge put to the jury, and which we thought were important for us to have, that we might better estimate what was the real weight due to the finding in fact by the jury. We have communicated with the learned Judge, and have obtained from him the form

of the questions he put. Before he put the questions, certain facts were admitted by the counsel on the one side and the other tending to clear the case of some difficulty, but not resolving the case altogether; and the question turns upon the finding of the jury to this effect, that both the plaintiff's land and the intervening land had, for more than twenty years, been so mined as to make the defendants' operations dangerous. They did not say that the defendants knew of the extent to which the plaintiff more than twenty years ago, or those whom the plaintiff succeeded, had underworked his land. Then follows this other finding, that the defendants so far knew that the land had not been left in the solid, that they ought to have concluded that their operations would be dangerous. Whatever other points might have arisen in this case, upon which we say nothing at present, we should have been prepared to sustain the verdict for the plaintiff if we could have seen clearly that the questions put to the jury, and the findings of the jury in answer thereto, amounted to the fact that the defendants had been guilty of negligence. Upon the most careful consideration we have been able to give, we think the finding does not come up to that point. The question of negligence was a very proper question to be put under the circumstances; it has not been distinctly put and answered by the jury, and therefore there must be a new trial.

PIGOTT, B.—I was not in court when the case was heard, and therefore I give no opinion upon it.

MARTIN, B.—If it is meant to be said that it is law that an excavation beneath the ground which has existed for twenty years is to cast upon the adjoining owner absolutely the support of the land as if it were unworked land, I hope the question will be raised distinctly and judgment given upon it.

CHANNELL, B.—I did not mean to give any opinion upon that point.

Rule absolute for a new trial.

[IN THE PRIVY COUNCIL.]

The Right Hon. LORD CHELMSFORD, SIR J. W. COLVILLE, SIR E. V. WILLIAMS,
Feb. 21, 1861.

PAGE v. EDULJEE.

14 L. T. 176; L. R. 1 P.C. 127; 12 Jur. N.S. 361.

Sale of goods—Auction—Conditions of sale—Varying conditions—Resale—Rescission of contract—Resumption of goods by seller.

AUCTIONEERS AND VALUERS. SALE OF GOODS.—*E. at an auction bought goods on certain conditions then declared. Afterwards E. paid the deposit and signed the contract of sale with other conditions annexed:—Held, that the relinquishment of the first agreement was a sufficient consideration for entering into the second; and that the contract completed by the payment of the deposit might well be varied by the signing subsequently of a memorandum inconsistent with it. In some cases the vendor of goods may resell without rendering himself liable to an action, as where goods sold are left in the possession of the vendor and the purchaser will not remove them and pay the price after receiving express notice to that effect. But if before actual delivery (and a fortiori, if after delivery) the vendor resells the property while the purchaser is in default, the resale will not authorize the purchaser to consider the contract rescinded so as to entitle him to recover back any deposit of the price or to resist paying any balance of it which may be still due.*

This was an appeal from a judgment of the Supreme Court of Ceylon.
The action was brought by the appellant, who was the master of a ship *Nova*

Scotian, to recover from the respondent, a Parsee merchant, at Colombo, a sum of 383l. 11s., being the loss caused by a resale of the ship in consequence of the default of the respondent.

The facts are fully stated in the judgment.

W. Williams for the appellant.

F. W. Everitt for the respondent.

LORD CHELMSFORD delivered the judgment of their Lordships as follows:— This is an appeal from a judgment of the Supreme Court of Ceylon reversing a judgment of the District Court of Colombo in favour of the appellant (the plaintiff in the suit), and ordering judgment to be entered for the defendant (the respondent) with costs. The action was brought in the district court to recover the balance of a sum of 1,020l., the amount at which a stranded ship called *Nova Scotian* was sold by the plaintiff, the master, and purchased by the defendant under the following circumstances: The *Nova Scotian* had arrived at Colombo in the month of December, 1862, and was lying there at anchor with a cargo of rice on board, when, on the 18th of that month, she was driven from her anchorage and stranded on the beach near the harbour. Before her stranding, the *Nova Scotian* appears to have been worth 9,000l., and she was under insurance for 7,000l., but the plaintiff thought that her back had been broken by the stranding, and in his opinion it would have cost from 1,500l. to 2,000l. to get her afloat again. Under these circumstances the plaintiff caused two surveys to be held on the *Nova Scotian*, and acting upon the judgment of the surveyors, and under their advice, he advertised her with her tackle and apparel for sale by auction on the 2nd and 3rd January, 1863. The sale took place on the days named. The property sold was arranged in sixty-eight lots, the vessel being the last lot in the catalogue, and was offered for sale separately from her sail, stores, spars, hawsers, and rigging, which were included in prior lots. The catalogue of sale was headed "Catalogue and Particulars of the Sale of the Ship *Nova Scotian*, of Liverpool, 999 tons, built in 1860, as she now lies stranded opposite the Racket Court, condemned on survey to be sold on account and for the benefit of the concerned, with all her sails, stores, &c." The conditions of sale were printed at the foot of the catalogue, and were read out in the room by the auctioneer before the sale commenced. By one of these conditions a deposit of 25 per cent. was to be made on each lot; by another, all goods were to be at the risk of the purchaser from the time of sale; and by a third, all Customs duty was to be paid by purchasers. The defendant's son-in-law attended the sale, and by his authority bought several of the lots, consisting of the tackle, sails, spars, and other articles belonging to the vessel, and the vessel herself was afterwards knocked down to him at the sum of 1,020l. No memorandum was signed in the auction room either by the auctioneer or by the defendant's agent; but after the sale (whether on the same or a subsequent day does not appear) the defendant's son-in-law, on his part, and the auctioneer on behalf of the plaintiff, signed a memorandum to the following effect: "That Cowasjee Eduljee is declared the highest bidder for and purchaser of the ship *Nova Scotian* hereinafore described, at the sum of 1,020l. sterling, at which sum he the said Cowasjee Eduljee doth agree to become the purchaser thereof accordingly, and also agree on his part to perform the conditions of sale, and in consideration thereof the vendors do agree to sell and convey the said vessel unto the said Cowasjee Eduljee, his heirs and assigns, or as he shall direct, according to the before-mentioned conditions." The conditions referred to in this memorandum, which were on the other side of the paper, varied from the conditions read out in the auction room in these particulars:—Instead of a deposit of twenty-five per cent. the purchaser was to pay only ten per cent. There was no condition that the goods were to be at the risk of the purchaser from the time of sale. The purchaser was to pay auctioneer's commission as well as customs duty, and this important condition was added: "Should the purchaser neglect or fail to

comply with these conditions, his deposit money shall be forfeited, and the sale may be enforced, or the vessel may be resold at the option of the vendors; and in case of a re-sale, the increase (if any) of the purchase-money shall be retained by the vendors, and the deficiency (if any) and all costs and expenses shall be made good by the defaulter at the present sale, and be recoverable as liquidated damages." There was conflicting evidence as to whether these conditions were read out when the memorandum was signed. The defendant's son-in-law, who signed for him, stated in his evidence that he "signed the memorandum while it was lying on the table, and did not know what was underneath." That "the only conditions which he knew anything about were those attached to the catalogue." The defendant undoubtedly thought the sale was to be completed by his signing a memorandum upon the conditions contained in the catalogue, as appears from the fact of his having paid 250*l.* immediately before the memorandum was signed, being a deposit of twenty-five per cent. upon the purchase-money, in accordance with those conditions. It was also proved that when the 250*l.* was paid a receipt was asked for, and the auctioneer replied that it was unnecessary, as the memorandum to be signed would be enough; a representation which would materially strengthen the belief of the defendant that the conditions contained in the catalogue were those to which his purchase was subject. The defendant having received authority from the auctioneer, went himself to take possession of the vessel, and directed two anchors to be put out, to prevent her drifting further on the shore. On the 8th January he received a notice from the Board of Health to discharge the cargo of rice, which had become heated, and was occasioning a nuisance; this not having been done, the board proceeded to destroy the vessel by firing into her. A bill of sale was prepared by the legal agent of the defendant, but before it was tendered for the plaintiff's signature, a demand was made upon him to deliver the certificate of registry to the defendant. The plaintiff refused to comply with this demand, on the ground that the vessel having become a wreck it was his duty to give up the certificate to the collector of the customs for transmission to England under the provisions of the Merchant Shipping Act, 1854. On the 12th January, 1863, the auctioneers, Messrs. Ledward and Co., wrote to the defendant the following letter:—"We have the honour to annex on the other side the particulars of the balance of our claim on account of the sale to you of the ship *Nova Scotian*, which we have been required to settle forthwith, and we must request you will enable us to do so this day. We hereby undertake, on account of Captain Page and ourselves, to complete the bill of sale when tendered." To this letter the defendant replied on the 13th January: "In answer to your letter of yesterday's date, I beg to inform you that the captain having failed to comply with his agreement, and having sold the vessel under circumstances which led to its subsequent destruction, and being now, as you are aware, unable to carry out the agreement, I decline to pay the balance of the purchase-money, and shall look to you and the captain for the repayment of my deposit, and the damages which have occurred to me by reason of your default." On the receipt of this letter, Messrs. Ledward and Co. wrote to the defendant on the 14th January in these terms:—"As in your letter of yesterday you decline to pay us the balance of the purchase-money for the hull of the *Nova Scotian*, and other articles purchased by you at public auction, we beg to give you notice that the same, after due publication, will be resold at your risk in terms of the conditions of sale." The ship was accordingly again put up to sale and sold for 500*l.*, and the plaintiff brought his action to recover the difference between the original price and the sum realised upon the resale, together with the auctioneer's commission, the balance claimed, after giving credit for the defendant's deposit of 250*l.*, being 383*l.* 11*s.* The libel of the plaintiff (to which was annexed the memorandum signed on the part of the defendant and the conditions therein referred to, which the plaintiff prayed might be taken as part of the libel) alleged that the defendant agreed to purchase the hull of the ship *Nova Scotian*, as she then lay stranded on the beach, for the sum of 1,020*l.*, according to certain condi-

tions thereunto annexed, and amongst them the stipulation that the purchaser should pay a deposit of 10 per cent. in part payment of the purchase-money, and should pay the remainder on the transfer-deed being executed; but if the remainder of the purchase-money should not be paid, interest at 10 per cent. should be paid by the defendant until payment in full, but without prejudice to the right of the plaintiff (in case the defendant should fail or neglect to comply with the conditions) to treat the deposit-money as forfeited, and to have the sale enforced or to have the vessel resold, at the option of the plaintiff, in terms of the conditions of sale. The libel then alleged the payment by the defendant of the deposit of 250*l.*, his failure to pay the remainder of the 1020*l.*, and the resale of the vessel in terms of the conditions of sale, and claimed the deficiency of the resale, together with all costs and charges attending the same, as liquidated damages. The defendant's answer, in the only parts of it necessary to be noticed, consisted of—1. A denial that he "purchased the vessel on the conditions in the libel mentioned, for that the vessel was put up for sale on entirely different conditions, to wit, the conditions appearing in the annexed document marked letter A (being the catalogue and the conditions therein contained). 2. That although the defendant was ready and frequently offered to pay the remainder of the purchase-money, yet the plaintiff would not convey the vessel nor furnish the defendant with the necessary documents for the preparation of a legal conveyance. 3. That the plaintiff had not, at the time of the sale, and has never since had, the necessary power, right, and authority to sell the vessel or make a good conveyance thereof. 4. That the plaintiff since resumed possession of the vessel and offered the same for sale. And the defendant prayed that the plaintiff's suit might be dismissed with costs and the plaintiff be condemned in reconvention to repay the deposit of 250*l.*, and to pay damages to the amount of 1,000*l.* for the loss of the profit and advantage which would have accrued to him from the vessel when repaired and floated, as well as from the loss of the tackle, implements, and other articles belonging to the said vessel and which have since become useless for that purpose. The case was tried in the District Court of Colombo, witnesses being examined on both sides, and the judge ultimately decided all the issues in favour of the plaintiff. He found that the defendant purchased the vessel subject to the conditions annexed to the libel. That the plaintiff had authority as master to sell. That as the vessel was sold as a wreck, the master was bound to forward her register to the collector of customs for transmission to the port of registry, and that it was not necessary for the defendant to have the certificate in order to enable him to prepare the bill of sale. And that the plaintiff was justified by the terms of the contract of sale in resuming possession of the vessel and selling her, and he ordered judgment to be entered for the plaintiff for 373*l.* 1*s.*, being the amount which he claimed, less 10*l.* 10*s.* said to have been paid by him to counsel, which the Judge thought he was not entitled to recover from the defendant. Upon appeal by the defendant from his judgment to the Supreme Court, it was set aside and judgment ordered "to be entered for the defendant with costs." It was stated at the bar that there was no other record of this judgment than the one printed with the papers, and it was assumed on both sides that, though it is in the general form just stated, it has the effect of entitling the defendant to the return of his deposit and also to the damages of 1000*l.* which he prays by his answer. The ground upon which the Supreme Court decided the appeal in favour of the defendant seems to have been that, the plaintiff having founded his claim upon an agreement with conditions varying from those in the catalogue, in respect of their containing a clause of resale, and the court being of opinion that, upon the facts proved, the defendant did not enter into an agreement containing any such condition; the plaintiff, having wrongfully repossessed himself of the vessel and resold her, had deprived himself of his right to recover the price from the defendant. That this was the view of the case taken by the court appears from the learned C.J. having adverted to the argument on behalf of the plaintiff

that the right of resale existed independently of the stipulations in the signed set of conditions of sale, which he showed not to be law by a reference to the case of *Martindale v. Smith*, 1 Q.B. 389, and other cases in Tudor's Leading Cases. As the district Judge decided in favour of the plaintiff, there was no occasion for him to consider whether the payment by the defendant of the 250l. in part of the purchase-money, did not bind the parties to the contract of sale as completely as if there had been a written memorandum. But the Supreme Court did not take that fact into their consideration, and with reference to it the C.J. said, "After the sale the defendant paid the deposit of 25 per cent. stipulated in the conditions which had been read out, and this payment satisfied the requisitions of the Ordinance 7, 1840, section 21, and the sale and purchase of the ship's hull were thereby made valid and completed according to our colonial laws, and unquestionably the sale and purchase were made and the deposit paid under the conditions of sale read at the auction, and not under those which the plaintiff sets up." The Supreme Court, therefore, must have been of opinion that there was a binding agreement for the sale of the vessel between the parties. If, therefore, the plaintiff had correctly stated his claim in his libel, and had founded it (as he ought to have done) upon a sale according to the conditions read in the auction room, he would clearly have been entitled to judgment, unless any of the objections contained in the answer of the defendant would have been available as a defence. Their Lordships agree with the Supreme Court in thinking that there was no agreement substituted for the one commenced in the auction room and completed by the payment of the deposit, but they must express their dissent from the opinion expressed by the Chief Justice, that "if the defendant knowingly signed conditions which imposed the new obligation on him of paying any loss arising from a resale, such fresh agreement would be insufficient to maintain an action, being entirely without consideration," as under such circumstances the relinquishment of the first agreement would undoubtedly amount to a sufficient consideration. Their Lordships do not doubt that the contract completed by the payment of the deposit might have been varied by the signing subsequently of a memorandum inconsistent with it. Their opinion is founded on the particular circumstances of this case—the acceptance of the deposit under the terms of the conditions read out in the auction room, the silence of the seller on the subject of any changes in the conditions, and the above mentioned conversation at the time of the receipt of the deposit. If the plaintiff had properly framed his libel, precisely the same defences might have been set up as are now contained in the defendant's answer, and therefore in order to prepare the way for a decision upon the real merits of the case it is necessary to consider the objections which the defendant has urged to the plaintiff's right to recover in the present action. Taking these objections a little out of the order in which they are stated in the answer, the first to be considered will be, whether the plaintiff had power, right, or authority to sell the vessel. Upon this issue there seems to be no reasonable doubt that the plaintiff could convey a good title to a purchaser as against his owner. The vessel was lying stranded upon the beach, without the possibility of getting her off, except by the expenditure of a large sum of money. The plaintiff, not trusting to his own judgment alone, procured surveys to be made, and proceeding upon the advice of the surveyors, determined to sell the vessel; a course which, it is reasonable to believe, the owner would have pursued upon a view of all the circumstances if he had been upon the spot. But supposing the plaintiff to have acted upon a mistaken view of the necessity of the case, the defendant could not insist upon there being any implied warranty of title. The plaintiff sold the vessel in the special character of master, and not as owner, and acted upon a *bonâ fide* belief of his authority to sell. The vessel was advertised as a stranded vessel, and the defendant had every opportunity of examining her, and ascertaining whether she had been brought into such a condition as to give the master authority to sell her as a wreck. The next point to be considered in the defendant's answer is the allegation that the plaintiff did not convey the

vessel, nor furnish the defendant with the necessary documents for the preparation of a legal conveyance. This relates to the refusal of the plaintiff to deliver the certificate of registry to the defendant. According to the Ordinance, No. 5, 1852, passed in Ceylon, the law to be administered in this case is the law of England. Now, by the 58th section of the Merchant Shipping Act, where a registered ship is actually or constructively lost, the register is to be sent to her port of registry. The defendant could not, therefore, be entitled to demand its delivery to him, and to refuse to execute the bill of sale upon its non-delivery. The next part of the answer which requires attention is that in which the defendant justifies his refusal to perform his contract, in consequence of the plaintiff having resumed possession of the vessel and offered her for sale. It was upon this ground that the Supreme Court considered that the defendant was entitled to their judgment. If the plaintiff could have proceeded upon a sale on the conditions annexed to the libel, in which there was a power of resale, this defence would necessarily have been excluded; but even if he had rightly claimed upon the contract which took place in the auction room, it would not have been a sufficient answer to the action. In this case the vessel had been delivered to the defendant, and he was in complete possession. The act of the plaintiff in retaking and selling her was wrongful, and entitled the defendant to bring an action of trover, but did not amount to a rescission of the contract. If, when the defendant declined to pay the balance of the purchase-money, and altogether repudiated the agreement, the plaintiff had taken him at his word, and resumed possession without anything more being said, the case might have been different; but instead of the plaintiff agreeing to take the vessel back, and rescind the contract, he gave express notice to the defendant that the vessel would be resold at his risk, "in terms of the conditions of sale." There is no case to be found in the books where, after a sale and complete delivery of a chattel, and the price not paid, the vendor's taking the property out of the purchaser's possession has been held to amount to a rescission of the contract. *Martindale v. Smith* (1 Q.B. 389), and other cases, have determined that, where there is an agreement to purchase property to be paid for at a future time, and the money is not paid at the day, the property remaining in the possession of the vendor, he has no right to sell it, and if he does, the purchaser may maintain trover against him. There may be cases where the vendor might sell without rendering himself liable to an action, as where goods sold are left in the possession of the vendor, and the purchase will not remove them and pay the price, after receiving express notice from the vendor that, if he fail to do so, the goods will be resold. But the authorities are uniform on this point, that if before actual delivery the vendor resells the property while the purchaser is in default, the resale will not authorise the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due. If this is the case where the possession of property sold remains with the vendor, *a fortiori* must it be so where there has been a delivery, and the vendor takes it out of the possession of the purchaser, and resells it. Their lordships have entered thus fully into the various defences contained in the defendant's answer, in order to show that the merits of the case are entirely with the plaintiff; and that, if he had rightly conceived his action, he would have been entitled to recover; but he unfortunately has chosen to proceed upon a different contract from that which he established by proof. The Supreme Court rightly overruled the decision of the district Judge, and held that there was no other agreement between the parties than the one which proceeded upon the conditions read out in the auction room. But, upon their view of the case, they ought to have directed a nonsuit to be entered, and not have given judgment for the defendant, much less a judgment which, according to the admission of the counsel on both sides, gave the defendant the whole of the damages claimed in his answer. No evidence was given of any amount of damages having been sustained by the defendant; and the claim, in respect of the assumed loss of the tackle, implements, and other articles belonging to

the vessel, which were bought at the sale before the vessel herself was knocked down to the defendant, cannot be entertained. It is impossible to sustain either the judgment of the Supreme Court or that of the district Judge. If the judgment of the latter were to be upheld, founded as it is upon the establishment by the plaintiff of his right to resell the vessel under the power contained in the conditions of sale, the judgment would be an answer to any action which might be brought by the defendant for the wrongful act committed by the plaintiff in selling his property. It is unfortunate that the plaintiff should have brought forward his undoubted claim upon erroneous grounds, and their Lordships wish it to be distinctly understood that in their opinion the plaintiff would be entitled, upon a libel properly framed, to recover the price of the vessel, less the deposit; and that none of the defences pleaded would be available to the defendant in such an action. The defendant, on the other hand, would be entitled to recover damages in an action of tort founded on the retaking of possession and resale of the vessel; and these damages would probably be measured by the price which the vessel realised on the resale. Their Lordships therefore trust that the parties will see the propriety of preventing further litigation by an arrangement, of which the fair and just terms must be obvious. As the matter stands before them, they are compelled to recommend to Her Majesty that the judgment of the Supreme Court, and that of the district Judge be set aside, and a nonsuit be entered, and that there be no costs of this appeal on either side.

Judgment reversed.

STUART, V.C., March 17, 1866.

ROBERTSON v. SCOTT.

14 L. T. 187.

Trust-money—Payment into court.

TRUST AND TRUSTEE.—*In a suit for the administration of trust property the Court, on an application by the parties beneficially interested, and where there was no imputation against the trustees, ordered the trust-money to be paid into court.*

This was an adjourned summons in the above suit, for the purpose of enforcing payment by trustees of certain trust-money into court.

Under the will of Alexander Robertson the plaintiff, an infant, was entitled, in the event of his attaining twenty-five, to the sum of 135,310*l.* 13*s.* 2*d.*

The testator died in December, 1856, and in March, 1865, this suit was instituted by the plaintiff for the administration of his estate.

The money in question had been invested in consols in the names of the trustees of the will, and they objected to its being paid into court.

All parties interested in the fund had been served with notice of the application and all, with the exception of an infant and a lunatic, were before the court.

Swanston appeared in support of the summons.

Walford, for the trustees, submitted that as the plaintiff had only a contingent interest it was necessary that all parties should be before the court. It was the duty of the trustees to protect the trust-fund to the best of their ability; and, as there was no imputation against them, it would be contrary to the practice to order the money to be paid into court. He cited

Ross v. Ross, 1 Beav. 89.

The VICE CHANCELLOR.—I am rather surprised at the language ascribed to Lord Langdale in the case of *Ross v. Ross*, for, as far as I know, it is the invariable practice of the court, in suits for the administration of trust-property, to order the money, upon the application of the parties beneficially interested, to be paid into court. The order must, therefore, be to that effect. The costs will be costs in the cause.

STUART, V.C., March 22, 1886.

WHITMAN v. AITKEN.

14 L. T. 248; L. R. 2 Eq. 414; 12 Jur. N.S. 350.

Discussed, *Johnson v. Crook*, [1879] E. R. A.; 48 L. J. Ch. 777; 12 Ch. D. 639; 41 L. T. 400; 28 W. R. 12 (M.R.).

Will—Construction—Legacy—“ Paid or payable ”—Gift over—Vesting.

WILL.—*Testator bequeathed a legacy to D., his executor, coupled with a direction that “ in case of his death before the same should be actually paid or payable to him,” it was to go to his children:—Held, on D’s dying three months after the testator’s death without having appropriated the legacy, that his children, and not his personal representative, were entitled to it.*

This was an administration suit.

David Aitken, by his will dated the 28th April, 1856, left all his real and personal estate to his widow and his nephew David Maxwell Aitken, upon trust to convert and invest the same, and out of the proceeds to pay certain legacies and annuities, and, *inter alia*, a legacy of 2,000*l.* to his nephew, D. M. Aitken, but in case of his death before the same should be actually paid or payable to him, then the trustees for the time being were directed to stand possessed thereof, or the securities whereof the same should be invested, in trust for all the children of the said D. M. Aitken who should attain the age of twenty-one, and if daughters, attain that age or marry, and in case no child of the said D. M. Aitken should acquire a vested interest, then in trust for the children of Ritson Aitken. The testator further, and in the same language previously used with respect to the legacy, gave to D. M. Aitken two-thirds of his residuary estate, and appointed his widow and D. M. Aitken the executor and executrix of his will.

The testator died on the 2nd September, 1856, and his will was proved in the Prerogative Court of Canterbury by the executor and executrix, and in the Exchequer Court of York by the executrix alone.

Three months after the death of the testator, that is to say, on the 4th December, 1856, D. M. Aitken died, leaving a widow and an infant daughter.

Neither the legacy of 2,000*l.* nor the share in the residue had been paid to or appropriated by D. M. Aitken; and the question was whether, by reason of his death before the same was actually “ paid or payable ” to him, his interest passed to his infant daughter or his personal representative.

Cole, Q.C., and *Bristowe*, for the trustees, submitted the question for the decision of the Court.

Malins, Q.C., and *Speed*, for the personal representative of D. M. Aitken, contended that immediately after the testator’s death D. M. Aitken took a vested interest in the property. No other interpretation could be put upon

the words "paid or payable," without making the testator's bounty depend solely upon the diligence of the executor. They cited

Halifax v. Wilson, 16 Ves. 168. *Collins v. Macpherson*, 2 Sim. 87. *Jones v. Jones*, 13 Sim. 561.

Greene, Q.C., and *Fischer*, for the children of Ritson Aitken.

J. H. Palmer, Q.C., and *J. C. Hill*, for the infant daughter of D. M. Aitken, were not called upon.

The VICE CHANCELLOR.—It is true that where the words in a will are ambiguous, the court will resort to the context and the circumstances of the case in order to arrive at their true meaning, and it is also true that even where the words are clear in themselves, they are liable to be controlled by the context; but it is one of the most important rules of construction that clear and indubitable language must, if possible, be carried into effect. So many cases have been reported in which the court has departed from the literal meaning of the testator's words, that one is naturally led to the conclusion that the exact meaning of words is only a matter of secondary importance in forming a decision on questions of this kind. But the language used here is so rational and consistent that the court can do nothing less than carry it out in its literal sense. It is this: "A gift of 2,000*l.* to David Maxwell Aitken, and in case of his death before the same should be actually paid or payable to him, then the trustees for the time being are directed to stand possessed thereof, or the securities whereon the same should be invested, in trust for all his children." The word "paid" points so distinctly to an event which the testator intended should happen, that there can be no doubt about it. "Payable" would seem only to refer to the legatee's death in the lifetime of the testator. In one of the cases referred to in the course of the argument, the words "due and payable" are made use of, and in another "payable and divisible." These are such doubtful expressions that they might well give rise to considerable argument. But in the present case nothing can be more rational and explicit than the language used; it provides that in case of the legatee dying before the legacy shall have been paid to him, his children are to have the benefit of it. With this clear intimation of the testator's wishes before me, I can come to no other conclusion than that the child of D. M. Aitken, and not his personal representative, is entitled to this property. There must be a declaration to that effect.

STUART, V.C., March 12, 13, 1866.

KAY v. HARGREAVES.

14 L. T. 281.

Discovery—Exceptions to answer.

DISCOVERY.—Where all the parties (including the plaintiff) interested under the will and in the partnership of a deceased relation finally settled their respective claims by a deed of arrangement, and more than twenty-four years afterwards, the plaintiff, as next of kin to one of the parties, and upon the ground of his mental incapacity at the time of the execution of the deed, filed a bill for a discovery of all the partnership accounts antecedent to the arrangement, and for a declaration that the deed was not binding as against such party:—Held, upon exceptions to answer, that the plaintiff was not entitled to the discovery sought.

This case came on upon exceptions to the defendant's answer.

The plaintiff was the widow of a Mr. Richard Kay, and the daughter of a

Mr. Thomas Hargreaves, who up to the time of his death in 1822, was a partner in a firm of calico printers, &c. After the death of Thomas Hargreaves, a deed of release, dated the 12th April, 1842, was executed by one James Hargreaves, the defendant John Hargreaves, the plaintiff and her husband, and all the persons interested under the will and in the partnership of Thomas Hargreaves, whereby (*inter alia*) it was arranged that James Hargreaves should receive the sum of 37,000*l.* in respect of his interest in the property.

James Hargreaves died in 1863, and the defendant acted as the administrator of his estate.

The plaintiff was his sister, and one of his next of kin, and she alleged that at the time of the above release her brother's mind was in so weak a state as to render him incapable of understanding the partnership accounts, or the nature of the deed he was called upon to execute.

The bill prayed for a full and complete discovery of all the partnership dealings and accounts from 1822, and for a declaration that the deed of April, 1842, and the accounts, agreement, and other transactions therein recited, ought not to be binding on James Hargreaves, nor upon the plaintiff, as one of his next of kin, and that the amount of James Hargreaves' personal estate, and the plaintiff's share therein, ought to be ascertained.

The defendant in his answer, after stating that all matters in connection with the deed of 1842 had been fully explained to James Hargreaves, and that he perfectly understood them, stated that he, the defendant, could not answer certain interrogatories without making his answer very bulky and incurring great expense. He maintained that both James Hargreaves and the plaintiff were bound by the release of 1842; but that if it should be considered by the court that the plaintiff was entitled to reopen the accounts, then he submitted that inquiries could be directed at the hearing, by which the information now sought might be obtained. The defendant further asked to be allowed that benefit from the release, and all other objections to the discovery which he would have been entitled to had the same been raised by him by demurrer or plea.

To this answer the plaintiff excepted.

The Attorney General (Sir R. Palmer), Bacon, Q.C., and Little, for the plaintiff, contended that it was essential to the validity of a release that all the parties should be fully alive to the nature of the deed they were about to execute; but here the weak intellect of James Hargreaves precluded him from a proper appreciation of his own act. The plaintiff wished to establish her own rights, and the fact of the arrangement having been entered into by all the parties interested in the property could not affect her claim to relief. She was entitled to a full discovery, and if she was excluded now from inspecting the books and investigating the accounts, she would be unable at the hearing to bring before the court those facts essential to the establishment of her case. The discovery, instead of causing delay and entailing expense, would have a contrary effect. As to the exceptions to the answer, the question involved was one more of principle than detail. They cited

Wedderburne v. Wedderburne, 2 Keen, 738, 749. *De La Rue v. Dickenson*, 3 K. & J. 388. *Swabey v. Sutton*, 1 H. & M. 514; 9 L. T. (N.S.) 711. *Lett v. Parry*, 1 H. & M. 517; 5 L. T. (N.S.) 416. *Cook v. Collingridge*, Jac. 607. *Mazarredo v. Maitland*, 3 Mad. 66. *Anon. v. Harrison*, 4 Mad. 252. *Rowe v. Teed*, 15 Ves. 372. *Freeman v. Fairlie*, Mer. 24. *Clegg v. Edmonson*, 22 Beav. 125.

His Honour referred to

Macdonald v. Richardson, 1 Giff. 81; 10 L. T. (N.S.) 166.

Rolt, Q.C., Malins, Q.C., and E. E. Kay, for the defendant, were not called upon.

The VICE CHANCELLOR.—There is no doubt about the importance of this question. Generally speaking, the plaintiff is entitled to discovery if it appears material to the relief prayed, and the defendant has submitted to answer; but the question of materiality is one which the court must look at with reference to the constitution of the suit and the character of the proceedings. The present bill has been filed under most extraordinary circumstances. The plaintiff, as one of the next of kin of her brother, seeks to disturb a deed of arrangement executed twenty-four years ago by all of the members of her family. This deed, which was prepared with great deliberation, and in the planning of which all who executed it had an opportunity of seeking professional advice, was intended to act as a final adjustment of the rights of all parties interested under the will and in the partnership of Thomas Hargreaves. Two of the parties to the deed were the plaintiff and her husband claiming in her right. It does not appear to have entered into the head of the husband, who is now dead, to take exception to the arrangement; but the plaintiff now, not in her individual character, but as next of kin to her brother, whom she alleges to have been of weak understanding, seeks to set aside the deed. It is said that a discovery is necessary in order to arrive at a balance of the accounts, and that the plaintiff is entitled to have all those dealings in the partnership which formed the basis of the deed of release reopened for her inspection. If this were allowed, it would have the effect of disturbing an arrangement entered into by the whole family, and I certainly should not be justified in extending the hard doctrine of discovery to such a case. The exceptions must be overruled with costs.

STUART, V.C., March 23, 1866.

JOHNSTONE v. HAMILTON.

14 L. T. 282.

Practice—Costs of suit—Will—Secret trust for charity—Void bequest.

EXECUTOR AND ADMINISTRATOR.—*In a suit occasioned by a bequest, involving a secret trust, of leasehold and personal estate, and in which it was declared that the leaseholds belonged to the Crown:—Held, on further consideration, that the costs must be paid rateably out of the leaseholds and personalty.*

This cause came on for further consideration on a question of costs. The case at the hearing was fully reported 12 L. T. (N.S.) 822, and it will be therefore only necessary to mention the following facts:—

William Brownley, who died in February, 1864, by his will dated 14th February, 1862, gave, devised, and bequeathed the residue of his estate, both real and personal (after payment of legacies) to his five executors absolutely.

In June, 1864, a suit was instituted by one of the above executors against the other four for the purpose of ascertaining the rights of the parties interested under the above will, in the freehold and leasehold estate, i.e., in the realty and personalty savouring of realty, without interfering with the pure personalty.

It appeared that the plaintiff and defendants were members of a Presbyterian College, an institution supported by voluntary contributions, and that the testator in his lifetime contributed liberally towards the expenses of the college, and was a great benefactor to the Presbyterian Church, of which he also was a member, and that shortly before the date and execution of his will he communicated to the defendants, or some of them, his desire, if possible, to devote some portion of his property, after his death, for the benefit of the college.

It also appeared that it was the intention of the testator in making the residuary bequest above mentioned, that the residuary legatees should apply for the benefit of the college such portion of the residuary estate as was allowable in law; and further, that it was his expressed wish and hope that, so far as his residuary estate consisted of property which could not legally be given to charity, the devisees would nevertheless make use of the same for the benefit of the college.

The plaintiff alleged that the freehold and leasehold portions of the residuary estate were respectively devised and bequeathed to him and the defendants, not upon any trust of the like purport as aforesaid, but by reason of the testator's knowledge of the sympathy of himself and the defendants with his (testator's) religious views, and his wishes in relation to the college.

The personal estate had been applied by the executors in accordance with the trusts of the testator's will.

The pleadings had been amended by making the Attorney General a party to the suit, and although he set up no claim to the real estate he asserted the right of the Crown to the leaseholds.

At the hearing, on the 4th July, 1864, a decree was made to the effect that the executors were entitled to the freeholds, but that the gift of the leaseholds being void they passed to the Crown, and an inquiry was directed as to that portion of the property, and an account of the rents, &c., as well as an account of the pure personalty; and it was ordered that the debts, funeral expenses, and legacies should be apportioned between the leaseholds and the personal estate connected with land on the one hand, and the personal estate unconnected with land on the other; reserving further consideration.

The chief clerk certified the value of the leaseholds to be 14,819*l.*, and that of the pure personalty 25,387*l.* 8*s.* 7*d.*; and he apportioned the amount to be paid for debts, &c., in respect of the leaseholds, at 358*l.* 16*s.* 3*d.*, and in respect of the personalty at 614*l.* 14*s.* 1*d.* There was no next of kin.

The question now to be decided was, whether the costs were to be paid rateably out of the pure personalty and leaseholds, or solely out of the leaseholds.

Malins, Q.C., and *J. Napier Higgins*, for the plaintiff, contended that the costs ought to be borne wholly by the leaseholds, which were in fact the subject-matter of the suit. The plaintiff and the defendants, as trustees, were entitled to expend the whole of the pure personalty on the object of the trust, and the ordinary doctrine of apportionment between realty and personalty did not apply to the peculiar circumstances of the present case. Moreover, the costs of the administration had already been paid out of the personalty. They cited

Taylor v. Bogg, 5 Jur. N.S. 137.

Craig, Q.C., and *R. Potter*, for the defendants, supported the plaintiff's contention.

Wickens, for the Attorney General, argued that the costs ought to be borne rateably by the leaseholds and personalty, and that there was nothing to justify the opposite contention.

The VICE CHANCELLOR.—As the testator himself has originated the questions in the present suit, I cannot entertain the proposition that his pure personalty is to be exempted from the costs. There must be the ordinary rateable proportion.

[IN THE COURT OF EXCHEQUER.]

April 16, 1866.

THE SOUTH KENSINGTON HOTEL COMPANY (LIMITED) v.
BRAGINTON.

14 L. T. 288.

Practice—Delivery of postea—Associate.

This was an action tried before Pollock, C.B., at Westminster, on the 24th June, 1865, when a verdict was found for the defendant. A bill of exceptions was tendered at the trial by the plaintiffs' counsel, which his Lordship declined to receive, for the reason that it contained an incorrect statement of the evidence. Since that time no further steps had been taken.

Beasley now moved, on the defendant's behalf, for a rule directing the associate to deliver the *postea* to the defendant.

BRAMWELL, B.—We have no jurisdiction in banco in this matter. The associate is an officer at Nisi Prius, and the proper course for the defendant to pursue is to take out a summons before the Lord Chief Baron, who tried the cause,

The rest of the COURT (Pollock, C.B., Martin and Pigott, BB.) concurring.

Rule refused.

[IN THE COURT OF EXCHEQUER.]

April 20, 1866.

THE LANCASHIRE COTTONSPINNING COMPANY v. GREATORIX.

14 L. T. 290.

Practice—Action for calls under the winding-up order—Order for inspection by defendant of the share-registry and allotment-book—Discretion of judge—Review.

COMPANY. M.—In an action by a company against an alleged shareholder for calls under a winding-up order, the court will uphold the order of a judge at chambers giving liberty to the defendant, after plea, to inspect the registry of shares, the allotment and agenda books in the possession of the company.

The granting such an order is purely in the discretion of the judge at chambers, and the court will not review his exercise of such discretion unless they clearly see that the order was wrong.

Holker, on the part of plaintiffs, moved for a rule to rescind an order of Willes, J., of the 12th March, giving liberty to defendant to inspect the registry of shares and the allotment-book and the agenda-book of the company. This was an action for calls. The company was registered under the Companies Act of 1856-57. Defendant was a holder of twenty shares. An order to wind-up had been made and liquidators had been appointed, and a call of so much a share made on each shareholder, which the defendant had not paid. The declaration contained allegations to the above effect, and the defendant by his plea traversed them all. After pleading, defendant applied at chambers for an order to inspect the documents in question, and the learned judge made the order which was now sought to be rescinded. It

was contended that this was a fishing application for an inspection from which defendant would derive no benefit. The principal document sought to be inspected was the allotment-book, the production of which would do no good to defendant and would inconvenience the plaintiffs. It was for plaintiffs to make out a proper allotment of the shares, and if they failed to do so defendant would succeed. [PIGOTT, B.—The book is the defendant's case as well as the plaintiffs'.] A similar application was refused in *The Birmingham, Bristol, and Thames Junction Railway Company v. White* (1 Q.B. 282; 10 L. J. (N.S.) 121 Q.B.). (POLLOCK, C.B.—These matters are purely discretionary. The defendant has a right to see his own books.) He says he is not a shareholder. [BRAMWELL, B.—Not to the extent, it may be, that you charge him with, and on that ground it is he desires an inspection of the allotment-book; and if it be that the register of shares is *prima facie* evidence of his being a shareholder, he is surely entitled to show by the allotment-book that he is not a shareholder to the amount you seek to charge him with.]

POLLOCK, C.B.—Before rescinding an order of a learned judge at chambers in a matter of this kind we ought to see very clearly that he was wrong in making it, and in the present case I think he was not. It is in fact a matter for the discretion of the judge, and seeing nothing to show that he exercised a wrong discretion this rule must be refused.

BRAMWELL, B.—I am of the same opinion. It is very inconvenient for us to be called on to review what has been done by a judge at chambers, and we should not do so unless we clearly saw that the order made was wrong. The judge at chambers can, and, speaking from my own practice, always does, inquire into all the facts of the particular case, which we cannot do here.

MARTIN and PIGOTT, BB. concurred.

Rule refused.

The LORD CHANCELLOR (Cranworth), April 12, 1866.

Ex parte MARKS, *re* MARKS.

14 L. T. 318; L. R. 1 Ch. 334.

Bankruptcy—Order of discharge—Bankruptcy Act, 1861, s. 159.

BANKRUPTCY.—Although the conduct of a bankrupt has been wrong and reckless, yet, if it has not amounted to a committing of one of the offences specified in the 159th section of the Bankruptcy Act, 1861 (as, for example, that he has contracted debts at a time when he could not have any reasonable or probable ground of expectation of being able to pay the same), the Court will not refuse his order of discharge.

This appeal stood over from the 24th January, to be argued on the merits, the point of law having been decided on the former occasion. (See the report, 13 L. T. 37.)

The appeal was from an order of Mr. Commissioner Sanders, at Birmingham, who had suspended the bankrupt's discharge for twelve months, and also ordered him to be imprisoned for six months.

De Gez, Q.C., in support of the appeal, contended that, inasmuch as there was an alternative power given by the 159th section of the Act of 1861 to award imprisonment or to suspend the order of discharge, it was impossible for the court now to inflict imprisonment, because there had already been suspension for a considerable time, although with protection. With respect to

the sentence of suspension for twelve months, he contended that the conduct of the bankrupt did not come within the meaning of any one of the five offences mentioned by the 159th section, and therefore that the sentence should be reversed. He referred to

Re Mew and Thorne, 13 L. J. 87 Bank.

Little, for the assignees, contended that the bankrupt had contracted debts without any reasonable or probable expectation of being able to pay them. The evidence showed that he had obtained goods from one Marshall shortly before the bankruptcy, giving a distinct assurance that he was perfectly solvent at the time. This was not only entirely out of the ordinary course of trade, but was an aggravating circumstance as to the manner in which the debts were contracted. The bankrupt had, therefore, no ground to complain of that part of the commissioner's judgment which referred to the suspension of the certificate for twelve months. He referred to

Ex parte Barker, re Barker, 9 L. T. (N.S.) 672.

The LORD CHANCELLOR (Cranworth).—I should have been glad to have affirmed that part of the order of the learned commissioner which suspended the certificate, because there is no doubt that the conduct of the bankrupt has been reckless and wrong. It is perfectly true that the language of the section is, "If the bankrupt shall not be accused of acts amounting to misdemeanor, or if he shall have been accused and acquitted, but in either case there shall be made, and shall appear to the court to exist, objection to the granting of an immediate discharge, the court shall proceed to consider the conduct of the bankrupt before and after adjudication, and the manner and circumstances in and under which his debts have been contracted." What, therefore, ought to have been proved for my satisfaction was, that at the time when the bankrupt contracted the debt with Marshall, he could not have had any reasonable or probable expectation of being able to pay the same. I find nothing in the evidence to satisfy me that the bankrupt thought he should have any difficulty in paying Marshall's debt. Although he was going on in a reckless course of dealing, he might have expected that he would have been able to sell the goods procured from Marshall at an advance, and thus be in a position to satisfy his creditor. It is extremely probable the commissioner laboured under a full moral conviction that this man was pursuing a reckless course of trading without sufficient means; but, under the circumstances, I cannot say there was ground to justify the suspension of the order of discharge. The order of the court below must be reversed and the discharge allowed.

De Gez applied for the costs of the appeal and of the court below.

The LORD CHANCELLOR.—I shall give the costs of the appeal, but not of the court below.

STUART, V.C., April 17, 1866.

MEREST v. MURRAY.

14 L. T. 321.

Injunction—Power of sale—Mortgage—Breach of trust.

MORTGAGE.—On a bill by a mortgagor to restrain a mortgagee from enforcing his power of sale under the mortgage-deed, and where no answer had been put in, but it was alleged by the bill that a breach of trust had been committed by the mortgagee:—The Court, on motion, granted an injunction until the filing of the answer or further order.

This was a motion on the part of the plaintiff in the above cause for an

interim injunction to restrain an immediate sale of certain mortgaged property.

The facts as stated by the bill were as follows :—

By an indenture, dated the 1st July, 1865, and made between the plaintiff James John Merest, of the one part, and the defendant Stirling Frederick Marshall, of the other part, the plaintiff mortgaged, by way of security for the sum of 1,500*l.*, the advowson to the rectory of Dorsington in Gloucester, of which he was the owner. The deed contained a proviso to the effect that, in the event of the plaintiff paying to Marshall, his executors, administrators, or assigns, the said sum of 1,500*l.*, with interest at 5 per cent. on the 1st January then next ensuing, then that Marshall, his heirs or assigns, should reconvey the mortgaged property to the plaintiff. The deed also contained a covenant by the plaintiff with Marshall for payment of the 1,500*l.* and interest on the 1st January, 1866, and a proviso that if after that date default should be made in the payment of such principal or interest, then it should be lawful for Marshall, his executors, administrators, or assigns, if he or they should so think fit, absolutely to sell and dispose of the said hereditaments and premises, either by public auction or private contract, for such price or prices, and generally in such manner, as he or they in his or their discretion might think proper, &c.

It appeared that Marshall was the sole trustee of the marriage-settlement of John Hall Murray and Juliet Murray (two or the defendants in the suit), and that the money advanced upon the above mortgage security was part of the trust-money of such settlement.

The plaintiff alleged that in December, 1865, Murray being in want of money, requested Marshall to call in the 1,500*l.* advanced on the mortgage, and hand it over to him without any security. This, however, Marshall refused to do upon the ground that in so doing he would be committing an active breach of trust, but at the solicitation of Murray he consented to retire from the trusteeship of the settlement, in order that the defendant Frederick William Rowlatt (who was a brother of Murray's wife), and the defendant Augusta Avarne (Murray's sister), and both of whom were willing to accede to Murray's wishes with respect to the trust-money, might be appointed trustees in his stead.

This arrangement having been carried into effect, a deed was executed in January, 1866, whereby Marshall assigned to the new trustees all his interest in the trust-money advanced on the mortgage.

Immediately after the execution of the last-mentioned deed, the new trustees acting, as plaintiff alleged, under the direction of Murray, commenced proceedings in the Court of Queen's Bench for the recovery of the 1,500*l.* interest and costs, and on the 23rd February, 1866, obtained a judgment against the plaintiff; but no writ of execution or sequestration had been issued out thereon.

The mortgaged property was advertised to be sold by the new trustees on the 18th April, 1866, but some delay having arisen in the necessary preparation for the sale, Murray, who, as the plaintiff alleged, was in immediate want of money, determined to obtain a transfer of the mortgage-debt to himself, in order the more speedily to realise the same and thus obtain immediate possession of the mortgage-moneys. With this view he accordingly on the 8th March, 1866, instructed a Mr. Norman, his then solicitor, to make the necessary transfer. Mr. Norman, however, declined to carry out these instructions, upon the ground that by so doing he would be countenancing a breach of trust. This matter was then placed in the hands of another solicitor, who prepared the deed required. By this deed the mortgage-debt, interest, and the securities for the same were assigned to Murray absolutely. The deed contained no mention or reference to the trusts to which the mortgage-money was subject, and at the time of its execution no pecuniary or valuable consideration passed between the parties.

The plaintiff alleged that Murray threatened and intended to proceed with the sale of the property on the 18th April, 1866, and also to issue a writ of

execution on the before-mentioned judgment, or to enforce the same by sequestration. He further stated that the value of the property amounted to upwards of 4,000*l.*, and he said that he was willing to pay off the whole of the mortgage-debt, but was unable to find any person who would advance the necessary money on the security of a transfer or assignment of the mortgage by reason of the dealings therewith by the defendants.

The plaintiff charged that as he was ignorant of the names and addresses of the persons beneficially entitled to the mortgage-money and interest under the settlement, the defendants ought to discover the same, and also the nature and contents of the settlement.

The bill, which was filed on the 10th April, 1866, prayed that the several defendants might answer the premises and make a true and full discovery of the several matters as aforesaid; that an account might be taken of what was due and owing on the mortgage of the 1st July, 1865, and that on payment by the plaintiff of the amount which should be found to be so due to such person, and in such manner as the court might direct (which payment the plaintiff was willing and thereby offered to make), the defendants might be ordered to reconvey the said advowson, rectory, and premises comprised in the mortgage security, and to deliver up the deeds and muniments of title relating thereto to the plaintiff, or as he should direct; that the defendants J. H. Murray, F. W. Rowlatt, and Augusta Avarne, might be restrained from selling or offering for sale, or otherwise dealing with or disposing of the said mortgaged property or any part thereof, and from parting with the legal estate in the same, or any part thereof; that the defendants might be respectively restrained from issuing out any writ of execution or sequestration, or any other process on the said judgment so obtained as aforesaid, and from taking any other steps or proceedings to enforce the same, and from taking any other steps and proceedings for recovering the said sum of 1,500*l.* interest and costs; and that the defendants might pay the costs of the suit.

No answer had been filed by the defendants. There was some small amount of interest owing by the plaintiff.

Malins, Q.C., and G. O. Morgan for the plaintiff.

Greene, Q.C., and Cutler for the retired trustee.

Wickens for the new trustees.

F. Webb for the tenant for life.

The VICE CHANCELLOR.—In the present case it appears that in the month of July last the plaintiff borrowed from a trustee of a marriage-settlement a sum of 1,500*l.*, upon the security of the advowson of the rectory of Dorsington and certain premises. The trustee of that marriage-settlement is before in court, but he is no party to the proposed sale now sought to be restrained. As trustee for the wife and children he was no doubt satisfied with the mortgage before he entered into it, and thought himself justified in lending the trust-money upon it. The mortgage-deed contains a power of sale without any notice whatever previously to the sale being required. If there were anything before the court to show that the mortgagee might reasonably call in his money within six, nine, or twelve months, it might account for the conduct of the parties, and justify the extreme measures resorted to. But what has occurred? A tenant for life having conceived that some object might be answered by dealing with the trust-fund, applied to the late trustee to assist him in his purpose, but this the trustee refused to do. A change consequently took place in the trustees: one of the new ones was a widow lady, a sister of the tenant for life, and the other a brother of the tenant for life's wife. Six months after the execution of the mortgage proceedings are taken by the tenant for life for the recovery of the mortgage money from the plaintiff, and the sale of the property has been advertised for to-morrow. In this extremity

the mortgagor files this bill, and in it tells such a story as shows that the transaction amounts to a breach of trust by the present trustees. If a sale were to take place to-morrow there must inevitably be a great sacrifice. These are the facts as they appear upon the part of the plaintiff, and there is nothing to contradict them, except the statement that the object of the new trustees and the tenant for life is to get a better security. The court is, under the circumstances, bound to grant an injunction in order to prevent a great sacrifice of this property, and, therefore, the sale advertised for to-morrow must not take place. The order will be for an injunction to restrain the sale and all proceedings in the action until an answer has been filed, or until further order, but if any interest is due by the plaintiff it must be paid within three days.

[IN THE QUEEN'S BENCH.]

April 25, 1866.

NOTT v. BOUND.

14 L. T. 330; L. R. 1 Q.B. 405.

Discussed, *R. v. Bridport County Court Judge*, [1905] E. R. A.; 74 L. J. K.B. 464; [1905] 2 K.B. 108; 92 L. T. 571; 53 W. R. 527 (K.B.D. Div.).

Distress—Church-rate—Illegal charges—Summary information—57 Geo. 3, c. 93—7 & 8 Geo. 4, c. 17.

ECCLESIASTICAL LAW.—*The 57 Geo. 3, c. 93, regulates the charges to be made in respect of certain small distresses, and a schedule of the Act states in respect of what matters certain costs may be claimed. The statute imposes a penalty upon any one for taking any other or greater costs than are mentioned in the said schedule, or for making any charge whatever for anything mentioned therein and not actually done. These provisions are, as far as they are applicable, made by the 7 & 8 Geo. 4, c. 17, to apply to distresses for church-rates. Upon a distress for a church-rate, the bailiff made certain charges mentioned in the before-mentioned schedule, which charges, however, though incurred, were not applicable to such a seizure:—Held, that as he had not claimed any charges not in the schedule, he was not liable to the penalty.*

This was a case stated under the 20 & 21 Vict., c. 43, upon a refusal of parties to convict the respondent.

It appeared that the Justices had issued a warrant of distress upon the goods of the appellant for the non-payment of 1l. 11s. 2½d. for a church-rate, and 7s. 6d. costs, which warrant was placed in the hands of the respondent for execution. He accordingly proceeded to levy the amount. Amongst other charges attending the distress, he charged 6s. 4d. for an appraisement and 2s. 8d. per day for five days for a man in possession.

By the 57 Geo. 3, c. 93 (an Act to regulate the costs of distresses levied for payment of small rents), which as far as it is applicable is by the 7 & 8 Geo. 4, c. 17, made applicable to distresses for church-rates, &c., it is enacted that,

“No person whatsoever employed in any manner in making such distress . . . shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold . . . any other or more costs and charges for and in respect of such distress . . . than such as are fixed and set forth in the schedule hereunto annexed . . . and no person or persons whatsoever shall make any charge whatsoever for any act, matter, or thing mentioned in the said schedule unless such act shall have been really done.”

By sect. 3 it is enacted,

"That if any person or persons whatsoever shall in any manner take, levy, or receive . . . any other or greater costs and charges than are mentioned and set down in the said schedule, or make any charge whatsoever for any act, matter, or thing mentioned in the said schedule and not really done, it shall be lawful for the party or parties aggrieved by such practices to apply to any one Justice . . . for the redress of his, her, or their grievance so occasioned . . . and if it shall appear to such Justice that the person or persons complained of shall have levied, taken, received, or had other or greater costs and charges than are mentioned or fixed in the schedule hereunto annexed, or made any charge for any matter or thing mentioned in the said schedule, such act, matter or thing not having been really done, such Justice shall order and adjudge treble the amount of the moneys so unlawfully taken to be paid by the person or persons so having acted to the party or parties who shall thus have preferred his, her, or their complaint thereof, together with full costs, &c."

The schedule of the Act contained the following items and accounts:

	s.	d.
Levying distress	3	0
Man in possession per day	2	6
Appraisement, whether by one broker or more, 6d. in the pound on the value of the goods.		
Stamp the lawful amount thereof.		
All expenses of advertisement, if any such, catalogues, sale and commission and delivery of goods, 1s. in the pound on the net produce of the sale.		

The appellant having paid the amount charged by the respondent as above stated, he summoned him before Justices under the provisions of the foregoing 2nd section of the 57 Geo. 3, c. 93, for taking the two sums of 6s. 4d. for an appraisement, and 2s. 6d. per day for a man in possession, contending that, upon a seizure for a distress for nonpayment of a church-rate, neither of such sums could be demanded, such claims being only applicable to a seizure upon a distress for rent. The majority of the Justices being of opinion that the case was not within the statute, dismissed the information, whereupon the present case was stated.

Hayes, Serjt. now appeared for the appellant and contended upon the facts and a proper construction of the statutes, the Justices ought to have convicted; for that inasmuch as neither an appraisement nor a man in possession was required in such a case, it was unlawful to charge for them. [BLACKBURN, J.—I cannot see anything in the statute that if he charges for a thing which he really does, he is to be liable to this penalty.] The charges are inapplicable to such a matter; the respondent had no right to make the charges, and this was the evil the statute was intended to correct.

Harrington, for the respondent, was not called upon.

BLACKBURN, J.—I am entirely of opinion that the majority of the Justices took the correct view. The statute for small distresses enacts certain matters, and provides that if more is taken for any matter referred to in the schedule than is there set down, or if anything is charged for that is not really done, a penalty shall be incurred. Then comes the latter statute, which includes distresses for church-rates within the provisions of the first Act. The bailiff in this case thought he would sell by auction, and appraised the goods and made charges similar to those in the schedule, and the Justices were of opinion, as I am, that if he made charges for what was really done, it was not within the Act. If the charges are not lawful, the amount can be recovered in a civil suit.

The other Judges concurred.

Judgment affirmed.

[DIVORCE.]

May 1, 1866.

HUTCHINSON v. HUTCHINSON AND BARKER.

14 L. T. 338; 12 Jur. N.S. 491.

Husband's petition—Confession of adultery by petitioner—Discretionary bar.

DIVORCE AND MATRIMONIAL CAUSES.—*Before the court will exercise the discretion which it possesses under the 31st section of the 20 & 21 Vict. c. 85 to dissolve the marriage, notwithstanding that the petitioner has also been guilty of adultery, it must be shown that in all other respects he is free from blame, and that, with the exception of the particular lapse proved or confessed, he had been a good and faithful husband to his wife.*

Where the husband (the petitioner) confessed adultery on intervention of the Queen's Proctor, and where his conduct to his wife was blamable, the Court reversed the decree nisi and dismissed the petition.

This was a husband's petition for dissolution of marriage on the ground of the wife's adultery with the co-respondent. It was heard by the Judge Ordinary on the 18th November, 1865, and a decree *nisi* was granted. The Queen's Proctor subsequently obtained leave to intervene on affidavits showing that the petitioner himself had been guilty of adultery; and the court was now moved to reverse the decree *nisi* and dismiss the petition. It appeared from the affidavits read in support of the application that the parties were married in 1847; that a few months after the marriage the petitioner communicated the venereal disease to his wife; that in 1848 he sailed on a voyage from Hull to Dantzic and returned in 1849 affected with fresh disease; that the respondent, warned of the fact, refused to have intercourse with him, though they cohabited for a short time after his return; and that she then left him and went into the service of the co-respondent, with whom she afterwards lived.

The petitioner, in his affidavit in reply, confessed adultery at Dantzic while in a state of drunkenness, but denied that he had returned home afflicted with disease.

The Solicitor General (*Dr. Spinks* with him) for the Queen's Proctor.

Dr. Wambey, for the petitioner, urged that his youth (twenty-one years of age) at the time he committed the adultery should be taken into account, and that the discretion of the court should be exercised in his favour. Besides, the offence had been condoned by the subsequent cohabitation, and the principle laid down in *Anichini v. Anichini* (2 Curt. 213) should prevail.

WILDE, J.O.—The question here arises under the 31st section of the Act, which gives the court a discretion to make a decree for dissolution of the marriage, notwithstanding that the petitioner may have been guilty of adultery; but so far as that discretion goes, it has never been exercised except under very peculiar circumstances. Without attempting to say that there is no act of adultery which might not be looked over for this purpose, still I think it is obvious that the person who asks the court to exercise a discretion in his behalf ought to be in all other respects free from blame. It is obvious that a husband who seeks that concession from the court ought to be able to say that but for this one lapse he had been a faithful and good husband to his wife. In this case, what are the facts that are admitted and plain? They are these: that within a few months after his marriage he communicates the venereal disease to his wife; and that not long after he goes on a voyage and commits adultery at a brothel with another woman. He pleads drunkenness in extenuation. But it must be

observed that he was perfectly sober when he went there, and the court cannot accept the excuse offered. I am quite clear that he wilfully and in his senses committed adultery. How can I say under these circumstances that that which is venial in him is punishable in the wife? When it is said that the offence was committed a long time ago, it may be answered that the wife's adultery also took place a long time ago. His offence is no older than hers. Under these circumstances I must order the decree *nisi* to be reversed and must dismiss the petition.

[ADMIRALTY.]

Dr. LUSHINGTON, November 8, 1866.

THE MAGGIE ARMSTRONG v. THE BLUE BELL.

14 L. T. 340.

Foul berth—Riding at single anchor in a gale.

SHIPPING.—*One ship brought up during a gale in a fair berth in the Downs, and another ship coming up, anchored within a cable's length of her, riding at one anchor. The gale increasing, drove both ships from their anchors, when the last ship came into collision with the first ship, so that the first ship had to be taken to the Roads in a sinking state and beached:—Held, that the ship last coming up was solely liable for the collision, from having given the first ship a foul berth in riding so close to her at single anchor.*

Deane, Q.C., and Vernon Lushington, for the *Maggie Armstrong*.

Brett, Q.C., and E. C. Clarkson, for the *Blue Bell*.

Dr. LUSHINGTON gave judgment in this case, which was an action by the brig *Maggie Armstrong*, 289 tons, from Shields, coal laden, for Havre-de-Grace, against the brig *Blue Bell*, 191 tons, from Hartlepool, coal laden, for Shoreham, to obtain damages for a collision between them off the South Foreland at 7 p.m. on the 13th of last January. The *Maggie Armstrong* stated the wind as S.W., and the weather as heavy gale and hazy, with rain. The *Blue Bell* represented the former as from S.W. to S.W. by S., and the latter as thick at intervals, with rain, and a hard gale. The case for the plaintiffs was, that the *Maggie Armstrong* brought up a fair berth in the Downs, with her port bow anchor and sixty fathoms of chain, in ten fathoms water, and rode safely until the *Blue Bell* ran back to the Downs and brought up to the S.E. of her, and within a cable's length, thereby giving her a foul berth; that the *Maggie Armstrong* was riding taut, sheered to windward of the anchor, with her helm lashed a-starboard, her mainyard braced with the port braces, and her foreyard square, and the ebb tide making to the westward; that the *Maggie Armstrong* had her riding light duly exhibited, and a good look-out was kept by her anchor watch; that the *Blue Bell* was then also riding sheered in the same way; that at the time and under the circumstances aforesaid, the *Maggie Armstrong* and *Blue Bell* broke their sheers, and as the *Maggie Armstrong* in the act of sheering lay with her head to the eastward, the *Blue Bell* came stem on into her starboard midships, and with her anchor pricked her severely in the side below the water's edge, and also carried away her rail, bulwarks, stanchions, and covering board, and damaged her top sides and stove in her boats on deck; that as the vessels approached the *Maggie Armstrong* hoisted her foretopsail to endeavour to keep clear of the *Blue Bell*, but without effect. It was then alleged that, in order to get clear, the *Maggie Armstrong* set her jib, but it immediately blew away, and she was obliged to slip her anchor and chain, and then drove clear to leeward and away

from the *Blue Bell*, and brought up in the Margate Roads, where finding she was in a sinking state, a Deal boat and a Ramsgate lugger, and afterwards two steam-tugs, were engaged to get her into Ramsgate Harbour, which they did in the evening of the following day, the 14th January, having been obliged in the meantime to beach her, to prevent her sinking in deep water. The defence of the *Blue Bell* set forth, that she was brought up by her port bow anchor and forty-five fathoms of chain, the tide being ebb, having her yards braced to the wind, and her helm shored to starboard, heading about W.N.W., riding to windward of her anchor, and having her anchor light up; that in this state of things the *Maggie Armstrong*, which had been riding at the distance of three cables' length from her, and on her port bow, broke her sheer, and drove down towards her (the *Blue Bell*), rendering a collision between the two vessels imminent, whereupon those on board the *Blue Bell* hailed the *Maggie Armstrong* to set her jib and staysail for the purpose of her keeping clear of the *Blue Bell*; but this was not done, and the *Maggie Armstrong*, with her starboard side, about the forerigging, came into contact with the stem and cutwater of the *Blue Bell*, which was still riding steady to her anchor, and the *Maggie Armstrong* then caused the *Blue Bell* also to break her sheer. Looking at the facts indisputably proved in this case, it appears that, at the period in question, the 13th January, there was a violent storm, and that several vessels having attempted to go down Channel, found it necessary to go back into the Downs in consequence of the intensity of that storm, and they came to an anchor, and as it is represented, as near to the shore as they safely could do. It is admitted on all hands that the *Maggie Armstrong* was the first vessel that put back and came to anchor. That is an undisputed fact, and if she came to a safe and proper anchorage, then all the other vessels that came up after her, if there was no other cause to prevent their so doing, were bound to give her a clear berth, and avoid giving her a foul berth. It is the main question in this case whether the *Blue Bell* gave her a foul berth or not. On the part of the *Maggie Armstrong* this is distinctly averred, and on the part of the *Blue Bell* it is distinctly denied. The *Maggie Armstrong* brought up with sixty fathoms of cable, and the *Blue Bell* with forty-five only. It is sworn, as far as hard swearing goes, on the part of the *Maggie Armstrong*, that she had a foul berth given her by the *Blue Bell*, and on the other hand, the *Blue Bell* says she brought up at three cables' lengths from the *Maggie Armstrong*, and, consequently, did not give her a foul berth. As to whether the *Maggie Armstrong* drove or dragged her anchors, I apprehend it to mean about the same thing, the only difference being, when you say that a ship drives, it is without an accusative case, and in the other instance you say she drags, which I suppose to be about the state of things here. With respect to the state of the wind, weather, and tide, I apprehend it to be true, that if a foul berth was given to the *Maggie Armstrong*, these two vessels might have come into collision without the *Maggie Armstrong* dragging or driving. If the collision occurred without the *Maggie Armstrong* dragging her anchor—whether she did or not, we must consider what would be the strength of the wind and tide, and which way the *Maggie Armstrong* would have gone, provided she broke her sheer. That appears to me to be one of the most important questions to consider. In order to pronounce a decree for the *Maggie Armstrong* the Court must be satisfied that she was not to blame in any part of the transaction, and the *Blue Bell* was to blame. The only blame attributable to the *Blue Bell* is this, that she gave a foul berth to the *Maggie Armstrong*, and that she was riding on such a night as this with a single anchor and forty-five fathoms of cable; but this amount of blame, in the absence of any corresponding blame on the part of the *Maggie Armstrong*, is sufficient to account for the collision, for the whole consequences of which the *Blue Bell* must be held responsible, and there must be a decree to that effect.

The Court was assisted by Captain Redman and Captain Weller, of the Trinity House.

ROMILLY, M.R., April 17, 18, 1866.

DAUGARS v. RIVAZ.

14 L. T. 348.

Injunction—Breach of—Motion to commit—Costs.

INJUNCTION.—*The consistoire, or governing body of the French Protestant Church of London, were, in 1860, restrained by injunction from interfering with the plaintiff, a pastor of that church, in the discharge of his duties as pastor. In 1866, M., a defendant in the suit, and also a pastor of the church, was present at a meeting of the consistoire, when they resolved to suspend the plaintiff from the discharge of his duties. M., as agent of the consistoire, took an active part in enforcing, though he did not in passing, that resolution. The plaintiff then moved for an order to commit M. for contempt of court, on the ground of the alleged infraction by him of the injunction granted in 1860. The members of the consistoire were not served with, and did not appear upon, the motion:—Held, that the Court would not, in their absence, decide upon the validity or invalidity of the act of suspension, and that upon the whole case stated in support of the motion, it must be refused; the only order to be made being that the plaintiff must pay the costs of it.*

This was a motion on behalf of M. Daugars, the plaintiff in the suit, for an order to commit M. Marzials, a pastor of the French Protestant Church of London, for contempt of court. The alleged contempt of court consisted in the fact that he had in divers manners interfered with the plaintiff in the discharge of his duties as a pastor and officiating minister of that church, in direct contravention of the decree, order, and injunction of this court, pronounced in the month of January, 1860: (*vide Daugars v. Rivaz*, 3 L. T. (N.S.) 109).

The facts of the case which led to the institution of this suit, and the declaration of the court in it, are so fully stated in that report, that it is unnecessary now to do more than refer to them as so reported. The circumstance which conduced to the present motion, and the facts connected with it will sufficiently appear from the judgment of the Master of the Rolls *infra*.

Jessel, Q.C., and Wickens, supported the motion.

Selwyn, Q.C., and Pearson, contra, were not called upon for any argument.

LORD ROMILLY.—I shall not trouble you, Mr. Selwyn, upon this motion. The case is this: it is an application to the court for an order that is intended to have the effect of enforcing the observance by M. Marzials of a decree pronounced by me in this suit in the year 1860. The motion is for an order to commit him for contempt of court, he having, as it is alleged, committed a breach of an injunction then granted by this court. By that injunction the defendants, M. Marzials being one of them, were restrained from hindering or preventing the plaintiff from discharging the duties of his office of pastor of the French Protestant Church in London, or in any manner interfering with the discharge of the same further or otherwise than in accordance with the Discipline of the year 1641, and the Reglements du Consistoire of that church. The first question then to be considered is, whether there has been a violation by M. Marzials of those regulations? The position of M. Daugars' counsel is a singular instance of the difficulties in which counsel may sometimes be placed. They had to show that the acts of interference complained of were the acts of M. Marzials himself. Now, what was done was this: the consistory of the church thought fit to suspend M. Daugars from his office of pastor and preacher in the church. With respect to that resolution of the consistory, M. Marzials in his affidavit says, "I acted on the occasion of the passing of that resolution as the agent of the consistory; I was present at the meeting

at which the resolution was passed, but I retired from it when the resolution was being carried. I took no part whatever in the act of suspension." That is not contradicted; nay more, it is even admitted, by M. Daugars' counsel. If so, the acts of interference, whatever they may have been, were not the acts of M. Marzials. But then it was said, "Oh! you cannot say it was not the act of M. Marzials. He was the officiating minister. He was a pastor of the church; and as a pastor and officiating minister, his presence at the meeting was necessary to give them jurisdiction in the matter." If so, there follows then this question: Was the act, or were the acts complained of as being infractions of the injunction, within the Discipline of 1641, and the *Reglements du Consistoire*? Upon that I have been referred to those documents and to particular clauses in them. I have been asked, on this motion, to put a construction upon them, and, of course, in doing so, to express an opinion that shall be binding upon the members of the consistoire. Well, but how can I do that? They are not now before me—they have not been served with notice of this motion; and in truth, if that motion were rightly conceived, it would be difficult to see how they could have been served and appear upon it. Notwithstanding that, however, I am asked in their absence to do this—to determine that acts of theirs are culpable; and to say that they are to blame. I am asked to make those declarations on this motion without hearing what they have to say in the matter. It was admitted that M. Marzials was their agent in what was done; but it is observable that he has not in his evidence gone into any consideration of the question of the legality or illegality of the suspension. He only says, "I did not do it." I am asked, as I have said, to decide in the absence of the members of the consistory that acts done by them are illegal. It was only the other day, in a patent case, that I refused to make any declaration that should be binding on absent parties, without hearing them; and I cannot do so in this case. Any one could have told M. Daugars what would be the result of his pursuing the course of conduct which he did. What occurred was this: in 1857, the consistory thought proper to remove him from his office of pastor to the church. He then filed the bill in this suit, praying a declaration that he had not been lawfully dismissed or discharged from his office of pastor of the French Protestant Church of London; and that, notwithstanding a declaration made by the elders and deacons of the said church on the 1st July, 1857, of the vacancy of the said office, he had ever since continued to be, and still was, pastor of the said church. He also prayed a declaration that M. Marzials had not been duly appointed, and was not a pastor of that church; and for the injunction to which I have alluded. He also sought to restrain M. Marzials from discharging, or attempting to discharge, the duties of a pastor of the church. The cause came on to be heard; and in 1860 I made a decree in the plaintiff's favour. On that occasion I stated my opinion to be that M. Marzials was a properly appointed pastor of the church. I stated also that the bill could not be entirely dismissed against him, because, being a pastor, he was a most important member of the consistory and a necessary party to the cause; but I said it must be dismissed against him, so far as it prayed distinct relief against him; and that he must have his costs. With that part of the decree M. Daugars was not satisfied. He refused to recognise him as a pastor, and did other things in antagonism to him and the members of the consistory; for instance, when reading the service of the church, M. Daugars refused to pray for M. Marzials as a pastor of it, which was a usual thing. After the decree was pronounced by me, an information was filed by the Attorney-General, having for its object the framing of a scheme which should settle all the matters in dispute between the parties. After that, however, M. Daugars again quarrels with the consistory, and they again suspend him. They did so for reasons into which, in their absence, as I have said, I shall not enter. The matter can, in that respect, only be treated in the regular way. It is obvious, I fear, that what has been determined will

not settle all the questions between the parties. The only documents which, at present, appear to be binding on the society are, the Discipline of 1641, and the Reglements du Consistoire. But upon those I cannot now express any opinion. Suppose, for a moment, that I was to assume M. Daugars to be perfectly in the right; that the acts are those of the consistoire, and that M. Marzials has done all that is imputed to him; that he has introduced other parties into the pulpit, to the exclusion of M. Daugars; that he has interfered with him in the discharge of his duties; still is it possible for me, on a motion to commit M. Marzials for contempt of an order of this court, to go into the consideration whether those various acts are or are not within the Discipline of 1641 and the Reglements du Consistoire, or any, or either, and if so, which of them? Take, for instance, the rule as to "temper." In examining the acts complained of, I might perhaps come to the conclusion that both M. Daugars and M. Marzials should be removed. Now, those are matters which I should have to decide before I made the order now asked for; but in reality I have no sufficient materials before me for the purpose. Before, however, I entirely dismiss the matter, I will, in the second place, say a few words as to what appears to me to be the nature of the acts alleged to have been done by M. Marzials, and whether they bring him within the scope of the injunction. By the express order of the consistory, he on one occasion occupied the pulpit before M. Daugars came to it. M. Daugars then approached it, with the view of getting into it, when some persons who were present prevented him from so doing. He immediately addressed himself to the congregation there assembled. M. Marzials was among them. The effect of M. Daugars' address was that several of the congregation—how many in particular is not material—followed him out of the church. M. Marzials then seems to have made a sign to the organist to play the organ, with a view of drowning the address of M. Daugars. But I hardly think that in itself was a thing of which M. Daugars could complain. However, assuming M. Marzials to have been acting as agent of the consistoire, and assuming them to have had (as in their absence I cannot say they had not) the right to instruct him, it only shows that the *major vis* in the quarrel was on the side of M. Marzials and the consistoire. As for M. Daugars leaving the church, it may have been that he thought it wiser and safer to stop at that stage of the proceedings. But, assuming all those facts and circumstances to be as I have stated them, it is quite impossible to say that M. Marzials has done any act that brings him within the scope of the injunction. It would be absurd to hold him guilty of a breach of it, for the real persons who have, if any one has, infringed it, are the consistoire. They are not here. Could I, ought I, to inflict on M. Marzials a punishment—ought I to make him a vicarious sacrifice, and execute upon him a penalty for the misdeeds of others, simply because I have him before me and I have not the real offenders? He, indeed, has told us that in truth he is a passive instrument in the hands of the consistoire, and can, of himself, do nothing. It is quite impossible for me to hold that he is liable on this motion, and I must refuse it. The only order I can make in it is, that M. Daugars must pay the costs of it.

STUART, V.C., April 18, 1866.

HALL v. THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

14 L. T. 351.

Contract—Specific performance—Conveyance—Parties.

VENDOR AND PURCHASER.—Where property was devised to trustees upon trust for A. for life, for her sole and separate use, and after her decease in trust for such person as she should appoint; and A. conveyed to B.:—Held, on a conveyance to a third party, C. (A. being still living), that the trustees were necessary parties.

This bill was filed for the specific performance of a contract.

James Dancer, by his will, devised certain freehold property to trustees, their heirs, &c., upon trust, during the lifetime of his daughter, Mrs. Hall, to pay the income to her for her sole and separate use, and after her decease in trust for such person as she should appoint, and in default of appointment in trust for her heirs.

After the testator's death Mrs. Hall, in 1852, conveyed the property thus devised to the plaintiff absolutely.

The plaintiff subsequently entered into a contract with the defendants for the sale of the property, and they had agreed to purchase, but they now objected to complete without the concurrence of the trustees. Mrs. Hall was still living.

This bill was consequently filed, praying that the agreement entered into by the defendants might be specifically performed, and that the purchase-money and interest might be paid into court.

Bacon, Q.C., and A. Smith for the plaintiff.

Kekewich for the defendants.

The VICE-CHANCELLOR.—There must be a decree for specific performance, but as it seems only reasonable that, under the circumstances, the concurrence of the trustees should be obtained, I shall order them to join in the conveyance. Let the order be entitled in the Lands Clauses Consolidation Act, and the purchase-money paid into court under the 69th section.

STUART, V.C., April 18, 1866.

RIVES v. RIVES.

14 L. T. 351.

Trustee Act 1850—Investment by mistake—Infants made trustees for executors.

TRUST AND TRUSTEE.—Where an investment in consols had been made by executors, by mistake, in the names of infants:—Held, for the purposes of reinvestment, that the infants must be considered as trustees for the executors, and a declaration made to that effect.

This bill was filed for the purpose of obtaining a declaration that the infant defendants were trustees, within the meaning of the Trustee Act of

1850 (13 & 14 Vict. c. 60), of certain moneys which had been invested, by mistake, in their names in consols.

The facts were these:—

John Cook Rives, a domiciled American, by his will dated the 24th April, 1861, after various other dispositions of his property, bequeathed the residue of his estate to his five children, and to each of them he gave a package containing 10,000 dollars in Missouri State Bonds, and directed his executors to pay the same to them on their attaining majority, and in the meantime, during their minority, to appropriate the interest thereof towards their education and support.

The testator died in April, 1864, and his will was proved by the plaintiffs, his executors, both in England and America.

In July, 1864, the plaintiffs transmitted from America to Messrs. Peabody & Co. the sums bequeathed by the testator to his children, amounting in all to 10,000*l.*, and directed them to invest the same in Three per Cent. Consolidated Annuities.

The defendants (two of the testator's children entitled to two-fifths of this sum) were infants, and it appeared that Messrs. Peabody, in ignorance of this fact, had invested their shares in their names respectively.

In April, 1865, the plaintiffs being desirous of reinvesting the stock in United States securities, obtained an order from the Orphans' Court, at Washington, to enable them to do so, but the authorities at the Bank of England refused to transfer the stock standing in the names of the infant defendants without the court's assistance.

The plaintiffs thereupon filed this bill, praying that the moneys so invested in the defendants' name might be re-invested in their own the plaintiffs' names, and be under their control, and that the defendants might be declared trustees thereof, and that the right of transferring the stock and receiving the dividends to accrue thereon might vest in the plaintiffs or such other persons as the court might appoint.

Kekewich for the plaintiffs.

F. Vaughan Hawkins for the defendants.

The VICE-CHANCELLOR.—The investment appears to have been made by mistake in the names of the defendants, and I consider that they must be held as trustees of the fund so invested for the plaintiffs. There will be a declaration to that effect, coupled with a vesting order.

STUART, V.C., April 21, 1866.

BROWNE v. TYLER.

14 L. T. 352.

Marriage-settlement—Construction—Proceeds of sale of commission.

ARMY AND NAVY.—*B.*, a captain in the army, covenanted with the trustees of his marriage-settlement "that if he should become a major in the army or attain higher rank therein, and should at any time thereafter retire by the sale of his then commission, then and in such case he would pay over to the trustees the sum realised by such sale to the extent of 1,500*l.*," to hold upon the trusts of the settlement. Subsequently *B.* having obtained the brevet rank of major, sold his captain's commission for 1,373*l.*:—Held, as against an assignee, that the proceeds of the sale of *B.*'s commission were subject to the trusts of his marriage-settlement.

The question in this case was, whether the proceeds of the sale of the

commission of George Richard Browne, as captain in the army, were subject to the trusts of his marriage-settlement.

By that settlement, dated in June, 1857, G. R. Browne covenanted with trustees that "if he should become a major in the army or attain higher rank therein, and should at any time thereafter retire by the sale of his then commission therein, then and in such case he would immediately thereupon pay over to the trustees or trustee for the time being of his settlement the sum realised by such sale to the extent of 1,500*l.*," to hold by them upon the trusts thereof.

At the date of the above settlement G. R. Browne was a captain in the army, but subsequently, in July, 1865, he sold his captain's commission for 1,373*l.* 12*s.* 3*d.* Before he sold out, however, he had obtained the brevet rank of major, by which, although he was still a regimental captain, he became a major in the army.

The plaintiff, who was the father of G. R. Browne, claimed the proceeds of the sale of his son's commission by virtue of an assignment of the same to him in 1863.

Swanston for the plaintiff.

E. Kay for Browne and his wife and children.

Osborne Morgan for the trustees of the settlement.

The VICE-CHANCELLOR.—I consider that the proceeds of the sale of the commission are impressed with the trusts of the settlement. The only thing which appears to me to suggest any doubt in the case is the fact of the 1,500*l.* stipulated for in the settlement being more than the price realised by the sale of the captain's commission; but this, in itself, is not enough to control the clear words of the settlement. There must be a declaration that the proceeds of the sale of the commission are subject to the trusts of the settlement, after payment thereof of the costs of all parties as between solicitor and client.

STUART, V.C., April 27, 1866.

Re THE SETTLED ESTATES ACTS AND ROBERT TUNSTALL'S WILL.

14 L. T. 352.

Practice—Demise—Costs of application charged on estate—Mortgagee's name inserted in order.

SETTLED LAND.—*The Court, in approving of an agreement to demise certain landed estates, and in directing that the costs of the application should be a charge on the property, ordered the name of the person advancing the money necessary for the payment of such costs to be inserted in the order.*

This petition was presented under the following circumstances:—

Robert Tunstall by his will, dated the 18th May, 1831, after otherwise disposing of part of his property, devised all his real or copyhold estates in Surrey and Middlesex, or elsewhere in England, to the petitioner for life, and after the determination of that estate by forfeiture or otherwise, to the use of trustees, in trust to preserve contingent remainders, with remainder to the use of the first and other sons of the petitioner severally and successively, according to seniority in tail, and in default of such issue in like manner to the daughters in tail, with remainders over.

The testator died on the 19th December, 1833.

There was no power of leasing contained in the testator's will, and only one of the trustees appointed for preserving the contingent remainders was living. The petitioner had living four daughters who had attained twenty-one, and one son an infant.

The present application was for the purpose of obtaining the approval of the court to an agreement entered into between the petitioner and a Mr. Austin, whereby the petitioner agreed to lease part of the property devised to him as tenant for life. The petitioner also asked that an order made upon a former application in 1864, and which confirmed another agreement to demise the same property, might be discharged, and that the costs of that and the present application might be ordered to be raised by way of mortgage on the property forming the subject of the petitioner.

Rasch for the petition.

Hughes for the respondents.

The VICE-CHANCELLOR.—I see no objection to the present agreement. The order may be drawn up as prayed, except that I shall direct that the name of the person advancing the money necessary for the payment of the costs be inserted in the order. This will have the effect of saving the expense of a mortgage-deed.

STUART, V.C., May 4, 1866.

Re COLLIS'S ESTATE.

14 L. T. 352.

See *In re Saunderton Glebe Lands*, [1903] E. R. A.; 72 L. J. Ch. 276; [1903] 1 Ch. 480; 88 L. T. 267; 51 W. R. 522 (Ch. D.).

Railway company—Purchase of land—Tenant for life and occupier—Compensation.

COMPULSORY PURCHASE.—*On a purchase by a railway company of lands from a tenant for life in possession, the Court ordered part of the purchase-money to be paid to the tenant for life by way of compensation for the injury and inconvenience which he had sustained.*

This was a petition presented under the Lands Clauses Act.

By the will of Thomas Collis, deceased, the petitioner became entitled as tenant for life in possession to certain landed property.

In December, 1865, the petitioner agreed to sell this property to the Midland Railway Company for the purposes of their undertaking.

The purchase-money, 310*l.*, had been paid into court, but the sum of 40*l.*, part thereof, had been assessed by way of compensation for the injury and inconvenience which it was considered the petitioner would sustain independently of the value of the property and of the damage to the adjoining lands occasioned by the works of the company.

The petition prayed that this sum of 40*l.* might be paid to the petitioner, that the residue of the purchase-money, 240*l.*, might be invested in Consols, and the dividends paid to the petitioner for life, and that the costs of and incidental to the application might be paid by the company.

The petition originally came before the court on the 20th April, but on that occasion it stood over in order that those entitled in remainder might be communicated with, and this having been done it now came again before the court for its decision.

Hardy, for the petitioner, said that the court had power under the 72nd section of the Lands Clauses Act to grant the application.

Sargant, for the company, offered no opposition.

The VICE-CHANCELLOR.—The application seems a reasonable one, and I think I shall be justified in acceding to it. The order may be drawn up in accordance with the prayer of the petition.

Wood, V.C., April 28, 1866.

MORGAN v. FULLER.

14 L. T. 353; L. R. 2 Eq. 297.

Patent—Particulars of objection—Exceptions.

PATENT.—*Particulars of objection alleging prior user must specify with particularity the time, place, and manner in which such user took place.*

This was a suit to restrain the defendants, who were carriage builders at Bath, from infringing the plaintiff's patent for the invention of certain improvements in the manufacture of carriages.

By an order made in the cause, dated the 18th January, 1866, certain issues of fact were directed to be tried without a jury.

The defendants had given the plaintiff notice that they intended to rely on the following particulars of objection:

1. That head-joints for opening and closing heads of carriages similar to the head-joints used and applied in plaintiff's said alleged invention for the same purposes, had been commonly used and applied for the same purposes by carriage builders generally throughout Great Britain long before the date of the said letters patent.

2. That head-joints so used and applied had been concealed in the lining of the carriages in which they were used and applied by carriage builders generally, long before the date of the said letters patent.

3. That head-joints for opening and closing the heads of carriages similar, or substantially similar, in form and action to those described in the plaintiff's specification had been actuated in their motions by lever handles and connecting rods before the date of the said letters patent, in carriages fitted or constructed by various carriage builders carrying on business in or near London, in or near Liverpool, in or near Manchester, in or near Southampton, and in or near various others of the principal towns of Great Britain, where the carriage building trade has been carried on, and, amongst other carriage builders, by Messrs. Thorn, of Great Portland Street, London.

4. That the mode described in the complete specification of the plaintiff's invention, of combining with the heads of carriages the mechanical parts described in the said specification, and to which the plaintiff professes to lay claim, had been in its essential features applied and used before the date of the said letters patent in various mechanical combinations and contrivances applied to various matters and purposes, including amongst others the construction of breaks to railway carriages, and carriages on ordinary roads, the construction of telegraphs, the construction of the pedal action of organs, and of the keys of pianofortes and musical instruments, the construction of cutting and holding instruments and implements, and the construction of printing presses.

5. That parts of the combination described and claimed in the said

complete specification as part of the plaintiff's invention had not been invented by the plaintiff at the date of the said letters patent.

6. That *parts* of the said combination, if so invented, were not described, or sufficiently described, in the provisional specification on which the said letters patent were issued.

7. That the said complete specification does not particularly ascertain and describe the nature of the said alleged invention, and in what manner the same is to be performed.

The plaintiff made an application at chambers for the defendants "to deliver within seven days further and better particulars of objection, by stating the names and addresses of the persons by whom, and the places where, and the dates at and the manner in which, the invention is alleged by the defendants to have been used before the date of the plaintiff's patent, and by stating also what parts of the plaintiff's combination are alleged by the defendants not to have been invented by the plaintiff; and, in default, that the defendants be precluded from giving any evidence at the trial of the issues of which proper notices shall not have been given in the said defendants' particulars of objection; and that the 5th and 6th objections delivered by the defendants be struck out."

The summons was adjourned into court, and now came on for argument.

W. Pearson, for the plaintiffs, submitted that the particulars of objection were too vague and general, and that the provisions of sect. 41 of the Patent Law Amendment Act, 15 & 16 Vict. c. 83, had not been complied with.

W. C. Fooks, for the defendants, opposed the application, and cited—*Heath v. Unwin*, 10 M. & W. 684.

The VICE-CHANCELLOR said he thought, if these exceptions were not allowed, the Act of Parliament would be merely waste paper. The words of the Act were, "that the place of, or places at or in which, and in what manner, the invention is alleged to have been used or published prior to the date of the letters patent, shall be stated in such particulars." In *Fisher v. Derwick* (4 B. N. C. 706), the particulars of objection against which exception was taken were as vague as they were here, and the Judge decided that they could not be allowed, and under the statute 5 & 6 Will. 4, c. 3, s. 85, which was then in force and was less stringent in terms than the present statute, the Judges held that there must be a *bona fide* statement of objection and not vague generality. The things referred to in the particulars must be stated with particularity. The defendant must know what particular class of carriages he intended to produce; he must, therefore, state of what kind they were, at what date they were used, and by what builders. He should disallow the objections, and fresh particulars must be sent in. Costs to be costs in the cause.

WOOD, V.C., May 3, 1866.

MACGREGOR v. METROPOLITAN RAILWAY COMPANY.

14 L. T. 354.

Lands Clauses Consolidation Act, s. 92—Part or the whole of the lands, &c., required to be taken.

COMPULSORY PURCHASE.—*Where a proprietor of a house and garden held them under two demises, the house and part of the garden being comprised in one, and the other part of the garden in the other demise, the company must take the whole and make compensation.*

This was a motion under the Lands Clauses Consolidation Act, 1845,

to restrain the defendants and company from entering upon and taking from the plaintiff, a Captain MacGregor, the owner of a house and garden near Notting Hill, which were required by the Metropolitan Railway Company for the purposes of their Act, without making proper compensation for the whole of the premises, the company having offered to compensate him for the house and part of the garden only. It appeared that the owner held the premises under assignments of two demises for terms of ninety-nine years each from Lady Day, 1854, the one comprising the house and a part of the garden, the other the remaining part of the garden. The company were about to make a tunnel under this property, not requiring the whole of it, and the question was whether they were bound to take the whole, or only the part required by them.

Rolt, Q.C., and *Cracknall*, in support of the motion.

W. M. James, Q.C., and *W. J. Bovill*, for the company, contended that the present did not come within the adjudged cases upon the subject, especially as the premises comprised in one of the demises were totally distinct from the other, and not required by the company. The clause upon which the question turned is as follows: Sec. 92:

“And be it enacted that no party shall at any time be required to sell or convey to the promoters of the undertaking, a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof.”

As to a tunnel, see

Sparrow v. Oxford and Wolverhampton Railway Company, 2 De G. M. & G. 94.

The VICE-CHANCELLOR expressed it as his opinion that under this section the company were bound to take the whole of the premises comprised in the two demises, but it was not now necessary to decide that question. There must be an interim injunction to restrain the defendants the company from taking or continuing in possession of any part of the plaintiff's house, garden, and premises, until compensation made by them to him for the part of the whole which they required or were bound to take.

[IN THE QUEEN'S BENCH.]

May 5, 1866.

REG. v. THE HEARTS OF OAK FRIENDLY SOCIETY.

14 L. T. 360.

Practice—Amending in a subsequent term a rule of a former term.

PRACTICE.—A rule made absolute or discharged in one term cannot be amended by the court in a subsequent term.

A rule nisi for a mandamus was discharged by the Court, nothing being said as to costs. In the following term application was made to the Court to amend the rule by discharging the rule nisi with costs:—Held, that the Court had no power in such subsequent term to amend the rule.

In Hilary Term (January 25) cause was shewn by *Quain* against a rule for a mandamus to restore a party to the office of secretary of the above

society, which rule was thereupon discharged, nothing having been said by the Court about costs.

Quain now applied to the Court to add to the rule by giving costs as against the applicant for the rule, and he did so upon the following facts. He stated that upon the rule being discharged he inquired of the Queen's attorney whether it was necessary that he should ask the Court to discharge it with costs, and was informed that the costs would follow the event, that upon subsequently attending at the Crown office to tax the costs, an objection was taken that as the rule was silent as to costs they would not be taxed, and the officer of the Crown office being of this opinion, he refused to tax.

Quain now applied to the Court to amend the rule by discharging the rule *nisi* with costs. [BLACKBURN, J.—Have we power to do so, the term in which the rule was discharged having expired? We are in the habit of amending rules in the same term, but this rule was disposed of last term.] We came as soon as we found the defect.

BLACKBURN, J.—The master on the civil side of the Court informs me this is never done, and hands me this entry. "*Scales v. Riding, Hilary Term 1865*. In Michaelmas Term plaintiff moved to increase the damages which rule was discharged, and nothing said as to the defendant's costs of opposing the rule. In the next term defendant applied to amend the rule by discharging the rule *nisi* with costs. The Court refused the application on the ground that it should have been made during the same term." As this, therefore, cannot be done on the civil side, it cannot be done on the Crown side*of the Court."

Application refused.

ROMILLY, M.R., April 19, 1866.

COCKS v. ROMAINE.

14 L. T. 390.

Right to light and air—Injunction—Cross demands by both plaintiff and defendant for damages—Bill dismissed.

EASEMENTS AND PRESCRIPTION.—Where, in an injunction suit to restrain the defendant from obstructing the plaintiff's light and air, a motion for a decree was made nearly three years after the filing of the original bill and other proceedings in the suit, and after various acts on the part of both plaintiff and defendant, whereby it appeared to the Court that each party had to some considerable extent injured the other, it was:—Held, that, although the plaintiff sought the injunction and damages against the defendant, and the defendant was to some extent to blame, still, that upon the evidence the proper course was simply to dismiss the bill without costs.

This was an injunction suit. The bill in it was filed in August, 1863. After filing the bill an injunction was granted by the Master of the Rolls in the terms of the motion then made, and in October, 1863, a motion to dissolve the injunction was refused. From that last decision the defendant appealed to the Lords Justices, who reversed it, and granted an order dissolving the injunction, but upon the defendant entering into an undertaking as then agreed upon.

The cause now came on for hearing on a motion for a decree. The material facts of the case, as stated by the bill, were these:—

By an indenture dated the 6th August, 1860, and made between

Nathaniel Powell of the one part, and the plaintiff of the other part, Nathaniel Powell demised to the plaintiff the messuage, tenement, and premises, No. 88, Chancery Lane, for the term of twenty-one years. The plaintiff was now in the occupation of the land and premises under that lease.

The defendant was the owner of a piece of land and premises immediately adjoining those of the plaintiff on the north side thereof, viz., No. 87, Chancery Lane.

The defendant had pulled down a house and other buildings formerly on his land, and was in the course of erecting other structures thereon. In so doing he had removed a wall, which was in a yard within the boundary of the plaintiff's land; and was proceeding to build another. The rear of the plaintiff's house was lighted by eleven windows situated on the west side of it and on the north side of it, looking upon the said court or yard on the plaintiff's premises, the court or yards on the defendant's premises, and some courts over which the plaintiff had a right of way. All the said windows were ancient lights and the access and use of light to and for the plaintiff's house had been actually enjoyed therewith as of right by the occupiers of the plaintiff's dwelling-house for the full period of fifty years without any interruption and without any consent or agreement made or given for that purpose by any deed or writing. Upon a certain portion of the defendant's premises indicated in a plan referred to in the pleadings, and coloured brown, stood the dwelling formerly erected thereon. Upon another portion, coloured blue, there recently, and for upwards of twenty years, had stood a low building consisting of one story only, and less than twelve feet in height from the level of the plaintiff's yard and having a flat roof with a skylight. Upon another portion, coloured sepia, there recently and for upwards of twenty years had stood a building two stories high. Upon another, coloured green, there recently and for twenty years had stood a building four stories high. The south external wall of that last-mentioned building formed the side of an alley or passage leading to Chichester Court and Star Yard. The whole of that passage or alley was open from the level of plaintiff's yard to the sky, and a very considerable amount of light and air had access to the plaintiff's premises and to the said windows or ancient lights in and belonging to the house No. 88, Chancery Lane, by means of that passage. It further appeared that the plaintiff had recently (as the bill stated) discovered, that the defendant threatened and intended to raise and build in the place of the said several buildings marked on the said plan with the said colours, brown, blue, sepia, and green, and upon the said open court leading to Chichester Court, and over Chichester Court, one entire building five stories high, and of the uniform height of forty-two feet from the level of the plaintiff's yard, whereof the said wall thereinbefore referred to as then in course of erection and intended to be erected by the defendant (and if the defendant should be restrained from building such wall, some other wall running parallel to and immediately adjoining the boundary line of the plaintiff's premises), was intended to be the southern external wall. The said wall and the proportions of the said new buildings adjoining thereto would, it was alleged, entirely cover the open space formerly existing above the said low building coloured blue on the said plan, with the exception of a small air-shaft proposed to be left there; and would also cover the portion of the said passage or alley to Chichester Court immediately adjoining the plaintiff's boundary line, the plaintiff's right of way being proposed to be secured by him by a covered passage in lieu of an open alley. The grievance of the plaintiff's case, as so made by his pleadings, was this: by the means aforesaid the plaintiff's paved yard, in lieu of having a clear opening of five feet or thereabouts at the north-west corner of it, reaching from the top of the door there (which was about six or seven feet high) to the sky, and of having on the north side of it buildings of a low range, would be entirely surrounded by lofty buildings, viz., on the east side by the plaintiff's own house, on the south and west sides by the adjoining ancient premises known as Rolls Chambers,

and on the north side by the defendant's house; and therefore the plaintiff's access of light and air to the said yard and the said windows or ancient lights would be very materially diminished.

The bill then prayed a declaration that the defendant might be restrained from building, raising, or carrying up the said wall or walls so intended to be built, raised, and carried up, situated and standing on the plaintiff's premises as aforesaid, and from continuing the said wall or walls along the said courses of lines hereinbefore mentioned, and from erecting, raising, or building any wall within the boundary of the plaintiff's premises. That the defendant might be also restrained from building any wall or walls or other buildings nearer to the boundary line of plaintiff's premises, or to a greater height than the old buildings formerly standing on the ground belonging to the defendant, and from erecting or building upon the said ground any wall, building, or erection of a greater height in any part thereof than the elevation at the same point of the old buildings as they then lately had stood thereon, so as to darken, or obscure, or impede the light or air theretofore enjoyed by the plaintiff, and from building in such a way, or doing any act whereby the plaintiff's light might be darkened or obscured, or the free admission of light and air be prevented or obstructed; that the defendant might be also restrained from continuing to stop up or prevent the plaintiff from using and enjoying the said right of way leading to Chichester Court or Star Yard as aforesaid, and that the damages sustained by the plaintiff by reason of the proceedings of the defendant hereinbefore stated might be assessed by and under the direction of the Court, and paid to the plaintiff; and finally that the defendant might pay the costs of the suit.

Jessel, Q.C., and *H. B. Ince* appeared for the plaintiff, and supported the motion for the decree.

Selwyn, Q.C., and *Wickens*, for the defendant, insisted that, since the institution of the suit, the plaintiff had virtually put himself out of Court. The defendant had done several things in the course of the alterations which he was carrying out, and lawfully, upon his premises to meet the views of the plaintiff. The evidence adduced on his behalf as to the precise nature of both his acts and those of the plaintiff shewed that many of the acts of the defendant were done by him at the express desire of the plaintiff, and at great inconvenience and loss to the defendant. It was now impossible—more than three years since the filing of the bill—to say that the plaintiff could be entitled to a decree upon it. In fact, the plaintiff ought to pay him damages instead of falling upon him for them.

Jessel, Q.C., in reply, referred also to the evidence in the suit as to what had been done by the parties since 1863, all which will sufficiently appear from the judgment of the Master of the Rolls *infra*.

LORD ROMILLY.—This suit was originally instituted in the month of August, 1863. The object of it was to obtain an injunction to restrain the defendant from interfering with the ancient lights and with the air of the plaintiff, and for other purposes to which I shall more particularly refer presently. The plaintiff is the occupier of No. 88, Chancery Lane, and the defendant occupies No. 87. On the 2nd October, 1863, on an application made to me in the vacation, I refused to dissolve an injunction which I had previously granted upon a motion for that purpose. The Lords Justices, on an appeal from my decision, afterwards dissolved the injunction, but upon an undertaking which they then required from the defendant. In October, 1864, he made some alterations in his mode of constructing the buildings in question in the suit; but no other step was taken by him till September, 1865. In that month he filed new affidavits, stating various things to which he had not previously deposed; and he now asks, as against the plaintiff, compensation and damages for acts done by him. In fact, the relative situation of the parties as plaintiff and defendant appears to be changed. The principal grounds of

complaint urged by the plaintiff are these: first, that in consequence of the improper and illegal conduct of the defendant, the plaintiff's light and air are considerably diminished; secondly, that the defendant has been, and is, guilty of a trespass on the property of the plaintiff, in that he has built, and is still continuing, a wall on the ground belonging to the plaintiff; thirdly, that he has been, and is, guilty of a trespass on the property of the plaintiff, in that he has built, and is still continuing, certain structures on the ground belonging to the plaintiff, which ground is at the back of the plaintiff's house; and, fourthly, that he has been, and is, guilty of a trespass on the property of the plaintiff, in that he has placed, and is still continuing, certain props against the roof of the plaintiff's house, which are wrongly placed there, and which, being there, greatly interfere with the plaintiff's enjoyment of his house and property. Now, with respect to those grounds of complaint, it may be observed that the first is the only one which is of any importance. As to the others, the first alleged trespass really appears to me, from all the evidence in the case, to be no trespass at all. I am convinced that if the arrangement then mentioned between the parties with respect to the wall had been fairly carried out, both would have been benefited. They would have had a good party wall, with a strong foundation to it. But the conduct of both parties mutually prevented that result. So with regard to the other alleged acts of trespass. The evidence satisfies me that the plaintiff has no real reason to complain. Indeed, his proceedings in the case appear to me in that part of it to be somewhat inexplicable. He seems not to be aware, or to have forgotten, that a court of equity will not aid a man who insists on the strict letter of the law being applied on his behalf, while at the same time he will not do what is, in other respects, his duty to the party against whom he makes the application. Then the only remaining matter for my consideration is the question of the interruption of the light and air coming to the back of the plaintiff's house. In fact, the allegations as to that part of the case are the only ones which afford anything like a support to the plaintiff's bill. But even as to those facts, they have changed since I granted the injunction in the first instance. It is possible that that change of circumstances arose from what was suggested by the Lords Justices, I mean by Turner, L.J., who said, "It is for the parties to consider whether they or either of them will make any, and if any, what modification or alteration in the plans of their buildings." Well, but the result was that the defendant did make some alteration in his mode of building. Those alterations appear to me, from the evidence, to have been, and to be, beneficial to the plaintiff instead of injurious to him. The light which he says is now obstructed came originally to the back windows of his house, over the walls of a building opposite those windows. The structure, of which that wall was the boundary, was at first about 7ft. from the plaintiff's windows. The alterations made by the defendant had the effect of putting the wall further back, that is, further off the windows, and although ultimately he raised the building itself from about 32½ft. to 40½ft., he still widened the intermediate space, I mean the space between the plaintiff's windows and his wall, and thereby increased the size of the opening through which the plaintiff's light and air came to him. I have not now to consider whether the interruption, such as it is, of the plaintiff's light and air is sufficient for an injunction. It is clear that he is not entitled to a mandatory one: but it seems to be admitted that his only claim (if any) is to damages. But even so, how can I now ascertain what compensation he is entitled to? Then with respect to the defendant's counterclaim; he ought, in my opinion, before he commenced his new operations, to have consulted with the plaintiff's lessor, and should have then come to some arrangement with him. But he did not do so. Then with regard to the plaintiff. He also is in fault in that part of the case. He says, indeed, that a former lodger whom he had, left his lodgings, and was unwilling to return. He would wish it to be inferred that the proceedings of the defendant were the cause of the

lodger's leaving the plaintiff's house and of his unwillingness to return. But it does not appear from the evidence that such was the fact. What, however, assuming it to have been so, did the plaintiff do? Why he himself has allowed the matter to rest for upwards of two years; and, moreover, has thereby inflicted on the defendant great inconvenience. Upon the whole case I have come to the conclusion that the justice of it will best be met by my setting off, so to say, the claims of the one party against those of the other. So far as regards the alleged obstruction by the defendant of the plaintiff's light and air by the erection of the wall in question, I am of opinion that the defendant was justified in acting as he has acted. So far as regards the plaintiff, I think, although he has not acted on the whole as he should have done, he should not be made to pay any damages. What I shall therefore do is, to make a decree dismissing the bill, but without costs.

WOOD, V.C., May 8, 1866.

TUNSTALL v. BARTLETT.

KNOWLES v. BARTLETT.

14 L. T. 400.

Statute of Limitations—Claim under—Indemnity deed—Practice in chambers.

LIMITATIONS (STATUTES OF).—*Under a deed of indemnity of October, 1841, in the nature of a family arrangement, W. K. the younger and an executor of the testator William Knowles, was indemnified by the rest of the family from any claim in respect of having allowed the investment of a considerable portion of the testator's estate (1,400l.) to two of the sons, George Knowles and Charles Knowles, on their promissory notes.*

These promissory notes had been barred by the Statute of Limitations, no interest having been demanded in respect of them nor any acknowledgment taken. A creditor's suit had been instituted to administer the estate of George Knowles, and a claim to be indemnified against any claim in that suit had been carried into chambers in respect of the said 1,400l. so formerly advanced to the sons. This claim was disallowed:—Held, that such claim was not barred by the Statute of Limitations, and same allowed with costs to be added thereto.

This was a claim in an administration suit adjourned from chambers into court.

These suits had been referred to the chief clerk in chambers to take the necessary accounts in respect of the estate of one William Knowles the elder. Another suit of *Cary v. Knowles* was against the executrix and executor of the said testator's will, William Knowles the younger being an executor, and it alleged, amongst other things, that they had improperly advanced 1,400l., part of the residue of the estate, to George Knowles and Charles Knowles, two of the testator's children, upon their respective promissory notes of the date of the 10th November, 1841.

By an indenture of the 12th October, 1841, between the said Elizabeth Knowles of the first part, George Knowles of the second part, William H. Knowles (another son) of the third part, Charles Knowles of the fourth part, and William Knowles of the fifth part, the residuary personal estate of the testator was ascertained to be 1,800l., and the investment of the 1,400l., part thereof, on the promissory notes aforesaid, was approved by all the parties.

This deed contained a covenant by Elizabeth Knowles, George Knowles, William H. Knowles, and Charles Knowles, to the said William Knowles (the executor) that they and each of them should from time to time, and at all times thereafter, save harmless and keep indemnified the said William Knowles, his heirs, executors, and administrators, of and from all and all manner of action or actions, suit or suits, trouble, costs, charges, and expenses at law or in equity, and all damages whatsoever that should or might at any time thereafter happen or accrue to him or them for or by reason of said William Knowles having (at the request and approbation of the parties as aforesaid) lent and advanced the amount of the net proceeds of the estate of the said William Knowles, deceased, unto the said George Knowles and Charles Knowles, upon their respective promissory notes, payable on demand, with interest, in the proportion before mentioned.

The promissory notes had been barred by the Statute of Limitations at law, the defendants having failed to demand or receive the interest on said debt, or take any acknowledgment thereof from said George Knowles.

This bill of *Cary v. Knowles* therefore (*inter alia*) prayed that the defendants, the executrix and William Knowles the executor, might be declared personally liable for the 1,400*l.* lost to their testator's estate through their neglect.

A claim had been carried into chambers by William Knowles (the son and executor) to be indemnified out of the estate of said George Knowles, in pursuance and by virtue of the covenant before set out, against a claim for the said 1,400*l.* and interest, or such moneys as he, said defendant William Knowles, might be ordered to pay in a suit in which one C. S. Cary and Hannah his wife were plaintiffs, as creditors of the said testator William Knowles.

The claim had been disallowed by the chief clerk in chambers, and the same now came on by way of appeal from that decision for discussion.

The question was, whether the claimant was not also barred by the Statute of Limitations.

Osborne Morgan, in support of the claim, contended that he had a full right under the deed of October, 1841, to be indemnified against any claim which might be made against him in the creditor's suit of Cary and Knowles.

Willcock, Q.C., and *H. S. P. Winterbotham* opposed it on the ground that the deed of indemnity did not provide for any such contingency; that the operation of the deed was limited to the breaches of trust *then* committed, and the debt on the promissory notes having been lost to the testator's estate by the personal laches of the defendant the said William Knowles the executor.

Charles Hall, for the executors, supported the same line of argument.

The VICE CHANCELLOR said the Statute of Limitations did not raise a bar to the present claim. It could not come into operation or take effect until a breach had been made, and no cause of action or suit had at present arisen. The executor William Knowles had not yet been damnified, but he had a right under the deed of indemnity to be protected against any such claim. The deed must be looked at in the light of a family arrangement, and the decision of Lord Lyndhurst in *Fuller v. Maitland* applied. The claim must therefore be allowed as entered in the terms of the covenant, the claimant to add his costs to the claim; the costs of the other parties to be costs in the cause.

Order accordingly.

[IN THE QUEEN'S BENCH.]

May 2, 1866.

OLDING v. WILD.

14 L. T. 402.

Salmon Fishery Acts—Fixed engine—Net.

FISH AND FISHERIES.—*A net was secured at one end to a pole temporarily fixed to the soil on the margin of the channels of a tidal river, one-half of the net being stretched across the channel at low water from a boat anchored to a buoy. The fisherman in the boat waited his opportunity, then let out the rest of the net, and rowed round to the pole, thus sweeping the river:—Held to be a fixed engine with 24 & 25 Vict. c. 109, s. 11, and 28 & 29 Vict. c. 121, s. 39.*

A claim to fish in that way by immemorial usage was held to be bad.

Case stated under 20 & 21 Vict. c. 43.

At a petty sessions for the county of Southampton, at Lyndhurst, on the 9th August, 1865, an information of Charles Wild was heard against Charles Olding, under the 11th section of the Salmon Fishery Act, 1861, charging that he the said C. Olding, on the 25th July, 1865, in a certain tidal water adjacent to the parish of Eling in the county of Southampton, and within the said county, unlawfully did place and use a certain fixed engine, to wit, a net temporarily placed to the soil there, for catching salmon in such tidal water there, and of which net he the said C. Olding was then and there the owner, contrary to the form of the statute, &c.

From the evidence of C. Wild it appeared that he was employed by a local society for preservation of salmon to prevent illegal fishing in the lower part of the river Test, an estuary of the sea there.

That on the 2nd July he saw the appellant in a boat with two buoys, at Horsehead, between the Redbridge and Eling channels. It was morning, and the half-tide was in about an hour's flood. That appellant drove in a stake about the size of a fold shore on the mudland on the western side of the river. The stake was about 14ft. or 15ft. long, and pointed with iron at the bottom. There was a rope fixed to the net and then made fast to the stake. The net was then in the boat. They had an anchor with a rope, and a buoy on to it about the middle of the channel. They rowed from the stake to the buoy and picked it up, tailing out the net at the same time. The net had corks at the top and lead at the bottom to sink it. They held on to the buoy about twenty minutes, after which they rowed the boat round (tailing out the remainder of the net) to the stake, and then hauled the stake up and then the net, catching about half a dozen salmon. On the part of the appellant it was admitted that he was the owner of the net.

For the defence it was contended that a net used as above described is not a fixed engine within the meaning of the 11th section of the Salmon Fishery Act, 1861, explained by the 39th section of 28 & 29 Vict. c. 121, and that admitting it to be such it came within the proviso that "this section should not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage;" and that the appellant and others had fished in the same way from time immemorial. To prove which as an established custom two witnesses were called, one of whom, Henry Payne, stated that he was about sixty-five years of age, and had been a fisherman all his life; he had fished the Eling river for quite fifty-five years. When they went fishing they stuck a pole into the mud, and went round with the net. They remained there until they saw the fish jump; they then shoot out the remainder of the net and fixed it to another pole to which they fastened the boat, and then hauled the net

into the boat. These stakes were not permanently fixed. They could not fish in any other way in any river. One of the poles, the one that remained, was the one they made the boat fast to. The pole was taken up at every haul. He had fished like this with his father and grandfather in Eling channel as one of the public. It was not possible to fish for salmon in any other way. He had heard from his father and grandfather that they had fished in this way all their lives. John Lebbern said he was sixty-one years of age, and had fished from a child; he had been accustomed to fish in the Eling channel. They stuck down a stake temporarily with a net on to it, and then rowed round to the stake again. Sometimes they used an anchor when they wanted to lay to. He had fished in this way for more than fifty years, and had heard his uncle say he had fished there before for years.

The justices considered that a net thus secured was a fixed engine within the meaning of the 11th section of the Salmon Fishery Act, and that this was not an ancient right or mode of fishing lawfully exercised at the time of the passing of the Act by virtue of any grant or charter, or immemorial usage, and thereupon convicted the appellant, imposing the penalty of 5*l.* and costs.

The following questions were submitted to this court:—

First, whether a net secured at one end to a pole, such as described, temporarily fixed to the soil on the margin of the channels of a river, and of which about one-half was stretched across the channel at low water from a boat made fast to a buoy attached to an anchor, and in which the fisherman waited for a considerable time, and then let out the remainder of the net, and rowed round to the said pole, thus taking a sweep of the river, as above described, is a fixed engine within the meaning of the 4th and 11th sections of the Salmon Fishery Act, 1861.

Secondly, whether, assuming a net so placed to be an engine within the meaning of the statute, the appellant is entitled, as one of the public, to fish for salmon with such engine as an ancient right lawfully exercised by virtue of an immemorial usage.

Mellish, Q.C. (Bullar with him), for the respondents.—This was a fixed engine within the meaning of the statutes. The 24 & 25 Vict. c. 109, s. 11, enacts that, “a net that is secured by anchors or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine;” and then the Amendment Act, 28 & 29 Vict. c. 121, s. 39, provides that a fixed engine shall include any net or other implement for taking fish fixed to the soil or made stationary in any other way. If there was any doubt about this net being a fixed engine within the 24 & 25 Vict., that is removed by the 28 & 29 Vict. As to the second point, a similar claim was set up in *Bevins v. Bird* (12 L. T. (N.S.) 306), but was held not to be legal.

Coleridge, Q.C., for the appellant.—In *Thomas v. Jones* (11 L. T. (N.S.) 450; 5 B. & S.), the net was used in a way somewhat like this, and fixed by a stone, and the court was of opinion that the justices ought not to have found it to be a fixed engine. [BLACKBURN, J.—That was before the 28 & 29 Vict. Probably the Legislature had heard of that case and put in an amended interpretation of what was intended by “fixed engine” to meet it, “made stationary in any other way.”] As to the second point, *Bevins v. Bird* must be conceded to be an answer.

By the COURT.—This is a very clear case on both points.

Conviction affirmed.

[IN THE QUEEN'S BENCH.]

May 10, 1866.

DRAKEFORD v. PIERCY.

14 L. T. 403; 7 B. & S. 515.

Principal and agent—Payment to agent.

PRINCIPAL AND AGENT.—*Plea to an action by the principal for goods sold, that they were sold by D. as apparent principal, and bought by defendant from him as such, and on D.'s own account and without notice that he was agent merely, and that defendant paid D. before notice that he was agent:—Held, a bad plea.*

Declaration: For goods sold and delivered, and upon an account stated.

Plea: That the goods were sold and delivered by one Davies, and that Davies sold as an apparent principal; and that defendant bought from Davies as the vendor on his own account, and had no notice that he was the plaintiff's agent only, and that without notice that he was any other than the principal, the defendant paid the price to him before he knew that plaintiff was owner of the goods, or that Davies was his agent in the sale.

Demurrer to the plea.

C. Russell, in support of the demurrer.—This plea assumes that an agent to sell is necessarily authorised to receive payment. That is not so: *Mynn v. Jolliffe* (1 Moo. & R. 326). Payment to an authorised agent is provable under the general plea of payment, and the defendant has also put that plea on the record. The plea does not aver that Davies had possession of the goods, or that he had authority to sell in his own name, or had any real or apparent authority to sell as principal:

Russ. on Factors, 52, 71, 75. Story on Agency, sect. 58.

Hindmarch, Q.C. (Crompton with him), in support of the plea.—The defendant knew no one but Davies in the transaction; he bought of him and paid him: that is the substance of the plea, which it is submitted is *prima facie* a good defence. In the absence of anything to the contrary, which, if it exists, may be replied, Davies had authority to receive payment:

Capel v. Thornton, 2 Car. & P. 352. *Coates v. Lewes*, 1 Camp. 444. *George v. Clogett*, 7 T. R. 359 (n.).

[SHEE, J. referred to *Ramazotti v. Bowring*, 29 L. J. 30, C.P.]

BLACKBURN, J.—This plea since the Common Law of Principal and Agent abolishing special demurrers, and before which the plea would have been bad as amounting to never indebted, falls short of being good for omitting an important element that Davies was allowed to hold himself out as apparent principal, and authorised to receive payment. The law is correctly stated in *Baring v. Corrie* by Bayley, J.: "A proprietor generally speaking is entitled to receive the price of his own goods, unless by improper conduct on his part he has enabled some other person to appear as proprietor of the goods, and by that means to impose on a third person without any fault on the part of that person. That is the true meaning of the rule laid down in *Horn v. Nichols*. There arise then three questions: first, did the plaintiffs enable Coles and Co. to appear as proprietors of the goods, and to practise a fraud upon the defendants? secondly, did Coles and Co. actually practise a fraud? and thirdly, did the defendants use due care and diligence to avoid such fraud?" Now, taking that to be the law, this plea fails to show any improper conduct on the part of the plaintiff, and carefully

avoids any statement of that kind, or that Davies was authorised to receive payment. Holroyd, J., in *Baring v. Corrie*, points out the difference between a factor and a broker. "A factor," he says, "who has the possession of goods differs materially from a broker. The former is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name it is within the scope of his authority, and it may be right therefore that the principal should be bound by the consequences of such sale: amongst which the right of setting off a debt due from the factor is one. But the case of a broker is different; he has not possession of the goods, and so the vendee cannot be deceived by that circumstance, and besides, the employing of a person to sell the goods as a broker does not authorise him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound." This plea avoids alleging anything to show that Davies was clothed with any real or apparent authority to sell in his own name. From the mere employment of an agent to sell no such authority arises, and if the agent so acts as to lead the vendee to believe that he is the true owner, and so to deal with him as a proposition of law, the vendee is not discharged from liability to the principal. These are all steps towards showing that the agent was clothed with authority to appear as principal, but steps only.

SHEE, J.—The plea is framed on the general and unqualified proposition that an agent authorised to sell is under all circumstances authorised to receive payment. There is nothing to qualify that proposition in the plea. In *Mynn v. Jolliffe*, Littledale, J. laid down the contrary proposition. No doubt there may be cases in which an agent employed to sell may be authorised to receive payment, but there is nothing in the plea to suggest that Davies stood in that relation to his principal, or that he was in the position of a factor, or that he was clothed with the authority that a factor has to receive payment.

LUSH, J.—The facts in the plea may be evidence in support of a *prima facie* case, under the plea of payment, but this plea states as a proposition of law that an agent authorised to sell has, as a necessary legal consequence, authority to receive payment. That is an untenable proposition. The plea does not show that Davies was clothed with any apparent authority to sell as principal, nor does it state any facts by which the plaintiff is estopped from suing for the price of the goods.

Judgment for the plaintiff.

[IN THE QUEEN'S BENCH.]

May 10, 1866.

CHICHESTER AND WIFE v. COBB.

14 L. T. 433.

Agreement—Consideration—Signing a contract with initials—Statute of Frauds.

CONTRACT.—A declaration alleged that C. and W. had agreed to marry, and in consideration thereof the defendant wrote and sent to W. a letter (setting it out verbatim): "So soon as all pecuniary and necessary arrangements are made to constitute a legal marriage, as proposed, I will be prepared to pay over for your behoof 300l." The letter was signed with the defendant's initials only, "E. C."

The declaration then alleged that all the arrangements were made, and that C. married W., and then came the general averment that all things had happened, &c., to entitle the plaintiffs to a performance of the promise:—Held, that the declaration showed an absolute promise by defendant, and a good consideration for it.

Semble, that a signature by initials to a contract or memorandum is sufficient within sect. 4 of the Statute of Frauds.

This was an action for breach of contract, and the declaration stated that the plaintiff G. A. H. Chichester and the plaintiff Mary Ann Williams had agreed to marry one another, and thereupon, upon the treaty for the said marriage, and in consideration thereof, the defendant wrote and sent to the plaintiff M. A. Williams a letter in the words and figures following, that is to say :

“ Kensington, 21st July, 1865.

“ My dear M. A.—So soon as all pecuniary and other necessary arrangements are made to constitute an unquestionable legal marriage as proposed, I will be prepared to pay over for your behoof 300*l.*, and concur in every practicable measure by which an equitable share, or its equivalent, in the settled property can be assured to you. I shall expect to see Edward here this evening, as requested in my note to him of last evening.—Yours ever affectionately,

“ E. C.”

And afterwards, and before the suit, all pecuniary and other necessary arrangements to constitute an unquestionable legal marriage were made, and the plaintiff G. A. H. Chichester married the plaintiff M. A. Williams: and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to a performance by the defendant of his said promise, yet the defendant has not paid over the said sum of 300*l.*, or any part thereof, and the same still remains due and unpaid.

Demurrer to the declaration.

Lush in support of the demurrer.—The declaration does not aver an agreement, nor allege an absolute promise by the defendant to pay the money. The declaration, for want of necessary averments, is too uncertain, and has no legal meaning. [BLACKBURN, J.—I think it sets out a contract to pay 300*l.* in consideration of the plaintiff's marrying. The meaning is, “As soon as you are actually married I will pay 300*l.*.”] It is impossible to say who M. A. is, and who E. C. is, on the face of the declaration. Although defendant sent the letter, E. C. may be a different person. Secondly, assuming the declaration to shew a promise, the signature by initials is not sufficient to bind the defendant under the Statute of Frauds—

Jacobs v. Kirk, 2 M. & R. 221.

M. Lloyd was not called upon to argue.

BLACKBURN, J.—A perfectly sufficient contract, founded on sufficient consideration, appears on the face of the declaration. First, the defendant writes to Mary Ann, who may be proved to be the plaintiff, that, so soon as she shall have completed an unquestionable legal marriage, he would pay over 300*l.* for her benefit. As to the point about the initials, I think they constitute a sufficient signing of the contract or memorandum to satisfy the Statute of Frauds. That point, however, does not arise upon the demurrer.

SHEE, J.—I am of the same opinion. There is sufficient on the face of the declaration to shew an absolute engagement by the defendant to the plaintiff to pay this money for her benefit on the perfecting of an unquestionable marriage.

Judgment for the plaintiff.

[IN THE COMMON PLEAS.]

May 1, 1866.

ROBINSON v. WRAY.

14 L. T. 434; L. R. 1 C.P. 490.

Inclosure Act—Cattlegates—Right to soil and shooting—51 Geo. III.

COMMON.—*In the year 1811, at the time of the passing of the Inclosure Act, 51 Geo. III., the lord of the manor of Thoraby in the North Riding of Yorkshire had the ownership of the soil and the exclusive right, by himself and his licencees, of shooting game over certain wastes called Wassett Fell and Bishopdale Edge. In that year the 51 Geo. III. was passed, being "An Act for dividing and inclosing lands in the manor of Thoraby and Aisgarth, in the North Riding," &c., appointing commissioners for carrying out the purposes of the Act.*

On the 19th June, 1816, they by their award set out the said moor, and ordered the same to be a stinted pasture. To the lord of the manor of Thoraby they awarded a certain proportion of sheepgates, and to W. R. Wray and other proprietors so many sheepgates "together with the ground and soil of the same in proportion to the sheepgates;" and they declared such allotments of cattlegates to be in compensation and in bar of all rights, interests, &c., &c., whatsoever existing at the time of the Act (except mines, which were reserved to the lord). The said moor had not been further divided into separate allotments, as provided by the Act. The defendant, as heir-at-law of the said W. R. Wray, claiming the said sheepgates so awarded as above and a concurrent right with the plaintiff and the other allottees of shooting over the moor, entered and killed game, whereupon the plaintiff as lord of the manor brought trespass:—Held, that under the Inclosure Act the exclusive right to the soil was no longer in the lord of the manor.

Case stated by consent without pleadings.

This was an action brought by the plaintiff against the defendant for trespassing upon certain stinted pastures, called Wassett Fell and Bishopdale Edge, in pursuit of game.

For several years prior to, and at the time of, the passing of the Inclosure Act hereinafter referred to, William Purchas, Esq., was the lord of the manor of Thoraby, in the North Riding of the county of York, and as such was owner of the soil and a tract of common, waste, or uninclosed ground, called Wassett Fell and Bishopdale Edge, mentioned in the said Act, and containing by estimation 950 acres or thereabouts.

As owner of the soil of the said common or waste ground he had, before and at the time of passing the said Act, the full and exclusive exercise, right, and liberty, by himself, his deputies and licencees, of shooting and killing grouse and other game thereon.

In 1811 an Act of Parliament (51 Geo. III.) was passed, intituled "An Act for dividing and inclosing lands in the manor of Thoraby and parish of Aisgarth, in the North Riding of the county of York." This Act, and a copy of the award made in pursuance thereof, may be referred to as part of this case.

The Act recites the existence of several stinted pastures, and of the said tract of common, waste, or uninclosed ground called Wassett Fell and Bishopdale Edge. That the said William Purchas, Esq., was, or claimed to be, lord and owner of the said manor of Thoraby, and as such to be seised of, and entitled unto, the soil and inheritance and to the mines and minerals within and under the said common and waste ground, and that the said William Purchas and divers other persons therein named respectively owners and proprietors of messuages and ancient inclosed lands, and in respect thereof, or as appendant, appurtenant, or belonging thereto, they or their lessees or tenants were entitled

to a right of common upon the said common or waste ground called Wassett Fell and Bishopdale Edge at all times of the year, without stint.

The Act enacts that John Humphries and William Moreton therein described should be the commissioners for surveying, dividing, setting out, allotting, and inclosing the said stinted pastures, common, and waste ground amongst the several persons interested therein.

The Act enacts that the said commissioners should set out, appoint, and apportion in cattlegates for the said William Purchas, one full eighteenth part of the said common and waste grounds, and no more, in recompense and full satisfaction for his right and interest as lord of the said manor, exclusive of such share thereof as he was entitled to in respect of his messuages, lands, and tenements to which a right of common in the said common or waste ground, was appendant or appurtenant as aforesaid.

The Act, after reciting that the whole or the greatest part of the said common or waste ground was of little value, consisting chiefly of peat earth and ling, and would not, at present, pay the expense of being subdivided into allotments, and the owners of messuages, lands, and tenements within the said manor interested therein were desirous that the said common or waste ground should only be ring-fenced, and held and occupied as a common stinted pasture, further enacts that the said commissioners should, and they were thereby required to set out the said common or waste ground called Wassett Fell and Bishopdale Edge in one allotment or inclosure, and ascertain, specify, and set forth in their award the proportional value of the same for regulating the stint thereof, and the number of cattlegates which the said common or waste ground should be capable of agisting or depasturing, and the respective cattlegates, or shares of cattlegates, to which all and every the owners of messuages and lands within the said manor interested therein should be entitled to in respect of such messuages and lands, and that the cattlegates and shares of cattlegates to be appointed and set out as aforesaid, should be estimated, allotted, and apportioned by the said commissioners to and amongst the said owners of messuages and lands in the proportions they were respectively rated to the land-tax for the township of Newbiggen and Bishopdale within the said manor for the year 1803.

And that the said commissioners should likewise order and direct that the said common or waste ground, as soon as conveniently might be after the passing of the Act, should be inclosed with a strong wall or sufficient fence, and should direct and award the said wall or fence to be kept in repair at the costs and charges of the persons entitled to cattlegates therein in proportion to the number of gates allotted or awarded to each of them, and that the same might be staff herded until such fence and the inclosure thereof could be made.

The Act further enacts that it should be lawful for the several owners for the time being of the common or waste ground thereby directed to be set out as a stinted pasture, or of cattlegates thereon, or the greater part in value of such proprietors (such value to be ascertained by the number of such cattlegates), from time to time after the execution of the said commissioners' award, by writing under their hands, to make rules and regulations as to the stocking the said common or waste ground with cattle, sheep, horses, and other stock.

Power is given by the said Act to the commissioners, on the request in writing of tenants for life, &c., to sell part of their respective allotments or cattlegates on the said common or waste ground in respect of such messuages, lands, and tenements, to pay the expenses of the Act and other expenses.

And further, that it shall and may be lawful to and for the several proprietors or persons entitled to the greatest part of the cattlegates upon the said common or waste ground, when inclosed as aforesaid and converted into a stinted pasture, by and with consent of the lord of the manor of Thoraby for the time being under his hand, from time to time, and at any time after the execution of the said award, by writing under their hands to elect and appoint one or more commissioner or commissioners to set out and divide the

same into allotments to and amongst the proprietors of the said common or waste ground, in proportion to their respective rights and interest therein, which commissioner or commissioners so to be elected and appointed shall, and they are thereby fully invested in every respect with all requisite powers and authorities for the purpose of effecting such future division as the commissioners thereby appointed are invested with, and in the meantime to make such rules and orders for regulating and occupying the said stinted pasture as are thereinbefore in that behalf particularly mentioned.

And also that nothing in the Act contained should be construed to defeat, lessen or prejudice the right or interest of the said W. Purchas of, in, and to all seigniories or royalties, mines and minerals, incident and belonging thereto, or in or under the said common or waste ground by the Act directed to be allotted, divided, and inclosed, but that he, she, or they should and might severally hold and enjoy, search for, and work all such mines, minerals, and other rights and privileges in the said common or waste ground (except the right to the soil thereof, for which a compensation was thereinbefore directed to be made), in as full, ample, and beneficial a manner as if the Act had not been made, making, nevertheless, reasonable satisfaction to the person or persons, owner or owners, or occupier or occupiers, of any allotment or allotments, for any damage which should or might be done or occasioned to their grounds or cattle by working such mines and minerals.

The Act also saves to his then King's most excellent Majesty, his heirs and successors, and to all other persons, bodies politic, corporate, and collegiate, his, her, and their respective heirs, successors, executors, and administrators (except the several persons to whom any allotment or allotments, or other compensation, should be made by virtue of the Act, and except such other rights as the intents and purposes of the Act should require to be barred, destroyed, or extinguished), all such estates, rights, titles, interests, claims, and demands of, in, and to the said stinted pasture, common and waste ground thereby directed to be divided, allotted, and inclosed as they had enjoyed before the passing of the Act, or could or might have had and enjoyed in case the Act had not been made.

An award was made and published by the said commissioners on 19th June, 1816, in pursuance of the said Act.

The said commissioners, in obedience to the said Act, by their said award, set out the said manor or common called Wassett Fell or Bishopdale Edge in one allotment or inclosure, and they declared that the same in their judgment was capable of agisting or depasturing 850 full-grown sheep. But, at the request of the owners or proprietors interested therein, they had ascertained how many Sheep the Wassett Fell part thereof would agist (which belonged to the Newbiggen proprietors), and how many sheep the Bishopdale Edge part should agist (which belonged to the Bishopdale proprietors), and they found that the part thereof called Wassett Fell belonging to the Newbiggen proprietors as aforesaid would agist or depasture 500 sheep, and the Bishopdale Edge part thereof belonging to the Bishopdale proprietors would agist or depasture 350 sheep, making in the whole 850 gates, and at such request as aforesaid they had allotted the same separately to the respective proprietors thereof. And the said commissioners did order and award that the said moor or common should from thenceforth for ever be and remain a stinted pasture and not lay open as common (subject, nevertheless, to the provisions relative to the future division thereof contained in the said Act), and did set out, appoint, and award the same in manner following; that is to say, first, with respect to that part thereof called Wassett Fell belonging to the township of Newbiggen, the said commissioners did set out and appoint to and for W. Purchas, Esq., his heirs and assigns for ever, as and for his eighteenth part or share of the said moor or common as lord of the manor of Thoraby, twenty-seven sheepgates, or grazing and herbage for twenty-seven full-grown sheep, and also eight-tenths of another such sheepgate in and throughout the said moor called Wassett Fell, together with the ground and soil of the same in proportion to the said sheepgates.

And the said commissioners did also thereby further set out, appoint, and award unto and for the said W. Purchas, his heirs and assigns for ever, in respect of his messuages and lands in the township of Newbiggen aforesaid, thirty-three sheepgates, or grazing and herbage for thirty-three full-grown sheep, and also one-tenth of another sheepgate in and throughout the last-mentioned moor, together with the ground and soil of the same in proportion to the said sheep-gates.

And the said commissioners by their said award did thereby appoint, set out, and award unto and for William Robinson Wray, his heirs and assigns, for and in respect of his messuages and lands in the township of Newbiggen aforesaid, fourteen sheepgates, or grazing and herbage for fourteen full-grown sheep, and also two-tenth parts of another such sheepgate in, upon and throughout the said moor, together with the ground and soil of the same in proportion to such sheepgates.

And the said commissioners with respect to Bishopdale Edge part thereof, did award the same in manner following (that is to say): they did appoint, set out, and award unto and for W. Purchas, Esq., his heirs and assigns for ever, for his manorial proportion therein, nineteen sheepgates, or grazing and herbage for nineteen full-grown sheep, and also one half of another such sheepgate, together with the ground and soil of the same in proportion to such sheepgates.

And the said commissioners did also appoint, set out, and award unto and for the said W. Purchas, his heirs and assigns for ever, in respect of his messuages and lands in Bishopdale entitled thereto, twenty-six sheepgates or grazing and herbage for twenty-six full-grown sheep in, upon, and throughout the said last-mentioned moor, together with the ground and soil of the same in proportion to the said sheepgates.

And the said commissioners did thereby set out, appoint, and award unto and for the said W. R. Wray, his heirs and assigns for ever, in respect of his messuages and lands in Bishopdale entitled thereto, twenty-five sheepgates, or grazing and herbage for twenty-five full-grown sheep in, upon, and throughout the said last-mentioned moor, together with the ground and soil of the same in proportion to the said twenty-five sheepgates.

And the said commissioners did by their said award order and declare that the several allotments, lands, grounds, and sheepgates, and shares of sheepgates thereby assigned, set out, allotted, and awarded unto the said proprietors respectively should be in bar of and full satisfaction and compensation for their several and respective cattlegates, shares of cattlegates, rents, rights of pasture, rights of soil, rights of common, and all other rights and interest whatsoever which they respectively had or were entitled to, in or upon the said several stinted pastures and moor or common at the time of the passing of the said Act of Parliament. And that from and immediately after the execution of their said award, all rights of soil and rights of pasture (except the right of the lord of the manor for the time being to the mines and minerals in and throughout the said moor or common called Wassett Fell and Bishopdale Edge) belonging to or claimed by any person or persons whomsoever, and upon the said stinted pastures moor, and common thereby directed to be divided, inclosed, or reduced to a stint, and every part thereof, should cease, determine, and be for ever extinguished.

Except so far as the estate, rights, and interests of the said W. Purchas in the said tract of common and waste ground were affected by the said Act and award, the said W. Purchas remained and was, upon and after the making of the said award, seised of and entitled to the soil and inheritance of the said tract of common and waste ground as at the time of the passing of the said Act, and at the time of the committing of the trespasses complained of, all the estate, rights, and interests of the said William Purchas were vested in the plaintiff.

In 1861 the said W. R. Wray died a bachelor and intestate, and thereupon the said several sheepgates, and parts of a sheepgate on Wassett Fell and

Bishopdale Edge respectively so as aforesaid respectively awarded to the said W. R. Wray, and all the estate, rights, and interest of the said W. R. Wray in the same, were at the time of the committing of the trespasses complained of vested in the defendant.

Since the passing of the said Inclosure Act and the execution of the said award several of the proprietors to whom sheepgates were awarded have conveyed them to purchasers, together with the ground and soil thereof, by the usual modes of assurance. And since the passing of the same Act and the execution of the same award, and down to the present time, each of the said proprietors of sheepgates upon Wasset Fell and Bishopdale Edge respectively (including the lord of the manor of Thoraby for the time being) has by himself or his tenants depastured sheep upon the same now stinted pastures respectively according to the number of sheepgates he was entitled to therein respectively.

From the time of the making of the said award the said stinted pastures called Wasset Fell and Bishopdale Edge have remained stinted pastures as directed by the said award, and up to the present time have not been set out and divided into separate allotments as provided by the said Act.

The plaintiff claims the sole and exclusive right of shooting and killing game upon each of the said now stinted pastures.

The defendant, as the heir-at-law of the said W. R. Wray, deceased, claims to be the owner of the several sheepgates and parts of a sheepgate upon Wasset Fell and Bishopdale Edge respectively so as aforesaid respectively awarded to the said W. R. Wray, and of the ground and soil of the same now stinted pastures respectively in proportion to such sheepgates and parts of sheepgates, and as such owner he also claims a concurrent right to shoot and kill game upon each of the same now stinted pastures along with the plaintiff, and the rest of the allottees and owners of sheepgates in the same pastures respectively.

The defendant on the 12th August, 1864, entered each of the said stinted pastures called Wasset Fell and Bishopdale Edge, and killed and carried away grouse in and upon each of the same now stinted pastures, but without the leave of the plaintiff.

The question for the opinion of the court is, whether the plaintiff is entitled to recover. If the opinion of the court should be in the affirmative, then judgment is to be entered for the plaintiff for 1s. damages and full costs of suit. If in the negative, then judgment is to be entered for the defendant with full costs of suit.

Plaintiff's points for argument:—1. That at the time of the trespasses complained of, the stinted pastures called Wasset Fell and Bishopdale Edge were the soil and freehold of the plaintiff, notwithstanding the Inclosure Act and award; and that the plaintiff had sufficient right to, and possession of, the said stinted pastures to entitle him to maintain the action against the defendant for such trespass.

Defendant's points:—That, on the true construction of the Inclosure Act and award, the plaintiff, having lost the exclusive right to the soil of the stinted pasture, has no longer the exclusive right of sporting over it, and that such right is not reserved to him by the reservation in the Act.

Mellish, Q.C. (Kemplay with him) for the plaintiff:

Rigg v. Lord Lonsdale, 1 H. & N. 923.

Manisty, Q.C. (Quain with him) for the defendant.

ERLE, C.J.—I think that in this case there is a clear implication, if there are not express words, to show that the right to the soil after the passing of this Act no longer belongs to the lord of the manor. This view is borne out by

looking at sections 9 and 19; and so too also section 2 satisfies me that the Legislature intended to put an end to the right of the lord of the manor.

BYLES, J.—I am of the same opinion. In almost all Acts of this kind, the object has been to put an end to the ownership of the lords of the manor, and to give the allottees the full benefit of the soil, for which, according to section 19, a compensation is to be given.

KEATING, J.—I am of the same opinion. Mr. Mellish claims the land for the lord of the manor. The Act divides the soil among the owners of the cattlegates. The commissioners had power to deal with the soil, and to give compensation to the lord of the manor; we ought to pause, before we decide in favour of the lord, because owners of the sheepgates have dealt with the soil as their own since the year 1816; that is not in itself sufficient, but the words of the Act seem to be clear, that it was the intention to put an end to the right of the lord of the manor to the soil.

M. SMITH, J.—I am of the same opinion.

Judgment for the defendant.

[IN THE COURT OF EXCHEQUER.]

April 30, 1866.

CLARKE v. BURN.

14 L. T. 439.

Contract to load vessels—Action for breach of—Plea, refusal of plaintiff to pay for previous loadings—Condition precedent—Pleading.

CONTRACT.—Declaration, that it was agreed that plaintiff should purchase of defendant 30,000 tons of coal, and that defendant should ship the same on board certain vessels for a period of six months from 1st August, and should load each vessel within twenty-four hours after notice that the said vessel was ready to be loaded at the T. docks.

Averment, that all conditions were performed necessary, &c., yet defendant broke the said agreement in this, that he did not load a certain screw steamer as agreed within twenty-four hours after the same was ready; and afterwards further broke the said agreement, and absolutely refused to perform the same, or to ship any more goods at all for plaintiff as agreed.

Plea to the second breach, that before defendant absolutely refused as alleged, plaintiff absolutely refused to pay, according to the said agreement, for certain coals that had theretofore been shipped for and delivered by defendant to plaintiff, although requested by defendant to pay for the same according to the said agreement, and although everything had happened and been done necessary to entitle defendant to such payment, wherefore defendant refused to load until such payment was made, as he lawfully might:—Held on demurrer to be a bad plea.

Declaration: That it was agreed by plaintiff and defendant that plaintiff should purchase of defendant certain goods, to wit, 30,000 tons of coal, and that defendant should ship the same on board of certain vessels from 1st August, 1865, and for a period of six months from that day, and that defendant should

load every such vessel within twenty-four hours after the said vessel was ready to be loaded at the Tyne docks, the defendant having due notice thereof, and that all conditions, &c., necessary to entitle the plaintiff to have the said agreement performed by the defendant, yet defendant broke the agreement in this, that he did not load a certain screw steamer, called the *S. M. Strachan*, and other screw steamers, as well as a certain sailing vessel called the *Columbine* as agreed, within twenty-four hours after the said sailing vessel and steamers were respectively ready to be loaded; and afterwards further broke the said agreement, and wholly and absolutely refused to perform or carry out the same or to ship any more goods at all for plaintiff as agreed, whereby plaintiff, &c. (allegation of damage). Claim 3,000*l*.

Plea 6, to the second breach :

That before defendant absolutely refused as therein alleged, plaintiff absolutely refused to pay, according to the said agreement, for certain coals that had theretofore been shipped for and delivered by defendant to plaintiff, although requested by defendant to pay for the same according to the said agreement, and although everything had happened and been done necessary to entitle defendant to such payment, wherefore defendant refused to load until such payment was made, as he lawfully might.

Demurrer and joinder in demurrer to said plea.

Plaintiff's points:—1. That it does not appear upon the record that payment in full for the coals as delivered is a condition precedent to the plaintiff's right to have the contract performed by defendant. 2. That defendant should have set out the terms of the contract relating to payment for the coals to be delivered by defendant to plaintiff. 3. The non-payment by plaintiff for certain coals theretofore delivered by defendant to plaintiff does not justify defendant's refusal to perform the contract on his part.

Defendant's points:—That it sufficiently appears upon the pleadings that the payment for coal shipped for and delivered to plaintiff was a condition precedent to plaintiff's right to insist upon a further shipment, and that, under the circumstances stated in the plea, the defendant was justified in refusing to ship any more coal till the coal already delivered had been paid for.

Gates, for plaintiff, in support of a demurrer to the plea.—There was nothing to show that it went to the whole contract, and nothing that might not be compensated in damages. It did not appear on the record how plaintiff was to pay for these goods, nor that payment on delivery of each shipload was a condition precedent to the performance of defendant's contract. If defendant relied on any breach of contract by plaintiff as a justification of his own misconduct, he should have set it out. In note 3 to *Pordage v. Cole* (1 Wms. Saund. 320 c.) it was said: "Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration;" and the well-known case of *Boon v. Eyre* (1 H. Bl. 273, note (a); 2 Black. Rep. 1312) was there referred to. [MARTIN, B.—The declaration states the contract to load certain vessels, and then goes on to aver a breach in not loading a certain steamer; and that is all right. It then proceeds: "and defendant afterwards further broke the said agreement, and wholly refused to perform the same, or to ship any more goods at all for plaintiff as agreed." Have you authority that that is a good breach?]

Hochster v. Delatour, 2 El. & B. 678; 22 L. J. 455 Q.B.; and *Xenos v. The Danube and Black Sea Railway, &c., Company*, in error, affirming the judgment of the 2 C.P., 13 C. B., N.S., 825; 31 L. J. 284 C.P., were to that effect. *Withers v. Reynolds* (2 B. & Ad. 832; 1 L. J. (n.s.)

30 K.B.), was also in plaintiff's favour. There was nothing in the present declaration to show each shipload was to be paid for on delivery, and plaintiff was clearly within the judgment of Patteson, J., in that case. He cited also—*Davidson v. Gwynne*, 1 East, 381.

Beresford contra, for defendant, supported the plea and contended it was a good plea to the breach to which it was pleaded. The declaration said nothing about how the goods were to be paid for, and it must, therefore, be taken that each load was to be paid for on delivery. Where a large quantity of goods had to be delivered, extending over a long period of time, the vendor, in the absence of express agreement to the contrary, was entitled to be paid on each delivery, and that was the proposition established by *Withers v. Reynolds*, cited contra. The plea amounted to a traverse of ready and willing to deliver.

MARTIN, B.—I am of opinion that this is a bad plea. It does not, in my opinion, sufficiently state the circumstances. I can conceive circumstances existing which would justify a man in refusing to go on, but here we cannot say what the contract really is. I do not think it is within *Withers v. Reynolds*, and that case was not put upon payment of past loads. Our judgment must be for the plaintiff.

BRAMWELL, B.—I am of the same opinion, and on general principle also I think this a bad plea. As my brother Martin has said, it is not within *Withers v. Reynolds*. In my opinion Mr. Beresford's view is not law. Now, I can see no inconvenience in not holding that each delivery is to be paid for at the moment, but much the other way. It seems to me to be clearly a bad plea.

POLLOCK, C.B., concurred.

Judgment for the plaintiff.

[IN THE COURT OF EXCHEQUER.]

April 30, 1866.

HARROLD v. THE GREAT WESTERN RAILWAY COMPANY.

14 L. T. 440.

Principle applied, *Siner v. Great Western Railway*, [1869] E. R. A.; 38 L. J. Ex. 67; L. R. 4 Ex. 117; 20 L. T. 114; 17 W. R. 417 (Ex. Ch.); *Plant v. Midland Railway*, 1870, 21 L. T. 836 (Ex.). See, *Cockle v. South-Eastern Railway*, [1870] E. R. A.; 39 L. J. C.P. 226; L. R. 5 C.P. 457; 22 L. T. 513; 18 W. R. 759 (C.P.); affirmed, [1872] E. R. A.; 41 L. J. C.P. 140; L. R. 7 C.P. 321; 27 L. T. 320; 20 W. R. 754 (Ex. Ch.).

Railway company—Train overshooting platform—Accident to passenger getting out of carriage—Negligence—Duty of a railway company to fence the line.

RAILWAY.—Upon a train on the defendants' line of railway arriving at a station, the two or three foremost carriages, in one of which plaintiff was a passenger, overshot the platform of the station, and where the carriages stopped the line of railway is on an embankment some height above a roadway. The night was rather dark and there was no light in the carriage, and no stationary light on the platform, nor was there any fence on the top of the

embankment between it and the roadway beneath. Upon the train stopping, plaintiff, knowing that the carriage had overshot the platform and without waiting to see whether it would be backed to the platform, got out of the carriage in the dark, and in doing so missed his footing and fell forward over the embankment into the roadway beneath; and in an action by him to recover damages for the injury thereby sustained it was:—Held, that on the facts stated the company were not guilty of negligence and were not liable.

Per Bramwell, B.—There is no duty in a railway company to fence their line of railway as towards passengers or persons already on the line. The duty in them to fence is towards persons off the line to prevent the latter from getting or straying upon it.

Case on appeal from the decision of the Judge of the County Court of Wiltshire, holden at Bradford, before whom and a jury the cause was tried on the 14th October, 1865.

The particulars attached to the plaint were in these words:

This action is brought to recover 50*l.*, for that defendants, having charge of a certain railway, called "The Wilts, Somerset, and Weymouth Railway," did neglect to fence off the said line of railway from the roadway adjoining the station at Limpley Stoke, and to place proper lights in and about the said station, and in consequence of the defendants' default the plaintiff, whilst lawfully on the said railway, fell from the said railway into the said roadway, whereby, &c. [allegation of damage]; and also, for that defendants, through their servants, were guilty of negligence in not stopping their train, conveying plaintiff for hire and reward in that behalf, at the platform of the Limpley Stoke station aforesaid (the proper place of debarkation for passengers arriving at the said station), and in consequence thereof, and of the absence of proper lights on and about the said station, plaintiff fell from the railway into the said roadway adjoining, to plaintiff's damage aforesaid.

At the opening of the case defendants' attorney objected to the particulars, on the ground that a count in tort was joined with one in contract; and further, that plaintiff could not sue defendants on the contract, because it appeared such contract had been entered into at Bath, which is not within the jurisdiction of the said court.

Plaintiff's attorney then, without argument, elected to proceed on the first count, and the second count was struck out.

At the close of the hearing, on reserving judgment, the Judge (with assent of defendants' attorney) gave plaintiff's attorney leave to amend in any way he thought fit, who, after consideration, was content to leave the particulars as they then stood.

Evidence was gone into by plaintiff only, and the facts were as follows:—On the 2nd August, 1865, plaintiff having taken a return ticket at defendants' station at Bath from that city to Wells, was returning by defendants' train from Wells towards Bath. The train arrived at the Limpley Stoke station, which is several miles short of Bath, and is within the jurisdiction of the court, at about half-past ten p.m. of the same day. The night was rather dark and rainy. When the train arrived at Limpley Stoke the two or three foremost carriages (in one of which plaintiff and other persons were passengers) overshot the platform of the station beyond the platform, and where these carriages stopped the railway is on an embankment raised some height above a roadway immediately beneath it. From the outer rail to the edge of the embankment there is a space of four or five feet, the further part of which is on a slope down to the top of a wall. As soon as the train stood still two fellow-passengers of the plaintiff alighted from the train without injury. Plaintiff then followed, and got out of the train. *He knew that the carriage was beyond the platform*, and found that the darkness was sufficient to prevent his seeing the lower steps of the carriage. He felt first for them

and then for the railroad with his foot, and in so doing missed his footing, stumbled, fell forward over the embankment into the roadway beneath, and sustained severe injury. There was no light in plaintiff's carriage, and no stationary light on the platform, but before the accident plaintiff saw the station-master coming down the platform with a lighted hand-lamp.

Upon these facts, defendants' attorney submitted there should be a nonsuit on both or either of the following grounds: first, because there was nothing to show any obligation on the company to fence off the railway from the roadway; and secondly, because, supposing there were, plaintiff had himself contributed by his own negligence to the happening of the accident in such a degree as upon his own showing to exonerate defendants from liability, even if they had been guilty of negligence.

The Judge reserved his judgment upon the question of nonsuit, and subject thereto the verdict was by consent entered for plaintiff. At the next sitting of the court on 19th December last, the Judge gave judgment as follows (after adverting to the facts): "What I have to decide therefore in the first instance is simply whether upon the evidence there was any obligation to fence off the railway from the roadway. Upon consideration of the particulars, of the facts, and of the authorities, I am of opinion that there was no such obligation, and that plaintiff must therefore be nonsuited. Railway companies are under special statutory obligations with respect to railway gates placed across public roads, accommodation gates, bridges over highways, and other accommodation works, which have nothing to do with the present case. They are also undoubtedly bound to keep their stations safe, and, as need is, adequately lighted for the use of passengers, but I am not aware that these precautions and safeguards are to be indefinitely extended, and that if for instance a station or platform on an embankment is itself sufficiently fenced, the fence protecting the platform is to be extended beyond it along the embankment so as to enable passengers to get out wherever they please. There is nothing in the present case to show that the company compelled the plaintiff or any other passenger to get out at the unsafe point beyond the platform. Such being my view with respect to the fencing of the roadway, I do not feel called upon to give any opinion upon the question of contributory negligence."

C. F. D. CAILLARD, Judge.

The question is, was the Judge right in nonsuiting the plaintiff under the circumstances above mentioned?

T. W. Saunders for plaintiff (the appellant).—The question was whether there was any obligation on the railway company to fence off their line of railway from the roadway. The other question of contributory negligence was not discussed in the decision of the Judge of the County Court. He contended that the nonsuit was wrong, and that the defendants ought to have protected the line—at all events, for some distance beyond the platform at either end by a fence between it and the roadway. There was negligence also in overshooting the platform, and not warning the plaintiff not to get out where he did, and cautioning him against the danger of so doing. Neither was there any light there, nor was the train backed so that plaintiff might alight on the platform. All these circumstances constituted negligence, for which defendants were liable, and plaintiff was entitled to recover: *Foy v. London, Brighton, and South Coast Railway Company*, 11 L. T. (N.S.) 606, C.P.; 18 C. B., N.S., 225, showed that it was a question for the jury, and ought to have been left to them.

T. J. Clarke (with *Digby*), for defendants, contra, was not called upon.

POLLOCK, C.B.—I am of opinion that our judgment must be for the respondents. The plaintiff at the trial never asked that the case should go

to the jury. Upon the facts here stated, I think there is no pretence for saying that the defendants were guilty of negligence.

MARTIN, B.—I am of the same opinion. Upon the train stopping at the station the plaintiff knowing that the carriage in which he was had overshot the platform, and without waiting to see whether or not the train would be backed so as to bring the carriage back to the platform, chose to get out of the carriage in the dark, and in so doing missed his footing and fell upon the line, which is at that spot upon an embankment raised some feet above a roadway beneath, and falling forward over the embankment into the roadway beneath, received the injury for which he now seeks to recover damages from the defendants. But I cannot see how, under these circumstances, the company can possibly be made liable.

BRAMWELL, B.—I also am of opinion with my brother Martin that the nonsuit was rightly directed. It is said by Mr. Saunders that the defendants ought to have fenced off the line of rail beyond the platform from the roadway. No doubt there is a duty on a railway company to fence their line, but that is a duty towards persons who are off the line to prevent them from straying or getting upon it. There is no duty in them to fence as towards passengers or persons who are already on the line; and where is to be the limit to the extension of the fencing? How far beyond the platform of the station is the fence to be continued? But there is another answer to the appellant's complaint. He should not have got out, but have sat still until the carriage he was in was drawn up to the platform, and if he had been taken on against his will, have brought an action against the company for so carrying him on beyond his destination, and not providing proper means for his getting out of the carriage at the desired station.

Judgment for the respondents.

[BAIL COURT.]

LUSH, J., May 4, 1866.

REG. v. MAYOR AND CORPORATION ACTING AS THE LOCAL
BOARD OF HEALTH OF HALIFAX.

14 L. T. 447.

Trespass to land—Damage—Lands Clauses Act.

COMPULSORY PURCHASE.—*The Court will not issue an order to remove an inquisition to assess the value of land compulsorily taken, unless for error apparent on the face of the inquisition, or for clear excess of jurisdiction. Misdirection of the Judge, or verdict against evidence by the jury, is not sufficient.*

Therefore, where, on an inquisition to assess the value of land taken by the defendants under their compulsory powers, the Court would not grant a certiorari to review the finding of the jury, although, after an offer of a certain sum by the defendants, they found that the plaintiff was entitled to nothing.

T. Jones showed cause against a rule obtained by Woollett calling on the defendants to show cause why an order should not issue to remove into this court an inquisition as to the value of some land taken by the defendants,

acting as the local board of health, on the ground that the jury had found that the plaintiff was not entitled to any compensation, through their taking into account the improved value of the property. The plaintiff, Amos Gland, is owner of a plot of land abutting on a road, and bounded by a wall. The defendants, in the course of some improvements, had raised the road, thereby diminishing the height of the wall on one side by three feet, and causing it, as the plaintiff said, to bulge on the other, thus "injuriously affecting" the plaintiff's property. There was a claim; an offer of 20s.; and then proceedings were taken under the 68th clause of the Lands Clauses Consolidation Act. The jury found that the plaintiff was not entitled to any compensation. The plaintiff went on three grounds: misreception of evidence by the under-sheriff; misdirection; and that the verdict was contrary to evidence. The affidavits on the plaintiff's side complained, that though the plaintiff's counsel repeatedly objected to the admission of evidence as to the improved value of the land by reason of the defendants' operations, the under-sheriff did admit such evidence. But the defendants' affidavits denied this. [LUSH, J.—The jury may say that no damage has been sustained, but they must not say in effect, though the land is to some extent immediately injured, yet we will give you nothing, because it will ultimately be worth a great deal more through an improvement, as, for instance, a railway running through the property.] Granted, but the evidence given by the persons who executed the works was that the lands were not at all injuriously affected. A *certiorari* does not lie in such a case, for unless there is absolute failure of justice through malversation or excess of jurisdiction, there is no ground on which the court has power to act. [LUSH, J.—There must be clear excess of jurisdiction; misdirection or improper reception of evidence, or even a perverse verdict, will not do.]

Woollett, in support of the rule.—The jury could not say the claimant was not entitled to any compensation, for the defendants had admitted that he was, and had made an offer of a specific sum. The plaintiff's counsel took objection to any evidence being given to the effect that the property would be benefited, but notwithstanding evidence was given to that effect. This is not denied in any part of the defendants' affidavits. The under-sheriff having admitted the objectionable evidence over and over again, the jury considered it in their award, and thus committed a clear excess of jurisdiction. If one house out of a row of a dozen belonging to the same owner were taken, it would be no answer to his claim to say that the rest were greatly benefited. [LUSH, J., remarked that the words in the affidavit that the jury returned a verdict "to the effect that the plaintiff had sustained no damage," were somewhat vague.] The words actually used were, "the jury find that the plaintiff is not entitled to any compensation." It is not denied that the road is raised, and that it leans against the plaintiff's wall. That is a clear trespass, and must entitle the plaintiff to something. The defendants take this wall, 150 feet long, and lean bodily against it, though they say they have put stones and rubble to prevent the pressure. The present road was formerly a culvert, and formed a complete protection to the plaintiff's property, but the wall is now only 3 ft. high on the side next the road, and is therefore no protection whatever. If they take the wall they take the land on which it is built, and we are entitled to some compensation for what they actually took. The case is the same as that of a railway under statutory powers taking property for which they had given no notice to treat. The offer of 20s. must be taken as an admission of some damage, and the jury were clearly wrong in giving less than that sum.

LUSH, J.—If there were any mode by which the question could be further discussed, I should have made the rule absolute, but I find with regret that I cannot do that. It seems to me that the only ground for your application is that the jury have exceeded their powers. The only reason for the court's

interference with the jury's award is, that they have exceeded their jurisdiction in awarding damages, as in *Penny v. The South-Eastern Railway* (7 E. & B. 660; 26 L. J. 225 Q.B.) for that, on account of which the plaintiff was not entitled; or in the converse case, as you say this is, refusing to give compensation for what he is entitled to, or setting off possible benefits against actual injury. But this does not appear on your affidavits, and it is denied on the other side. The question is, have the defendants, by raising the road, diminished the value of the plaintiff's land? I do not find on the affidavits that they took anything into account which they ought not to have taken, and as the result of their inquiry they say there was no damage. I cannot say that they were wrong in their conclusion. Suppose even that the plaintiff had had to rebuild the wall, and the company clearly proved that the property had become worth ever so much more than it was previously through their making the road, I am not prepared to say the jury might not say there was no damage even then.

Rule discharged with costs.

[BAIL COURT.]

SHEE, J., May 7, 1866.

BAKER v. STEVENS.

14 L. T. 448.

Arbitrator's charges—Award.

ARBITRATION, REFERENCE AND AWARD.—*The Court will not send back an award to the arbitrators merely because their charges for making the award are excessive, and are calculated on a principle different from that which either of the parties believed they would adopt.*

C. Pollock moved for a rule calling on the arbitrators in this case to show cause why their award should not be referred back on the ground that they had proceeded in the absence of the defendant and his surveyor, who were attending from time to time to explain and point out the work which had been done, and also that the arbitrators' charges for conducting the arbitration might be reduced. An action was brought on a builder's bill, which was referred to two surveyors to measure and value the work. The award was for the plaintiff to the amount of 503l. When the taxation took place the arbitrators charged 197l. 10s. for their fees for their attendances from time to time. The words of the order of reference were that "the cause be referred to the award, order, arbitrament, and determination of the arbitrators, to measure and value the work charged for by the plaintiff in his bill of particulars, such arbitrators to have all the powers of a judge at Nisi Prius." The usual charge of surveyors for "measuring and valuing" is two and a half per cent. on the work done. The arbitrators, however, refused to take this, because they had the powers of a judge at Nisi Prius. When before the master, an adjournment took place to allow the defendant to bring evidence of the custom to charge only the above percentage. At the adjourned meeting Pook first appeared as attorney for the arbitrators, and contended that the master had no discretion, and could not deal with the arbitrators' charges. Also that having the powers of a judge at Nisi Prius, their charges were not the subject of review by the master. The defendant contended that their power was simply to certify the quantity of work done, and to set a value on it. They seemed to think they were arbitrators to decide and award,

and also to measure and value. The master would not interfere, but left the defendant to apply to the court. The charges were for various attendances and consultations at different places at 1l. 1s., 1l. 10s., and 2l. 2s. each. The principle of percentage was discarded altogether, though they were only in the position of men who were to go and measure, and value in the ordinary way, the scale of their payment being regulated by custom. [SHEE, J.—Is not the reference to the order and arbitrament? These surveyors were to ascertain, first, the measure and value, and then there were other matters on which they were to exercise their discretion. You are attacking the very principle of payment in any other way than by percentage.] He was willing to admit that some extra charges for consultations, drawing up the award, &c., might be fair, but the amount was excessive and out of all reason. The bill should have been so much for valuing at the ordinary rate, and then any extras should have been added. They went on in the absence of the defendant or his representative, so that part of their work had to be done again, and they then charged 16l. 4s. for further attendances rendered necessary by their having thus proceeded wrongly. [SHEE, J.—The 2½ per cent. would be merely for the work of measuring and valuing, without the responsibility of making the award. Your affidavits only amount to an assertion by the defendant that he consented to the award under the belief that the charge would be 2½ per cent.]

After consultation with Master Brewer,

SHEE, J., could not see how the court could interfere. 197l. 10s. seemed a very high charge for an award of 503l., but there was nothing of which the court could lay hold to justify its interference.

Rule refused.

[IN THE COURT OF EXCHEQUER.]

April 18, 1866.

SHARP v. THE NORTH-EASTERN RAILWAY COMPANY.

14 L. T. 487.

Railway company—Action against as carriers—Non-delivery of goods—Negligence—Reasonable course of business.

CARRIERS.—*The defendants received from plaintiff at their station at W. a quantity of fruit for transit by railway from W. to C., and dispatched the same from W. by a goods train which arrived, in due course, at 5.45 p.m. on Friday at their station at L., where their line of railway ends, and whence goods, booked by them for C., have to be transferred from their station to the goods station of the Midland Railway Company at L., a short distance off from defendants' station. Had the plaintiff's fruit been so transferred at any time before eight o'clock that evening (and which it appeared it would have taken about half-an-hour to do), it would have been sent on by a Midland goods train that night, and have arrived at C. early on Saturday morning. It being, however, the custom for defendants' servants to leave work at the L. station at six o'clock every evening, the fruit in question was, according to the usual course in such cases, kept at defendants' station all that night, and was not transferred to the Midland station until Saturday morning, and consequently did not arrive at C. until Sunday.*

At the trial of an action against defendants, as carriers, for breach of

contract to deliver the fruit at C. in time for market on the Saturday morning, and also for non-delivery within a reasonable time, there was a conflict of testimony as to the terms of the contract, the plaintiff swearing that the station-master at W. undertook that the fruit should be at C. in time for the particular market, whilst the latter denied giving any such undertaking; but he did indorse the following memorandum on the waybill of these goods: "Forward immediately—wanted for market on Saturday. . ." Defendants also set up a contract under the consignment note, which plaintiff had signed, and contended that the goods had been sent on according to their ordinary course of business.

The learned Judge left it to the jury to say what was the contract between the parties, and, supposing they thought the defendants' version of it to be correct, whether, looking at their own memorandum on the waybill, the defendants were guilty of negligence in not sending on the goods to the Midland station on the Friday evening, even though it were not in their ordinary course of business to do so. The jury found a verdict for the plaintiff, and defendants subsequently moved for a rule for the new trial on the grounds of misdirection and of the verdict being against the evidence:—Held (refusing the rule), that defendants were negligent in not sending on the goods to the Midland station the same evening, and that it was not a reasonable course of business in them to keep at their station until the following morning goods marked in the waybill to be "forwarded immediately."

This was an action against the defendants as carriers of goods by railway from Wetherby to Colne, and the first count of the declaration charged,

"That plaintiff delivered to defendants, and defendants as such carriers received from plaintiff, a quantity of plums, to be carried by them from Wetherby to Colne, and there delivered for plaintiff in time for a market to be there held on the 2nd September, 1865, for reward to defendants, who received the same as such carriers, and all conditions were performed, &c., yet defendants," &c.

Breach assigned the non-delivery of the said goods in time for the said market, and allegations of loss thereby.

Second count:

"That plaintiff delivered the goods aforesaid to defendants as such carriers as aforesaid, to be by them carried from Wetherby to Colne *within a reasonable time*, for reward to defendants, and defendants received the same on the terms aforesaid, and a reasonable time for carrying and delivering the same elapsed, yet defendants neglected for a long and unreasonable time to carry and deliver the same, whereby plaintiff," &c. [allegation of damage.]

Third count in trover.

Pleas:—1. To the first count, a traverse of the delivery and receipt of the goods on the terms and for the purpose in the said count mentioned. 2. To the second and third counts, not guilty. 3. To the third count, that the said goods were not the goods of plaintiff.

Issues thereon.

The action was tried before Keating, J., and a special jury, at the last Yorkshire Spring Assizes at Leeds, when it appeared that on Thursday, the 31st August, plaintiff, a fruit merchant, purchased at Wetherby a quantity (fifty-six pecks) of plums, which were packed in hampers and taken by him to the defendants' station of the North-Eastern Railway at Wetherby, to be carried to Colne in time for the following Saturday's market at Colne, when he was told that the last goods train for that day from Wetherby had been dispatched, and that the plums could not be sent off before the next morning (Friday) between ten and twelve. The plaintiff filled up and signed at the station the usual consignment note of the hampers from himself as sender to the consignee at Colne, and the printed heading of the note was as follows:

"North-Eastern Railway Company.—Deliver as under, *subject to the conditions on the other side.*"

The first of those conditions was the following:

"The company are carriers only to places in the immediate vicinity of their goods station, and goods addressed to other destinations are received only to be carried to the nearest or most convenient goods station on the company's railway, and there delivered to or towards their destination by railway or other public carriers, or otherwise, as opportunity may offer; or they will, at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse, if there be convenience for receiving the same, pending communication with the consignees; and the delivery to such railway or other carrier, or advice given or sent to the consignee of the goods remaining on the company's premises, or that they are placed in the shed or warehouse, will be deemed a delivery of the goods, so as to relieve the company of all responsibility in respect thereof."

The sixth condition stated that

"Fish, fruit or other perishable articles, will be sold immediately to secure freight if it be not paid directly such articles are offered for delivery."

There was a conflict of testimony between the witnesses on the plaintiff's and defendants' behalf. The plaintiff and his man swore that the station-master at Wetherby positively undertook that the plums should be at Colne in time for the Saturday's market. On the other hand both the station-master and the station porter at Wetherby denied that any such promise or undertaking was made, and the former said he was unacquainted with the mode of carriage beyond Leeds, because the North-Eastern Railway system terminated at Leeds, but he did indorse upon the waybill relating to these goods the following memorandum:—"Forward immediately, wanted for market on Saturday morning."

In order for a parcel to go from Wetherby to Colne it would be taken by defendants on their line as far as their Wellington-street station of the North-Eastern Railway at Leeds, where the North-Eastern system terminates; and it would then have to be transferred from that station to the goods station of the Midland Railway Company at Hunslet-lane, Leeds, some short distance from the defendants' station.

The goods in this instance arrived in ordinary course at the defendants' station at Leeds at 5.45 p.m. on Friday evening; and had they been unloaded from defendants' wagon and dispatched at once to the Hunslet-lane station of the Midland Railway, so as to arrive there before eight p.m. the same evening, they would have been sent on thence by a Midland goods train that night to Colne, and so would have been in time for the next morning's market.

It was stated in evidence that it was the custom for the defendants' servants to leave work at six o'clock, and that in the ordinary course of business goods, although perishable, arriving at their station at 5.45 p.m., would not be transferred to the Hunslet-lane station until the following morning (Saturday) at eight o'clock, when, in point of fact, the goods in question were delivered at that station and dispatched thence for Colne at 11.15 a.m. The consequence was that they did not reach Colne until two a.m. on the Sunday, and were not delivered until the Monday morning, when the consignee refused to accept them. Plaintiff also refused to accept them, and they were ultimately sold by the Midland Railway Company, and realised, after deducting the amount due for carriage, 1*l.* 14*s.* 1*d.*, which was tendered to plaintiff, before action, and refused by him, and this action was then brought.

It was contended for plaintiff at the trial that the goods were delivered to defendants on a special contract and undertaking by them to have them delivered at Colne in time for the market on Saturday. On the other hand, the defendants' station-master denied giving any such undertaking, though he did indorse on the waybill the direction to forward immediately, so as to be

there for the market if possible. Defendants also set up a special contract under the consignment note which plaintiff signed, and contended that that was the contract which had been proved, and that the goods had been sent on according to the ordinary course of their business. The learned judge left it to the jury to say what was the contract between the parties; or, in other words, upon what terms defendants received the goods to be carried, and supposing they thought the defendants' version of the contract to be correct, whether, looking at their own memorandum on the waybill, defendants were guilty of negligence in not sending on the goods to the Midland station on the Friday evening, which it appeared could have been done in about half-an-hour, even though it were not in their ordinary course of business so to do. The jury found a verdict for plaintiff for 13*l.* 9*s.*, being the amount claimed for cost of the fruit, loss of profit in the market, expenses, and loss of time consequent on the non-delivery.

Overend, Q.C., (with him *Kemplay*) now moved for a rule to set aside that verdict, and for a new trial on the grounds of misdirection and of the verdict being against the evidence. The question was, had there been unreasonable delay on the part of the North-Eastern Company? There was no contract to deliver at Colne absolutely, but to deliver only subject to the condition on the back of the consignment note which plaintiff had signed. Arriving at defendants' Leeds station at 5.45 only, there was not time enough for them to be transferred that evening to the Midland station before six o'clock, the customary hour at which defendants' servants left work; the goods, therefore, were kept in the usual course until the next morning, when they were sent on. Defendants were not bound to keep their offices open and their servants at work beyond the usual and accustomed time, any more than bankers or merchants were to keep their banks and counting-houses open after the closing hours had arrived. There was no special contract here.

The Court (Pollock, C.B., Martin, Bramwell, and Pigott, BB.) were of opinion that defendants were negligent in not sending on the fruit to the Midland station the same evening. They ought to keep their men at the station long enough after the arrival of the train at so early an hour as 5.45 p.m. to enable them to discharge the train of its contents, and to send on the same evening such goods as might be booked to go on by the Midland line, and it was not a reasonable course of business in them, or such as plaintiff could reasonably have expected them to pursue, to keep at their station until the following morning goods marked in the waybill to be "forwarded immediately." They, therefore, refused to grant a rule to disturb the plaintiff's verdict.

Rule refused.

[IN THE COURT OF EXCHEQUER.]

April 27, 1866.

DANTEC v. ASHWORTH.

14 L. T. 488.

Vendor and vendee—Goods obtained by fraud—Bona fides of second vendee a question for the jury—Misdirection—New trial.

FRAUD.—A., an agent for the sale of manures on commission, had been employed in that capacity by defendant, a manure dealer, and being indebted to defendant on balance of account in a sum which he was unable to pay, it was arranged that he should obtain manures from other persons and send them to defendant in discharge of his debt. He accordingly purchased of plaintiff

a quantity of manure "at three months' credit to sell again," which by A.'s direction was sent by plaintiff to A. at the F. station, where they were received and taken away by defendant, to whom A. had forwarded the delivery note. On the trial of an action by plaintiff against defendant to recover the value of the goods, the learned Judge stopped the defendant's counsel from calling defendant as a witness, and told the jury that, if they thought A. represented himself to plaintiff as an ordinary buyer on sale for profit, and that he was not so, but that he procured the goods for the purpose of handing them over to defendant, that would be a fraud upon plaintiff, and he would be entitled to the verdict, even though defendant were no party to the fraud:—Held (making absolute a rule for a new trial), that that was a misdirection on the part of the learned judge and that the question of defendant's bona fides in the matter ought to have been left to the jury.

Declaration.—1. Count in detinue for the return of certain goods of plaintiff detained by defendant, or their value, and 20*l.* for their detention. 2. Count for money payable for goods bargained and sold, and sold and delivered, and for money due on accounts stated; and plaintiff claimed 100*l.*

Pleas:—1. To the first count, not the plaintiff's goods. 2. Further to the same count, not guilty. 3. To the second count, never indebted.

At the trial before Bramwell, B., at the last Spring Assizes at Chester, the following facts appeared:—The plaintiff was a manufacturer of artificial manures at Liverpool, and the defendant was in the same line of business at Frodsham, in Cheshire. It appeared that a person named Acton, an agent and dealer for the sale of manures, had been employed by defendant as an agent for the sale of defendant's manures on commission, and that in the early part of 1865 he was indebted to defendant on account of such agency in between 200*l.* and 300*l.*, which, on being pressed by defendant for payment, he was unable to pay. Under these circumstances it appeared, according to the evidence of Acton—who was called on the part of the plaintiff—that it was arranged that Acton, if he could not send money, should get manures from other persons, and send them to defendant in discharge of his debt. The goods in question (a lot of prepared boiled bones) were purchased by Acton from plaintiff "at three months' credit to sell again," and plaintiff, by the direction of Acton, sent them to the latter at the Frodsham station on the 29th April, 1865. The delivery order for them was sent by Acton to the defendant, by whom they were received and taken from the station. Upon the objection of defendant's counsel, the learned judge at the trial excluded evidence which was tendered by the plaintiff tending to prove fraud on defendant's part in reference to transactions with other parties arising out of the arrangement proved by Acton to exist between himself and defendant, viz., that Acton was to obtain goods from other persons with which to pay his debt to defendant; and, on an intimation from the learned Baron that it was of no use to call the defendant to prove his innocence in the matter, no witnesses were called on the part of the defendant. In summing up his Lordship told the jury that if they thought Acton represented himself to plaintiff as an ordinary buyer on sale for profit, and that he was not so, but that he procured the goods for the purpose of handing them over to the defendant, that would be a fraud upon plaintiff, and he would be entitled to the verdict, even though they should think defendant was no party to the fraud. The jury thereupon found a verdict for plaintiff for 29*l.* 16*s.*, the value of the goods.

Giffard, Q.C., for defendant, having obtained a rule *nisi* for a new trial on the ground of misdirection of the learned judge in telling the jury that the plaintiff was entitled to the verdict if they thought that Acton had been guilty of fraud, even though the defendant was no party to it,

M. Lloyd, for plaintiff, now showed cause against it.—It must be taken as a starting point that Acton was guilty of fraud, and the jury, in fact, found

there was fraud. The contract therefore was void against plaintiff. A man could not give to another a better title to a chattel than he had himself. No doubt *White v. Garden* (10 C. B. 919; 20 L. J. 166), would be relied on *contra*, but there the *animus furandi* on the part of the first vendee was negatived by the jury, who were not agreed as to the fraud, though they were of opinion that he did not intend to pay for the goods, and they found that the purchase by plaintiff was *bona fide* at a fair market price; whereas, in the present case, the jury found a false pretence by Acton, and the defendant had paid nothing for the goods. But assuming that *White v. Garden* amounted to putting a subsequent honest buyer for value in a better position than the original vendor, the present case, whether as between the original buyer and seller, or the first and second vendee, was a different, and, as in favour of plaintiff, a stronger case. [MARTIN, B.—The reason of the rule is this: the vendee is the owner of the goods until the vendor elects to avoid the contract on the ground of fraud, and if at the time of the second sale he has not done so, it is then too late as against the second vendee.] Here the defendant did not suffer, nor would he be in a worse nor an altered position than before. He had no equity against the real owner. It was shown that on balance of accounts defendant owed Acton 30l., so that defendant had been overpaid. [MARTIN, B.—The fact of overpayment is nothing; the question is, what was the state of things at the time of the transfer of the goods.] Story, J., in stating the rule in his *Law of Sales of Personal Property*, sect. 200, stated the only exception to be a *bona fide* purchase for valuable consideration, and payment. Now here there had been neither. *Higgons v. Burton* (26 L. J. 342 Ex.) and other cases, showed that the rule was not generally applicable. In *The Earl of Bristol v. Wilsmore* (1 B. & C. 514) it was held that where goods were obtained under a pretence of purchase by a party, who at the time had no intention to pay for them, no property passes from the vendor, and that no title was derived to any third person through the vendee. So also by *Ferguson v. Carrington* (9 B. & C. 59; 7 L. J. 139 K.B.), where goods had been fraudulently obtained, though *assumpsit* could not be maintained before the time of credit had expired, yet the vendor might treat the contract as null, and bring trover for the value directly. [MARTIN, B.—I do not see how you can distinguish this from a bill of exchange given in payment of a pre-existing debt; and that is a good consideration for the transferee to oppose an action by the owner who had been robbed of it. His Lordship referred to Story on Bills, sects. 192, 193, 4th edit.] There was a distinction between goods and a negotiable instrument, and the law with regard to the latter was not necessarily an authority as regarded goods. Suppose, before the price was demanded, plaintiff had avoided the sale as between himself and Acton. Defendant had paid nothing, and had 30l. in hand; why, then, should he not pay plaintiff?

McIntyre (with whom was *Giffard, Q.C.*) *contra*, for defendant, in support of the rule, was stopped by the Court.

BRAMWELL, B.—We are all of opinion that Mr. McIntyre must have a new trial. I think I misdirected the jury at the trial. The case of *Irving v. Motly* (7 Bing. 543; 5 M. & P. 380; 9 L. J. 161 C.P.) was cited at the trial by the plaintiff's counsel, and in the hurry of the moment I acted on the authority of that case; I certainly intimated to Mr. Giffard that it was of no use for him to call the defendant as a witness, and I told the jury that the *bona fides* of defendant was immaterial, and that if they thought that Acton had been guilty of a fraud their verdict must be for the plaintiff. In *Irving v. Motly* it was held that the *bona fides* of the defendants was immaterial, inasmuch as they were involved in the legal consequences of the fraud committed by their agent for their benefit, although the jury had found they were personally innocent. It is not now worth while to find fault with the decision in that case. It is enough to say that I think I was wrong in my direction in the present instance; I think that the *bona fides* of the defendant ought to have been left to the jury,

and that there ought therefore to be a new trial. The jury, I think, would have found fraud as against the defendant.

POLLOCK, C.B.—My brother Bramwell, who tried the cause, and who is familiar with all that passed at the trial, having expressed his opinion that there was a misdirection, I need go no further than to say that I agree with him, and think the rule for a new trial should be made absolute.

MARTIN and PIGOTT, BB., concurred.

Rule absolute.

LORD CRANWORTH, L.C., May 22, 23, 24, 1866.

JENKINS v. PARRY.

14 L. T. 503.

Mortgagor and mortgagee—Redemption—Solicitor and client.

MORTGAGE.—Where the owner of an estate has first mortgaged the property and then parted with the whole interest, he may, even upon a bill framed as a redemption bill, obtain a reconveyance of the estate, if the facts be such as to entitle him to have the transaction set aside on any established ground of equitable relief.

But where the plaintiff alleges that the defendants who purchased the property were acting at the time as his professional advisers, and the defendants by their answer admitted that they had acted in that capacity, but that they had ceased to do so for some time previously to the transaction, and that the plaintiff did not amend the bill and put the fact in issue; and where the case made by the bill was in several material points varied by the evidence, the plaintiff was held to be disentitled to relief, and decree of the court below reversed.

This was an appeal by the defendants from a decree, dated 1st May, 1865, of Stuart, V.C., whereby it was ordered that upon payment by the plaintiff Thomas Jenkins to the defendants of a mortgage-debt and other securities, and of what should be found due to them on taking the accounts, the plaintiff was entitled to have a reconveyance of the mortgaged premises then vested in the defendants by an indenture of the 13th October, 1848, and all the mortgage securities in respect thereof, and was also entitled to the benefit of the indenture of the 11th May, 1850.

This suit was instituted by Mr. Thomas Jenkins against the defendants John Pary, John Jones Attwood, and Hugh Hughes, for the redemption of a certain estate called Tynewydd, in the county of Cardigan, and an estate called Glascum, in the county of Radnor, on payment to them of what should appear due in respect of a sum of 2,000*l.* advanced by them for his use, and paid by them into the Bank of Manchester in 1848, and that the defendants should account for the rents and profits of the said premises since 1850, when they entered into possession.

The bill alleged that the plaintiff, being in want of money, borrowed a considerable sum from the Bank of Manchester upon the security of his estate, and that subsequently upon a negotiation being entered into between himself and the bank, the bank agreed to receive 2,000*l.* in full of the money due on their security; that in 1848 the plaintiff employed the defendants Parry and Attwood as his solicitors in the matter, and they promised to obtain the money for the purpose, and afterwards informed him that they had procured it, and the plaintiff considered that they had obtained the money on

his account and for his use and benefit, notwithstanding which they took an assignment to themselves of the security from the bank, and asserted that they made the agreement with the Bank of Manchester for their own benefit and advantage. The plaintiff submitted that he was entitled to redeem the property on payment of what should appear due to the defendants in respect of the 2,000*l.*, of which sum they could be considered only as trustees for his benefit, for they acted in the character of his solicitors in the transaction. It appeared that in March, 1850, they prevailed upon the plaintiff, who was tenant for life of the estate, and his son, who was entitled in reversion, to execute some deed in the nature of a mortgage to secure the repayment of the 3,000*l.* and interest. There was a direct conflict of evidence, the defendants alleging that the plaintiff parted with all his interest in the property when he executed a deed of trust for sale on the 24th July, 1841, in favour of his creditors, but subject to a mortgage to the Bank of Manchester, that they were beneficially interested in several of the judgment debts secured by such deed of trust for sale, and that in February, 1848, they negotiated with the Bank of Manchester with a view to a purchase of a debt due upon its mortgage, which negotiation resulted in an arrangement that the defendants should purchase the debt for 2,000*l.* They denied that they were instructed by the plaintiff or acted for him on that or on any other occasion subsequently to February, 1845, when they unsuccessfully endeavoured to effect a transfer of the mortgage held by the Bank of Manchester, and asserted that the deed of 1850 was merely a deed of further assurance.

Malins, Q.C. and *F. Waller*, in support of the decree of the court below, contended that the solicitors were nothing more than mortgagees; that they made the plaintiff a party to the deed of 11th May, 1850 for the purpose of confirming their title as such mortgagees; and that there was a clear and express reservation in the deed of the plaintiff's right to redeem. It was a transaction between solicitor and client, and came within the principle laid down in the case of

Fox v. Macreth, 1 White & Tudor's Lead. Cas.

The Attorney-General (Sir R. Palmer), *Cole, Q.C.* and *Surrage* objected to the whole of the Vice Chancellor's decree, on the ground that the plaintiff was not entitled to any relief in equity, he having, by the deed of 13th October, 1848, conveyed away absolutely every particle of his interest in the property. The deed of 1850 was merely a deed of further assurance affecting property in which the plaintiff had no interest. In the transaction with the Bank of Manchester the defendants were not acting as agents for Jenkins, but directly for themselves, and they could not be prejudiced by the existence of a special employment for a limited period three years before, which in no way connected itself with what was done on that occasion. They referred to

Watts v. Hyde, 2 Ph. 406. *Bellamy v. Sabine*, 2 Ph. 425. *Wilde v. Gibson*, 1 H. of L. Cas. 621. *Smith v. Clay*, 3 Bro. 640. *Lord Selsay v. Rhoades*, 1 Bligh's New R. 1. *Gregory v. Gregory*, G. Co. R. 21. *Roberts v. Tunstall*, 4 Hare, 257. *Parkinson v. Hanbury*, 11 L. T. (N.S.) 755.

Malins, Q.C., in reply, said it was the duty of the defendants from the inception to the conclusion of the transaction, to have regarded only the benefit of their client, and that it was impossible for them to throw off that relationship without at least communicating to the plaintiff their intention of acting solely in their own interest. He admitted the bill did not pretend to be one for a general redemption. He had only used the word "redemption" for want of a better word to express his meaning. The principle of the bill was, "You were my solicitors, you undertook a certain transaction, and ultimately obtained a transfer of the mortgage, and I must treat you as

having obtained it for my benefit." He contended that the lapse of time was immaterial, as his client had no knowledge of their proceedings, and therefore there could be no acquiescence.

The LORD CHANCELLOR (Cranworth).—This case is rather complicated. The first question is, what is the real character of the bill? If Jenkins had been the sole mortgagor originally, I should have had no doubt that it was an ordinary bill for redemption, for in the 16th paragraph he states, "The defendants John Parry and Hugh Hughes pretend that the sums of 3,000*l.* with some arrears of interest is now due to them on the security of the before-mentioned deed of mortgage of March, 1850, and they refuse to convey the hereditaments and premises comprised in that deed, except upon payment of the sum of 3,000*l.* and the alleged arrears of interest." The plaintiff, however, insists that under the circumstances herein appearing, the said deed of mortgage can only stand as a security for the balance of the said sum of 1,800*l.* paid by the defendant John Parry and the said John Jones Attwood to the said Bank of Manchester as aforesaid, and of the interest which has accrued thereon remaining after deducting from the said sum and interest the total amount of the rents and profits of the said hereditaments and premises received by the defendants John Parry and H. Hughes as aforesaid, and that the plaintiff is entitled to redeem and to obtain a proper reconveyance of the said hereditaments and premises on payment to the said last-named defendants of such balance, and that under the circumstances herein appearing the last-named defendants ought to be charged as mortgagees in possession, and ought to pay the costs of this suit. A clearer bill for redemption can hardly be conceived than that would be. It is plain to my mind, however, that there is no right of redemption here, and for several reasons. The first conclusive reason is, because from the bill and answer and evidence, it is perfectly certain that whatever interest Jenkins once had in the property, he has parted with it all. He is in a position similar to that of a person who, having mortgaged an estate, sells it, and then files a bill to redeem. Somebody is entitled to redeem, but not the person who has parted with all the interest. Here there was a very large sum of money to be raised, and all that the plaintiff had was a life-interest in possession as to a larger portion, and in reversion as to a smaller portion of the property. That was not enough to enable him to get the money, and therefore he goes to the remainderman to concur with him; and it is part of the stipulation that the property shall be sold, and the surplus money paid to the son. Thus it is clear that he parted with all his interest, and could not file a bill for redemption. But I rather agree with the Vice Chancellor in his view that, if the facts were such as to entitle the plaintiff to relief, although he could not file a bill for redemption, yet he would have an undoubted right to come before the court. In such a case I think it is necessary to look to the pleadings very closely, and see whether the facts are such as to warrant the relief sought for. What the Vice Chancellor has done is this. Discarding the notion that there could be relief by way of redemption, he thought other relief might be given. He said the defendant Parry and his partner were applied to by the plaintiff to enable him to raise money to pay off a mortgage held by the Bank of Manchester, and, having been so employed, they took steps to get a transfer of the mortgage; that the mortgage was about 4,000*l.*; they obtained the transfer for 2,000*l.*, and then, neglecting their duty as solicitors, they told him they could not get it, although in fact they did get it for their own benefit. Now, if the pleadings make out such a case, and it is clearly established by the evidence, I think relief would follow as a matter of course. The point is, whether the pleadings do so raise the question as to entitle Jenkins to the relief given by the Vice Chancellor, and for that purpose it is necessary to look closely at the case actually made, and on which the Vice Chancellor founded his decision. The plaintiff says that in 1850 he instructed the defendants Parry and Attwood to borrow for him the

money to pay off the moneys then due from him to the Bank of Manchester, which they promised to do if the plaintiff could arrange matters with the bank. Accordingly the plaintiff shortly afterwards, by one Mr. John Maurice Davies, effected a compromise with the bank for the delivery up of his title-deeds on payment of 2,000*l.*, which sum the bank agreed to accept in full satisfaction of all moneys then due and owing by the plaintiff for principal and interest, but which moneys then amounted to more than 2,000*l.* Shortly afterwards the defendants Parry and Attwood informed the plaintiff that they were ready with the sum of 2,000*l.* to pay to the Bank of Manchester; but that, if they paid it, the plaintiff must give them a mortgage of the said hereditaments and premises for the sum of 3,000*l.* and interest. This the plaintiff at first and for some time refused to give; but being desirous of carrying out the compromise with the bank, and being unable to raise money except upon the security of the hereditaments and premises, he at length was compelled to give them a mortgage to secure the sum of 3,000*l.* and interest. This is very important, because what the plaintiff represents is, that he employed Parry and Attwood to get the 2,000*l.* to pay to the Bank of Manchester, that they said they must have a mortgage for 3,000*l.*, that he objected to this, but at length acquiesced, and gave a mortgage for 3,000*l.* Now, that mortgage was in 1850, and the inference from all this is, that he means this transaction took place at, or shortly before, the time of that mortgage. He further says, that shortly afterwards the defendants Parry and Attwood informed him they had paid the sum of 2,000*l.* to the Bank of Manchester on his behalf, and requested him to execute a mortgage to them to secure the repayment of the sum of 3,000*l.* and interest, and in the month of March, 1850, the defendants Parry and Attwood prevailed upon the plaintiff and his son, John Bennett Jenkins, to execute a conveyance of the before-mentioned hereditaments and premises subject to redemption on payment of 3,000*l.* and interest. The plaintiff then alleges that "the defendant John Parry and the said John Jones Attwood were employed by the plaintiff as, and acted as, his solicitors in and about the several matters stated or referred to in paragraphs 7, 8, and 9 of this bill, and the plaintiff had no other advice or assistance." That is the case of the plaintiff, and how does he support it by evidence? In the first place, what is the answer? The answer wholly denies everything of the sort. The defendants say, "It is true we negotiated with the bank in 1848 for the purpose of purchasing up this mortgage; that it was all arranged and an agreement was entered into in February, 1848, but that by delays the transaction was not finally completed until October in that year." But they say this was without any communication with the plaintiff, and solely for their own benefit. They, however, state that they being solicitors at Aberystwith, in February, 1845, the plaintiff came to Attwood and told him he was a tenant under the Bank of Manchester, that the bank people had a mortgage on his property, that they were harsh landlords and were distraining on him, and he asked Attwood to get that mortgage transferred to some other landlord. Attwood states that he applied to some of his clients, but found that he could not succeed, and having communicated the fact to the plaintiff, there was an end of the matter, and that was the only occasion on which his firm ever acted for the plaintiff. It is perfectly true that although they say they discontinued to act for him, they do not give any specific date; but that omission might have been rectified if the plaintiff had chosen; he might have amended his bill traversing the allegation and putting it in issue as part of his case; that might have been material, unless the defendants explained it. The question therefore is, supposing a solicitor has been employed by a client in 1845 to see whether he cannot get a mortgage held by a harsh landlord transferred to some more lenient landlord, acting, moreover, as a friend, and has failed to do so, whether there is anything which prevents him three years afterwards purchasing that mortgage on advantageous terms? I see nothing. I should be as slow as any Judge to encourage anything like clandestine dealing on

the part of a solicitor at the expense of his client, but there must be some bounds to questions of that sort. The allegation in the present case seems to me to carry the doctrine beyond what authority will warrant. But is the statement true on the part of the plaintiff? In order to establish that part of his case the plaintiff is examined, and his evidence is very much the same as that in the bill, except that he alters the date from 1850 to 1848. But he does not amend his bill. His case is, that at the time of the completion of the transaction he took that which he calls the mortgage of 1850. Now that is not true. The transfer of the mortgage was in 1848, and therefore it is plain there has been an inaccuracy which he does not attempt to clear up in his bill. He says that in the year 1848 he employed Parry and Attwood to borrow a sum of money to pay off the moneys then due from him to the bank, which they promised to do if he could arrange matters with the bank, and that through his friend Mr. Davies he effected a compromise with the bank for the delivery up of his title-deeds on payment of the sum of 2,000*l.* That is the statement made by the plaintiff, but what says Mr. Attwood? He says that neither he nor his partners acted as solicitors or as solicitors' agents, or agents for the plaintiff in 1848, and they did not, nor did either of them before that time, act for him except that he (Attwood) did act for the plaintiff for a special purpose in 1845. Which of these accounts is true? Attwood says that the transaction with the Bank of Manchester was undertaken by himself and Hughes without any communication with the plaintiff. The solicitor to the Bank of Manchester gives a distinct account of the transaction having taken place between the directors and Attwood, who was anxious to get a transfer of the mortgage. That was in February, 1848. The account given by the plaintiff is vouched by the evidence of Davies, who says that he negotiated with the bank for him, but that is inconsistent with the account given by the solicitor to the bank, who deposes that the agreement was verbally entered into at a meeting which took place at the Bellevue Inn, Aberystwith, in February, 1848, between the directors of the Bank of Manchester and the defendants Hugh Hughes and John Jones Attwood, who on the occasion stated to him that they were induced to purchase the said mortgage-debt "in the hope that they might thereby be able to get payment of some other claims which they then had against the estate charged with the said mortgage-debt subsequent to such mortgage." The solicitor goes on to say, "I understood at the time that the said agreement to purchase was made on the individual account of the said John Jones Attwood and Hugh Hughes, and not on behalf or for the benefit of the said Thomas Jenkins, and that the said John Jones Attwood and Hugh Hughes were personally responsible to the Bank of Manchester for the fulfilment of the same." He also deposed that on the 19th June, 1848, in answer to a letter from Mr. John Maurice Davies, he wrote, "I am at present in communication with Messrs. Parry and Attwood, who have engaged to pay me the 2,000*l.* for which the bank agreed to release the estate, and I cannot, of course, open negotiations with any other person on the subject at present." There was a distinct notice to Davies that at that time negotiations were going on with Parry and Attwood. On the 25th June, 1848, the solicitor to the bank received a letter from a gentleman named Eyre applying as solicitor on behalf of the plaintiff for the abstracts of title to the mortgaged estates with the view of paying off the bank, whereupon he replied to the following effect: "I have been for months past and am still in communication with Messrs. Parry and Attwood, of Aberystwith, who have agreed to pay off my clients the Bank of Manchester; and until I find they are unwilling or unable to perform the agreement, I do not feel justified in communicating with other parties on the subject." What an absurd thing it was for the plaintiff to go on after that without communicating with them. The letters are utterly irreconcilable with the case made by the plaintiff. So the matter went on, the transfer was made, and so far as I can find out, from that moment to the present, no complaint was made on the subject until the bill was filed. There is not

so much difference as the learned counsel (Malins) supposes between this case and one in which the solicitors made a purchase on their own account. The plaintiff knew in July, 1848, that Parry and Attwood had purchased this on their own account. Supposing there was any truth in the statement that he had employed them, he knew they insisted upon their right at that time to purchase for themselves. Therefore, agreeing with the Vice Chancellor that if the case made by the bill, and supported by evidence, had been such as to warrant relief on the ground that this was a purchase made by a solicitor for the benefit of his client, then that relief might have been given, although the form of the prayer seemed to point to redemption; yet, differing from the Vice Chancellor, I cannot believe that the account stated by the bill is true—I think in such a case it was the bounden duty of the plaintiff, when he amended his bill, to have stated accurately what were the additional circumstances on which he relied as giving him the equity he was setting up. He does not do that, and therefore, looking at the case made by the bill and answer, and supported by the evidence, I come to the conclusion that the plaintiff has wholly failed in making out the case he set up. The bill must be dismissed with costs.

STUART, V.C., May 24, 1866.

BARLOW v. M'MURRAY.

14 L. T. 511; L. R. 2 Eq. 420; 12 Jur. N.S. 519.

Practice—Leave to amend—New parties—Pleading.

PRACTICE.—*The Court, in according leave to a plaintiff to amend his bill by adding parties, will not permit the introduction of such matter, in connection with those parties, into the amended bill, which would in effect constitute a new case against the defendant.*

This was a motion in the above suit on behalf of the defendant, William M'Murray, for an order to expunge a certain paragraph out of the amended bill, and for payment of the costs of the application by the plaintiffs.

It appeared that in February, 1861, the defendant, as mortgagee with a power of sale, sold to a Mr. Hutton a moiety of a Mr. Shipley's interest in the *Sporting Life* and *Eclipse* newspapers, and in the premises where those papers were published, for 1,500*l.* Shipley had been declared bankrupt in October, 1860, and at the period of the above sale the defendant was one of his assignees, but in June, 1863, he ceased to be so.

The bill alleged that the sale was made at an undervalue, and the object of the original bill was to make the defendant make good to Shipley's estate the difference between the real value of the above papers and the sum of 1,500*l.*, for which he had sold them to Hutton.

Upon the cause coming on for hearing, his Honour thought that Hutton ought to be made a party. The bill had accordingly been amended by adding Hutton as a defendant, and the paragraph complained of was then introduced into the bill, the effect of which was, that prior to the sale to Hutton, viz., in January, 1861, the defendant had agreed to sell two moieties of the property in the newspapers to a Mr. Beeton, but subsequently, for his own advantage, he would not carry out the agreement.

The Attorney General (Sir R. Palmer), Bacon, Q.C., and Swanston, in support of the motion, submitted that a new case had been made against the defendant by the paragraph complained of, and this the plaintiffs, in amending

their bill by adding parties, were not authorised by the practice of the court to do.

E. K. Karlake (Malins, Q.C. with him), for the plaintiffs, contended that it was most essential to the plaintiffs' case to show that Hutton's right, which was a more equitable one, was subject to a prior equity in Beeton. 'It was a matter of course implied, on leave being given to amend a bill by adding parties, that such allegations as were necessary to connect those parties with the case made by the bill must be introduced, and this was all that was done in the present instance. Moreover, the paragraph complained of only repeated a fact already in evidence, and could in no way alter the case made against the defendant.

The VICE-CHANCELLOR.—The plaintiffs have no right, on obtaining leave to amend their bill by adding parties, to introduce into it matter making a new case against the defendant. Such a proceeding is at variance with the practice of the court, and cannot be allowed. The paragraph must be expunged, and the plaintiffs must pay the costs of this motion.

STUART, V.C., May 31, 1866.

BURTON v. TEBBUTT.

14 L. T. 511.

Practice—Appearance of defendants.

PRACTICE.—Where defendants, after service of the bill, failed within the time limited to put in an appearance, the Court, upon motion, directed that in the event of their not doing so within a fortnight, the plaintiff might be at liberty to enter an appearance for them.

This was a motion in the above cause.

The bill was filed on the 22nd February, 1866, and a copy was personally served on each of the four defendants in the suit on the 9th March. On the 14th March the plaintiff's solicitors received a communication from Messrs. Field and Co. to the effect that they had been instructed to appear for all of the defendants, and asking to be supplied with six copies of the bill.

This request was accordingly complied with, and interrogatories having been prepared by counsel on behalf of the plaintiff, they were, on the 22nd March, served upon Messrs. Field and Co.

No answer was put in, and on the time for doing so having expired, the plaintiff's solicitors were informed by Messrs. Field and Co. that after receiving the copies of the bill, their instructions to appear for the defendants had been countermanded.

Subsequently, however (on the 18th May), Messrs Field and Co. put in an appearance for one of the defendants.

Swanston now moved for leave to enter an appearance for the remaining defendants.

The VICE-CHANCELLOR said that unless all of the defendants entered an appearance within a fortnight, the plaintiff might be at liberty to do so for them; and directed that an order to that effect should be served on the defendants.

Wood, V.C., May 3, 1866.

LANKESTER v. WOOD.

CROSSMAN v. WOOD.

14 L. T. 512.

Practice—Staying proceedings in creditor's suit after decree in another suit.

EXECUTOR AND ADMINISTRATOR.—Where a decree has been made in a creditor's suit to take the usual accounts of an intestate's estate a short time after the bill filed, and, as alleged, with a view to prevent another creditor who had also filed his bill for the same purpose, the Court, on an application to stay the proceedings in the second suit, will give special directions that that part of the real estate which it was alleged that the administratrix was about to dispose of should be sold in the usual way, and the proceeds brought into court to abide further directions with reference to the debt due to the second creditor.

These were two creditors' suits to take the accounts of the estate of one John Humphreys Thomas, deceased, formerly a licensed victualler at Sydenham. The first bill was filed on the 27th February, 1866, and a decree had been obtained referring it to chambers to take the usual accounts. The second bill was filed on the 21st February, 1866, by brewers, who had proved their debt in the first suit, for the same object, more especially to make the real estate available, but no answer had been filed by the plaintiffs in the first suit.

The plaintiffs in the first suit now moved that all proceedings in the second suit should be stayed.

The affidavit made in opposition to the motion by the solicitors in the second suit stated that it had been ascertained that the defendant in the first, being the administratrix of the estate, had entered into some arrangement by which the principal part of the real estate, consisting of a public-house, called the "Talma," should be sold; that the administratrix was in humble circumstances, her husband being a clerk with a limited salary in the plaintiff's solicitor's office; that the personal estate was wholly insufficient to pay the intestate's debts, and if the treaty for the sale of the real estate proceeded the proceeds were in danger of being lost to the estate.

E. W. Stock, in support of the motion to stay proceedings, relied on *Penny v. Turner*, 30 L. J. 135 Ch.

Fischer, for the administratrix.

Dickinson, for the plaintiffs in the second suit, contended that the whole was a contrivance to prevent his clients from obtaining a decree in their suit, by which the real estate might be made available for the intestate's debts which would be thus defeated. That the administratrix had not filed any answer in his suit, although the extended time for doing so had expired, and she and her husband were in contempt. He suggested that a peremptory order for sale of the real estate should be taken, and the proceeds paid into court.

The VICE-CHANCELLOR made an order that there should be added to the third inquiry directed by the decree in the first suit a direction that if the alleged contract for the sale of the public-house to a person of the name of Wyatt should not be carried into effect, the public-house and all other the real estate of the intestate should be sold for the benefit of the creditors with the sanction of the court, and the amount of the proceeds of such sale be brought into court, and an inquiry who had been in the occupation thereof since the death of the intestate. That the proceedings in the second suit should be stayed, the plaintiffs therein and the defendant Thomas the administratrix to add their costs to their debt.

Order accordingly.

[IN THE QUEEN'S BENCH.]

June 1, 1866.

SOMES AND OTHERS v. JENKINS.

14 L. T. 519.

Ship—Freight—Broker—Principal.

SHIPPING.—*T., a shipbroker, engaged shipping room in the plaintiff's ship for goods. T. sent on the plaintiffs' usual advertising card for freight to defendant, with a note of the quantity of freight he had engaged for. Defendant then shipped the goods and took the mate's receipts with defendant's name as the shipper. Defendant sent those receipts to T. with a set of bills of lading in his usual form, in which his name appeared as shipper of the goods. Plaintiffs then procured the captain's signature to the bills of lading and returned them with a freight-note to T., debiting defendant as the shipper with freight. T. sent on the bills of lading to defendant without the freight-note, but making out another freight-note. Defendant afterwards paid T. the freight.*

By the custom of the port the shipowner may retain the bills of lading until payment of the freight, when the freight is made payable there, or may part with them, and then the shipper has two months' credit from the sailing of the ship.

After the payment to T., and before the two months' credit had expired, T. stopped payment:—Held, under the circumstances that defendant was liable to the plaintiffs for the freight.

This action was brought to recover 108*l.* 5*s.* 7*d.* for freight of 330 hogsheads of beer from London to Bombay, per ship *Star of India*, and primage thereon.

The plaintiffs are shipowners of London, and the defendant is a brewer at Lambeth, trading as Goding, Jenkins, and Co., who had contracted with the Indian Government to supply beer at Bombay, Kurrachee, and Madras.

On the 14th September, 1863, a shipowner and broker named Thomson agreed with the defendant to provide ship room for the conveyance of the beer at 28*s.* per tun of four hogsheads, and 5*s.* primage, payable in London at two months after the sailing of the vessel.

The plaintiffs did not know of that agreement, but believed Thomson was acting as broker for the defendant in the usual way.

Part of the beer was carried in ships belonging to Thomson and part in ships in which he engaged ship room.

On the 5th July, 1864, Thomson engaged shipping room in the *Star of India* for 330 hogsheads of beer at 25*s.* tun, freight payable here. He sent to the defendant the plaintiffs' card as to the sailing of the ship, without informing him of the rate of freight, but intimating the number of hogsheads he had engaged room for.

When freight is payable here the shipowner may require settlement of the freight before parting with the bill of lading for the goods shipped, if he be not satisfied with the credit of the shipper.

On the 11th July the defendant shipped the 330 hogsheads of beer, and took the mate's receipts for them, which were forwarded by the defendant to Thomson. They stated the goods to have been shipped by the defendant's firm.

A set of bills of lading in a printed form stating the shipment to be by the defendant were sent by defendant to Thomson, who having filled up the blank, sent the same to the plaintiff's brokers for signature by the captain.

The captain's signature was procured and the brokers made out the freight-note :

Lion	591	150 hhds	Tons.	25s.	103	2	6
G. J. & Co.	740	180	82		5	3	1
Various.							
GODING, JENKINS and Co.,					£108	5	7
Per Thomson and Co., Order.							

The bills of lading so signed and the freight-note were taken up by Thomson and exchanged for the mate's receipts which were handed by him to the plaintiff's brokers.

Thomson then forwarded the bills of lading to the defendant.

The ship sailed and duly arrived at Bombay with the cargo, and the beer was delivered to the indorsees of the bills of lading from the defendant.

On the first Saturday after the two months from the ship's sailing, application was made to Thomson for the freight, and as he did not pay, afterwards to the defendant, who refused to pay on the ground that he had paid the amount of the freight-note to Thomson.

The freight-note sent by the plaintiffs' brokers to Thomson was not sent on by him to the defendant, but instead thereof another made out by Thomson as follows :

Messrs. Goding, Jenkins, and Co.,

London, 16th July.

Drs. to freight, &c., per ship *Star of India*, Capt. Holloway for
Bombay.

330 hhds. beer, 82½ tuns, at 28s.	115	10	0
Primage	5	15	6
	£121	5	6

Bombay contract, No. 2, due 17th Sept.

PATRICK THOMSON and Co.

The defendant paid that freight to Thomson on 1st August, 1864, but plaintiffs had no knowledge of this.

Bovill, Q.C. (T. Jones with him), for the plaintiffs, and

Mellish, Q.C. (Cohen with him), for the defendant :

Greaves v. Legg 2 H. & N. 210. Sweeting v. Pearce, 5 L. T. (N.S.) 79.

BLACKBURN, J.—I am of opinion that the plaintiffs are entitled to recover this freight from the defendant. If Thomson had in point of fact been acting as broker, and the defendant was his principal, there could be no doubt about the plaintiff's right to recover. But in September, 1863, there was an agreement between Thomson and the defendant, by which Thomson engaged to find ship room at the rate of 28s. per tun for a quantity of beer to be supplied by the defendant. The fact of this agreement having been made was not known to the plaintiffs when Thomson agreed for sending out the beer by the ship in question. The defendant then shipped the beer in plaintiffs' ship, and took the mate's receipts. After that he sends the mate's receipts and bills of lading in which his name appears as the shipper of the goods to Thomson, who fills up the rate of freight he had contracted for, and sends them on to the plaintiffs' brokers to procure the captain's signature. The bills of lading with the captain's signature and a freight-note are then sent to Thomson; but that freight-note is not brought home to the knowledge of the defendant. By the usage of London, when freight is payable in London, the shipowner is not bound to give up the bills of lading, but may retain them until the freight is paid if he be not satisfied with the credit of the shipper, or he may part with them, and then two months' credit for payment of the freight is allowed. It was said that the defendant was not cognisant of this usage. It is not, however, necessary

to decide whether that circumstance is material or not, because by law the shipper of goods at a particular port is to be held to deal with the shipowner according to the usage and custom of the port, and the shipowner has a right to treat the shipper as if he knew the usage and custom. It would be most inconvenient to hold otherwise, and the business of a shipowner could scarcely be carried on if he had a right to charge those persons only who might know, and not those who did not know of the custom and usage of the port. The defendant took back the bills of lading in this case, and paid the freight to Thomson without making inquiry of Thomson about the matter. As it turned out Thomson stopped payment. Under the circumstances, I think the plaintiffs have a right to say to the defendant that they parted with the bills of lading to him, taking his promise that he would pay the freight, and, therefore, that they were entitled to recover.

MELLOR, J. concurred.

SHEE, J.—I am also of opinion that the plaintiffs are entitled to recover. The learned Judge recapitulated the facts, and said that it was quite consistent with all that appeared that Thomson was acting merely as the agent of the defendant in the shipment of the goods by the *Star of India* ship; and being of opinion that he so acted as agent, the plaintiffs were entitled to recover.

Judgment for the plaintiffs.

[IN THE COURT OF EXCHEQUER.]

May 2, 1866.

WIGENS v. PICKWICK.

14 L. T. 521.

Pleading—General release in an assignment for benefit of creditors—Plea of in action on joint and several note—Replication that the note was not included in the release—Particular recital restraining general words—Effect of the release.

DEED AND BOND.—*To an action on a joint and several promissory note against one of the makers, the defendant pleaded a general plea of release. The replication set out the release, which was contained in a deed of assignment to a trustee for the benefit of creditors, made prior to the Bankruptcy Act, 1861, wherein was contained a recital that the debtor (the defendant) was indebted to his several creditors in the sums set opposite their respective names in the schedule thereunder written, and it then averred that the note declared on was not, nor was it intended to be, included in the sum set opposite to plaintiff's name in the said schedule, or in the release, and that no payment on account of the said note had ever been made to the plaintiff under the deed:—Held, notwithstanding, that the effect of the deed was to release the note declared on.*

Declaration on a joint and several promissory note of defendant and one W. E. Pickwick, dated 9th February, 1865, for 100l. at three months, and for money payable and on accounts stated.

Plea: That after making of the said promissory note, and before the same became due, and whilst plaintiff was the holder thereof, &c., and before suit, and on 22nd March, 1860, plaintiff by deed released defendant of and from all and all manner of debts, sums, bills, bonds, notes, . . . claims, and demands whatsoever which plaintiff then had, or thereafter might have, against defendant for or

in respect of any debt, transaction, matter, or thing up to the day of the date of the said deed; and, further, that the said promissory note was made or delivered by defendant to plaintiff for and in respect of a debt and transaction, matter, and thing before the day of the date of the said deed, &c.

Replication:—1. Issue on the said plea. 2. For a further replication, that the said deed was and is in the tenor following (the deed is set out at length and *verbatim* in the replication, and the following are the parts material for this report):

"This indenture, made 22nd March, 1860, between defendant of the first part, J. H., a trustee for the creditors of the said defendant, of the second part, and the several other persons whose names and seals are hereunto set and subscribed, being respectively creditors of the said defendant of the third part. Whereas the said defendant is justly indebted to the said several persons, parties hereto of the third part, in the several sums set opposite to their respective names in the schedule hereunder written, which he is unable to pay in full, and has therefore proposed and agreed to assign all his estate and effects unto the said trustee for the benefit of his creditors as herein-after mentioned. It was thereby witnessed that defendant thereby assigned unto the said trustee all his real and personal estate and effects whatsoever upon trust to sell, and out of the proceeds thereof to pay rateably and without priority to the creditors of the said defendant their several and respective debts, and the residue, if any, of the said proceeds to the said defendant. And in consideration of the premises and of the said assignment the said several persons, parties thereto of the third part, and also the creditors by or on whose behalf the said deed was or should be signed, did thereby release and for ever discharge the said defendant of and from *all and all manner of debt and debts, sum and sums of money, covenant and covenants, bills, bonds, notes, accounts, reckonings, judgments, executions, actions, suits, claims, and demands whatsoever* which they, any or either of them, then had or thereafter might have against the said defendant, his heirs, &c., *for or in respect of any debt, transaction, matter, or thing up to the day of the date thereof.* And the said creditors parties thereto, each for himself and not one for the other, thereby covenanted with defendant, his executors, &c., to indemnify him from and against the several bills and notes which had been accepted, made, or indorsed, or delivered to them respectively by defendant for or in respect of the debts or sums set opposite their names respectively or any of them."

Averments that plaintiff's name and seal was set and subscribed to the said indenture; that the sum set opposite to plaintiff's name in the said schedule was 133l. 6s. 8d.; that plaintiff at the time of making the said indenture was a creditor of defendant for that sum. And further, that the money payable by the said promissory note, and due on the said accounts stated, and the debt and claim in the declaration mentioned, *were not, nor were the same or any part thereof, intended, understood, or meant by plaintiff or defendant to be included in the said sum or debt of 133l. 6s. 8d., or in the said release.* And further, that no payment was at any time made to plaintiff of or on account of the said claim in the declaration out of any moneys received by virtue of the said indenture or otherwise.

Issue taken and joined on the said replication.

Demurrer and joinder in demurrer also to the same.

Defendant's points:—1. That it is not competent to plaintiff to explain, vary, or control the absolute nature of the release contained in the deed by parol evidence in the manner attempted in the replication. 2. That the effect and operation of the release contained in the deed can only be ascertained from the four corners of the deed itself. 3. That the release being free from ambiguity the recital contained in the deed cannot control the same. 4. That the release is not confined to the debts and sums of money set opposite to the creditors' names in the schedule, but, for the considerations mentioned in the deed, extends to all debts, sums of money, and promissory notes which such creditors (the releas-

ing parties) had against defendant at the date of the deed, and therefore to the promissory note and causes of action in the declaration.

Plaintiff's points:—1. That the matters set forth in the replication do not infringe the rule against the admissibility of parol evidence to contradict, control, or vary the contents of a deed. 2. That the deed does not in terms release the debt claimed in the action, and that plaintiff is at liberty to show that it did not, and to what debts the release applied. 3. That the release is only of the sums and debts set opposite to the creditors' names in the schedule.

A. Charles, for defendants, in support of the demurrer to the replication.—The deed contained a general release from all debts due from defendant to plaintiff, and expressly included all bills on which defendant might become liable. It was pleaded as a legal plea, and if within the meaning of the deed the release be shown to be general, defendant was entitled to judgment. It will probably be contended *contra* that the operation of the release was controlled by the recital in the deed, and that the release applied only to the sum specified in the schedule. But that was not so. The object of the deed was to relieve the debtor from all his debts. The trustee was to distribute the estate rateably. It was analogous to a deed of composition or arrangement under the Bankruptcy Act, 1861, and the same principles were to be applied to it. (He was here stopped by the Court, who called on)

Pinder, for plaintiff, to support the demurrer.—On the plainest principles of law with reference to the construction of deeds, the replication was good without having recourse to the principles of equity referred to by the other side. This was not a composition or arrangement deed under the Bankruptcy Act, 1861, but an assignment of defendant's estate upon trust to sell and pay rateably to the creditors the debts named in the schedule, and the surplus to the assignor. The note was not due at the date of the deed. The recital in effect was, that defendant was indebted to plaintiff in 133*l.* 6*s.* 8*d.*, and there was an averment that the promissory note was not intended to be included therein, and also, which was important, that no payment on account of the claim in the declaration had been made by the trustee out of moneys received under the deed. The release, though couched in general terms, was governed by the particular recital, and confined to the specific debts, and it was the same as a distinct recital that plaintiff was indebted in 133*l.* 6*s.* 8*d.* only. For that proposition *Payler v. Homersham* (4 M. & S. 423), which was on all fours with and undistinguishable from the present case, was a distinct and leading authority. It might be said here, as was said by Lord Ellenborough in that case, that the averment, that the money secured by the joint and several note was not meant to be included in the release, put an end to the question. The note being joint and several, was an important element. Suppose defendant to have been a surety for W. E. Pickwick, and upon execution of the deed he had expressly stipulated that it should not extend to the joint and several note, and that therefore the specific sum was put in? [BRAMWELL, B.—You put the case negatively, but suppose the parties ignorant of the existence of the note, then the allegation in the replication would be true, but surely the debtor would be discharged. MARTIN, B.—*Payler v. Homersham* is distinguishable. There it was not a debt at all. It was a liability on an indemnity bond given as a banker's guarantee, and the scope of the deed pleaded in that case had no reference to a liability of that kind at all. BRAMWELL, B.—You are attempting to explain the deed by parol.] Lord Ellenborough in *Payler v. Homersham* says: "The release being of an aggregate sum which is compounded of several debts, the plaintiffs may aver of what it is or not compounded." It was like a question of "parcel or no parcel," and plaintiff might show an intention to include specific debts, and to exclude the promissory note. Had it been included the debt would have been 233*l.* [MARTIN, B.—There may have been a dispute between the parties on this very matter; the defendant denying his liability on the note, or disputing its validity,

and the plaintiff insisting to the contrary, and ultimately the plaintiff may have yielded the point and executed the deed. All that is consistent with the replication.] For that very reason the parties, agreed to confine the operation of the release by the recital to the specified debt. In *Lyall v. Edwards* (6 H. & N. 137; 30 L. J. 193, Ex.), which was a stronger case than the present, a general release was held to extend only to claims known to the parties and not to a claim for a wrongful pledging of documents unknown at the time to the plaintiff. But here it was admitted that neither party intended the note to be included. [BRAMWELL, B.—People continually take it that the contrary of what is denied must have been intended, forgetting that there is another and an intervening state of things, namely, that the matter was never contemplated at all.] *Simons v. Johnson and another* (3 B. & Ad. 175), approving the decision in *Payler v. Homersham* and *Harrhy v. Wall* (1 B. & Ald. 103), were authorities to the same effect; and the last-named case showed that had plaintiff here executed the deed in blank as to the amount of his debt, the note, even though intended to have been excluded, would still have been released. *Daniel v. Saunders* (2 Chit. R. 564). But again, the note was joint and several, and there being no reservation in the deed of rights against co-debtors was an argument against the release extending to such debts; *Simons v. Johnson* (*ubi sup.*) [BRAMWELL, B.—Suppose, instead of 133l., it turned out that 200l. was due to the plaintiff, would he not be entitled to a dividend on the 200l.?] It was submitted he would not. The creditors were *cestuis que trust* of the trustee to the amount named in the deed *Lancaster v. Elce* (7 L. T. (N.S.) 123; 31 L. J. 789, Ch.), and the latter would not be justified in paying plaintiff any part of this note, or any more than the sum specified and admitted by the deed to be due; but if the release was to operate on the whole amount of the debt, then, on the other hand, a composition on the same amount would be payable, the obligation and benefit being mutual and correlative. The schedule, too, would be nugatory and useless if the effect of the deed were the same whether the amount of debt was inserted or not. The replication was good, unless the governing authorities on the construction of deeds were overruled. He cited also

Fazakerly v. McKnight, 6 El. & Bl. 795; 26 L. J. 30, Q.B. Com. Dig. "Release," E. 5, "Construction."

A. Charles, contra, was not called on to reply.

MARTIN, B.—This is an argumentative traverse. It strikes me that according to proper pleading the plaintiff should have traversed the release in his replication. The replication as it stands is argumentative. The true meaning of the deed is, that the parties shall insert in the schedule everything that is due from the debtor. The averment in the replication that the money payable by the promissory note and the debt or claim in the declaration were not, nor were the same or any part thereof, intended by plaintiff or defendant to be included in the said debt of 133l. 6s. 8d. or in the said release, is setting up parol evidence to vary the deed, and in my judgment that evidence would have been inadmissible. If you use an argumentative traverse, it seems to me that you should negative every possible case that can be suggested. As far as my judgment goes, the decisions in the numerous cases cited by Mr. Pinder were perfectly right, but I do not think that they are in point at all. They are all of them entirely distinguishable from the present case, which is that of a man's creditors releasing him severally from his debts. The clear object of the deed here was to release the defendant from all his pecuniary liabilities, and it is manifest that the deed was intended to include all his creditors. On this demurrer I think that the judgment of the court must be for the defendant, and that we must hold the replication to be bad.

BRAMWELL and PIGOTT, BB. concurred.

POLLOCK, C.B. was absent.

Judgment for defendant.

The Court, however, suggested that plaintiff might amend his replication, and gave him time until Monday the 7th May to elect whether he would do so or not, on which day

Pinder stated to the court that he had elected to amend by striking out the replication and taking issue on the plea of release, which

MARTIN, B. said was decidedly the proper course for plaintiff to adopt.

[ARCHES COURT] (CANTERBURY).

STEPHEN LUSHINGTON, May 12, 14, 28, 1866.

THE OFFICE OF THE JUDGE PROMOTED BY THE BISHOP OF
NORWICH v. BERNEY.

14 L. T. 528.

Beneficed clergyman—Solicitation of chastity.

ECCLESIASTICAL LAW.—*A beneficed clergyman, found guilty of solicitation of chastity, suspended for two years ab officio et beneficio, and condemned in costs.*

This case came before the court by letters of request from the Bishop of Norwich.

The case is only reported to show the character of the charge made, and the punishment awarded, the learned Judge being satisfied that the charge as made was established by evidence.

The articles, as admitted, alleged :

1. We article and object to you, the said Thomas Berney, that by the ecclesiastical laws, canons, and constitution of the Church of England all clerks and ministers in holy orders are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment and behaviour in every respect, and to abstain from incontinence, lewdness, solicitation of chastity, or any other excess whatever, and from being guilty of any indecency themselves, or encouraging the same in others; but that, on the contrary, they are enjoined amongst other things to be always doing the things which shall appertain to honesty, and endeavouring to profit the church of God, bearing in mind that they ought to excel all others in purity of life, under pain of deprivation, suspension, or any other ecclesiastical punishment or censure as the exigency of the case and the law thereupon may require and authorise, according to the nature and quality of their offence, &c.

The 2nd article pleaded the institution of the defendant, being in holy orders, to the rectory and parish of Bracon Ash, in the diocese of Norwich and province of Canterbury.

4. That the aforesaid H. M. C. is the wife of the Rev. J. J. C., and that she and her said husband resided together for about four years immediately preceding the month of May, 1864, in the rectory-house or parsonage of the parish of Bracon Ash.

6. Also we article and object to you, the said Thomas Berney, that on or about the 11th day of the month of May, 1864, you called at the said rectory-house of Bracon Ash aforesaid, and took luncheon with the said H. M. C. and her said husband; that after luncheon her said husband and her sister, the aforesaid M. E. D., who was then on a visit at the said rectory-house, went out

riding together, leaving you alone with the said H. M. C. in the drawing-room of the said house; that whilst you were so alone with her in the said drawing-room you looked at her, and took hold of her hands, and said to her, "Come on to the sofa with me; the blinds are down; Mr. C. will never know anything about it, and it will be a *liaison* between us" (meaning thereby to solicit and incite the said H. M. C. to consent to your committing adultery with her); that the said H. M. C. thereupon said to you, "How can you talk to me in such a way? Do you not know that I am a married woman? and yet you, a clergyman, wish me to commit such a sin." That you then asked her to sit on the sofa, but that she got up to go out of the room, when you set a chair for her and addressed her as follows, "I take my oath that as I hope for salvation, I will never say a word about it." That she immediately thereupon left the room, and came back about 4.30 p.m., when she found you still there, and alone; that she asked you to promise to her never to repeat such conduct again, and added that, if you did, she should tell Mr. C. (meaning thereby her husband); that you said to her, "Oh, no you won't," and that you then left the house.

7. Also we article and object to you, the said Thomas Berney, that several days after the occurrence in the next preceding article mentioned, to wit, on or about the 21st day of the said month of May, 1864, you called again at the rectory-house of Bracon Ash aforesaid, and remained in the dining-room of the said house for some considerable space of time alone with the said H. M. C.; and that whilst you were in the said room alone with her you, running from your chair to the sofa where she was sitting, sat down by her side, and asked her to come into the drawing-room, as the servants were not always passing by the drawing-room window (there being a walk used by the servants past the dining-room windows); that the said H. M. C. thereupon said to you that she was not ashamed of anything that she did, and that the servants might see and hear anything that she did; that you thereupon said "Hush!" and opened the doors leading from the dining-room into the kitchen and that you then shut the said two doors between the kitchen and the dining-room and returned to the said sofa, and again sitting down on it, placed one of your hands on the knee of the said H. M. C., and said to her, "I want something so very bad. I have been so excited all the week. Do let me have my own way; a slice out of a cut cake will never be missed. I shall go crazy if you don't let me have my own way. I shall go home and make a fool of myself with Susan (referring to your own housemaid) or some one else" (intending thereby to solicit and incite the said H. M. C. to allow you to commit adultery with her); that she said to you she could not go on so any longer, and that either you or she must leave Bracon Ash, &c.

Also we article and object to you the said Thos. Berney, that on the afternoon of a certain Tuesday about the end of the said month of May, 1864, the aforesaid M. E. D., the sister of the said H. M. C., the said H. M. C. being in your company at or near your house, you invited the said M. E. D. to accompany you together with her said sister into your greenhouse, that the said H. M. C. declined to accompany you to the said greenhouse on the ground that she was tired, but that the said M. E. D. consented to and did accompany you into the said greenhouse; that after you had been in the said greenhouse with her, you told the said M. E. D. that you had a new design for your garden which you wished her to see, and that she accordingly, by your desire, accompanied you into your library, and whilst she was alone with you in your said library, looking over the said design, you put your arms round her waist and kissed her; that she the said M. E. D. thereupon told you that she should go home directly, and that you then asked her to go upstairs, which she refused to do, and that you thereupon said, "You need not be afraid, I won't hurt you or get you into any trouble;" that you then went out of the library and walked up some stairs leading towards the drawing-room in your house, and said to her, "Oh, nonsense, do come;" that she then opened the door, and went out of

your house, and that you then followed her and said to her, " Well, the drawing-room is unfurnished, and a roll of carpet is a poor substitute for a sofa."

9. Also we article and object to you the said Thos. Berney, that on a certain occasion happening about ten days after the Tuesday in the next preceding article referred to, you being alone with the said M. E. D. in the drawing-room of the rectory-house of Bracon Ash aforesaid, asked her to sit on the sofa with you, and tried to kiss her; that she refused to sit on the sofa with you, or to allow you to kiss her; that you then got up and took hold of her by the arm, and kissed her against her will; and that you also tried to pull her on to the sofa; and that she then got up and left the room.

10 and 11. That by reason of the premises you have been guilty of lewd and incontinent conduct and conversation, and of inciting and soliciting the said H. M. C. and M. E. D. respectively to commit adultery and fornication with you.

12. That by reason of your conduct, &c., you have caused great scandal in the church.

The rest were the usual formal articles.

The allegation on behalf of the defendant went at some length into the story of the acquaintance between himself and the persons mentioned in the articles, and negatived the charges of solicitation of chastity, &c.

A responsive allegation was brought in on behalf of the plaintiff.

And the case was heard on *vivâ voce* evidence.

Dr. Deane, Q.C. and *Dr. Tristram* for the promoter.

Dr. Twiss, Q.C., Karslake, Q.C., and *Dr. Middleton* for the defendant.

The learned DEAN OF THE ARCHES being satisfied that the charge was established, suspended the defendant *ab officio et beneficio* for two years, and condemned him in the costs of the suit.

STUART, V.C., May 22, 1866.

MOREY v. VANDENBERGH.

14 L. T. 542.

Practice—Cross-examination—Notice of motion—Mis-statement in.

EVIDENCE.—*Motion by the plaintiff for the postponement of the cross-examination of his witnesses by the defendant until after the defendant had filed the last of his affidavits, refused on the ground that the notice of motion wrongly recited that the time allowed to the defendant for filing his affidavits had been enlarged.*

The court has discretionary power to permit the defendant to cross-examine the plaintiff's witnesses before filing his own affidavits.

This was a motion by the plaintiff in the above cause, asking that, as the time within which the defendant had to file his affidavits had been enlarged till the 8th June next, the appointment by the defendant to cross-examine the plaintiff's witnesses might be postponed till after the defendant had filed the last of his affidavits.

Malins, Q.C., and *Briggs*, in support of the motion, submitted that it would be contrary to the practice of the court if the defendant were permitted to cross-examine the plaintiff's witnesses before filing his own affidavits. It was evidently the defendant's intention to abide the result of the cross-

examination, and to shape his affidavits in accordance with the facts then elicited. They referred to

Lady Londonderry v. Bramwell, 5 W. R. 248; and Rule 19 of the Orders of 5th February, 1861.

E. K. Karlake, for the defendant, contended that by the 15 & 16 Vict. c. 86 the defendant had an undoubted right to select his own time for cross-examination. Neither the case nor the rule referred to had any application to the present question. The rule merely provided that, in the event of any party failing to cross-examine within the periods prescribed, he should lose his right of cross-examination altogether; and in the case cited the application had been made by the defendant, while here it was by the plaintiff, who would have the advantage of replying to the whole of the defendants' case.

The VICE CHANCELLOR.—There is no occasion, Mr. Karlake, to continue your argument. I shall refuse the motion, with costs, on the ground that the notice of motion wrongly recites that the time within which the defendant had to file his affidavits was enlarged. This was not the case; all that was done was to take out a summons which has not been disposed of. As regards the practice of the court, although the 40th section of 15 & 16 Vict. c. 86 has undoubtedly been greatly modified by rule 19 of the orders of 5th February, 1861, still the court has discretionary power to act as it thinks best in cases like the present.

STUART, V.C., May 25, 1866.

Re STONE'S TRUSTS.

14 L. T. 542; 12 Jur. N.S. 447.

Will—Construction—Legacy—Time specified for claim.

WILL.—*Testator by his will left certain legacies in trust for such of his cousins who should claim them within twelve months after his decease. After his death B., a cousin, residing abroad put in his claim within the time fixed, and at the same time, with the view of protecting the interests of C., another cousin, wrote to the trustees' solicitor as follows: "I have a brother, C., but I do not know his present address. I have written to find out; as soon as he is found he will write; therefore put in his claim." The solicitor complied with these instructions:—Held, that this was sufficient to entitle C. to his legacy.*

This was a petition presented under the following circumstances:—

George Stone, by his will dated the 28th October, 1862, devised and bequeathed all his real, copyhold, and the residue of his personal estate, to trustees on certain trusts for sale; and on further trust, after payment of debts, &c., to pay such of his first cousins on his father's side as should at his (the testator's) death be residing out of the United Kingdom, and who should claim their respective legacies within twelve months after the testator's decease, the sum of 500*l.* each.

The testator died on the 28th September, 1863.

The petitioner, Charles Carr, and his brother Henry Carr, as the testator's first cousins, were entitled under the above disposition to the sum of 500*l.* each, subject to their respectively putting in their claims before the expiration of the time fixed by the testator.

On the 30th May, 1864, Henry Carr, resident in California, put in his

claim; and, with the view of protecting the interests of his brother, the petitioner, wrote to the executors' solicitor as follows:

"I have a brother Charles, but I do not know his present address. I have written to him to find out; as soon as he is found he will write; therefore put in his claim. P.S.—I wish you to appear as attorney for myself and brother Charles, and present our claims to an interest in my deceased cousin George Stone's estate, and send a commission to B. C. Whiting, U. S. attorney, or John O. Wheeler, U. S. clerk to take depositions as to identity, &c."

This letter was received by the solicitor on the 7th July, 1864, and, in reply, after expressing his willingness to act in the manner required, he continued: "I will also inform the executors that your brother Charles's address will soon be ascertained, and that he will be entitled to a legacy of 500*l*." Subsequently, but not within the time prescribed, the petitioner ratified the claim made on his behalf by his brother.

The question raised was, whether this notice of the petitioner's claim was sufficient to entitle him to the legacy of 500*l*.

The legacy had been paid into court by the trustees, and the petitioner now asked that it might be handed to him.

F. O. Haynes appeared in support of the petition.

Lewin for the trustees and executors.

The VICE CHANCELLOR said that, under the circumstances, he considered the directions of the testator had been sufficiently complied with, and ordered the fund to be paid to the petitioner, after deducting the costs of the petition.

WOOD, V.C., May 23, 1866.

MAJOR v. THE PARK LANE COMPANY (LIMITED).

14 L. T. 543; L. R. 2 Eq. 453.

Building Act, 1855, s. 83.—Party-wall—Notice—Taking down party-structure.

LONDON.—*The 83rd section of the Metropolitan Building Act of 1855 prescribes what notice shall be given by parties intending to make alterations in their buildings with reference to the adjoining owners of party structures.*

The owner of a party-structure consisting of a coach-house and stable, proceeded to pull down the same, and in so doing removed a brestsummer, a beam of wood let into the adjoining owner's party-wall, with the intention of reconstruction; in fact, being a case of simple removal:—Held, that under the Act it was not necessary to give the three months' required notice of such intended alteration.

This was a bill by the plaintiff, who held the lease of a house, No. 5, in Park Lane, against the above company, praying an injunction to restrain them from pulling down, cutting away, or interfering with the party structure which separated the plaintiff's house from the defendants' adjoining building, and from otherwise doing damage or injury to plaintiff's said house and premises, and to repair and make good the damage already done.

The bill alleged that the plaintiff was the lessee of the house and premises aforesaid, for a term of fourteen years from Midsummer 1865. That the defendants were a company duly registered under the Companies' Act, 1862,

for the purpose of acquiring land for building and other purposes, and that they had purchased and were the owners of a certain building adjoining the plaintiff's house, separated therefrom by a party structure. The wall which separated the plaintiff's premises from the defendants' adjoining building, was essential to the support of the plaintiff's house and premises. That on the 23rd January last the defendants commenced pulling down their said building, and in the course of such operations the defendants had cut into the said party structure, and carried away a considerable portion of the wall which separated the plaintiff's house from the defendants' adjoining building. That by reason thereof the said party structure had become and was in a dangerous state, and unless restrained, the plaintiff would sustain irreparable injury. That no notice had been given by the defendants of their intention to pull down or interfere with said party structure under the provisions of the Metropolitan Building Act, 1855, which the defendants were bound to give, and the plaintiff had never given his consent to any act of the defendants in relation to the premises.

The clause 83 of the Metropolitan Building Act, 1855, upon which the principal question turned, is intitled "Party Structures," and provides for eleven cases as to rights of building and adjoining owners. And the 84th section provides that three months' notice should be given with respect to the exercise by building owners, and adjoining owners of their respective rights.

The cause came on by motion for decree on the 19th February last, when an order was made by his Honour, referring it to some architect to report what had been done and ought to be done in respect of the party structure in the bill mentioned, having regard to the provisions of the Building Act, 1855, with all necessary instructions.

Mr. Whichcord, the architect to whom the matter was referred, made the following report:

The wall is a party-wall within the meaning of the said Act. The defendants have removed the buildings on their side, and by so doing have disclosed four tiers of wooden bond in the wall and several gutter bearers. The end of a brestsummer, supported by a storey post at the north-west angle of the party-wall, has been built into the wall to the extent of a few inches; several bricks over it and forming a portion of the wall at the angle have been displaced, and I have no doubt such displacement has arisen from the attempt made to remove this brestsummer. I have carefully inspected the plaintiff's premises, but have failed to find any cracks or other indication of damage which could have been caused by works of the defendants. I do not consider the party-wall in any way dangerous. I think it would be proper to remove the end of the brestsummer and make good the wall as far as it is loose with sound brickwork in cement; there can be no damage in doing this, if ordinary care be used by the workmen. The upper tier of wooden bond and gutter bearers should also be taken out and replaced with brickwork, as the thickness of the party-wall at this level is only 14 inches, whereas below, and where the other tiers of wooden bond are situated, the wall is 18 inches thick. Upon mature consideration of the whole facts, I am of opinion that the plaintiff's house has sustained no damage from the work that has been done; that the defendants did not contemplate any interference with the party-wall, or doing more than removing their own old buildings from the site, but that in such removal the party-wall has been inadvertently interfered with, and timber has been laid open in it, and moreover that no repair of the wall, within the 83rd section of the said Act, was contemplated by the defendants.

JOHN WHICHCORD.

The plaintiff now moved for an injunction in the terms of the prayer of the bill.

The question was whether, under the terms of the Metropolitan Building Act, 1855, notice of what had been done ought to have been given by the defendants to the plaintiff.

W. M. James, Q.C., and E. Charles, for the plaintiff, contended that such notice was necessary, and that plaintiff was entitled to the injunction prayed.

Daniel, Q.C., and Druce, for the defendants, contended that what had been done by the defendants they had a perfect right to do, and that the provisions of the Act were not applicable to the case.

E. Charles in reply.—If a party pulls down with an intention of rebuilding, the Act applies.

The VICE-CHANCELLOR.—This is a nice construction of the 83rd clause of the building Act, which specifies various purposes for which other adjoining owners whose property is separated by a party-wall may deal with a party structure, and I apprehend that any person might do this, and the defendants are right in saying they might deal with anything leaning against that party structure, but not forming a support to it. There is nothing in the Act which goes the length of dealing with that which does not afford support, anything as being within the meaning of the Act, and forming a part of the party structure itself. There was built against this party structure originally a sort of stable and coach-house, and there appears also to have been placed on the top of the party structure a metal gutter which ran along the top of the party-wall, that thing which formed part of the lintel, partly formed with this brestsummer, let into a large sort of post, this post does not rest on the wall, but on a storey post at the further end. But that is let into the wall, and the wall being built in the way it is, no removal of it could take place without removing some of the bricks in the wall, or without shaking them; and the difficult part of the case is, that the brestsummer, as far as it is embedded in the wall, would afford some degree of support, the same amount of support as the quantity of bricks whose place it occupied, the half-brick or whatever it was; the brestsummer takes its place, and therefore dealing with it might be taken to be dealing in some sense with the party-wall. There is the real point of difficulty in the case. I cannot help observing that the brestsummer is not touched till after the bill is filed, and it is not the cause of the suit being instituted. What happened before the filing of the bill was this. The parties had set about preparing and had indicated what it was they intended ultimately to do. Before anything can be done in the way of building there is first of all something to be removed, and having to remove they contract with a person to do it. The contractor who has to remove has nothing to do with the building, and there is no necessity to give a notice of removal, or any notice, till the time came when they were going to build. And therefore it comes to a case of simple removal. It appears to be plain that, whatever may be intended, still as to clearing the ground no notice was necessary, unless that very clearing is something as to which notice should be given by the terms of the Act; therefore it brings it back to the question, whether before the bill was filed there was anything done which required notice. Before the bill was filed there was only the removal of the gutter, and in doing that there dropped down a few bricks. Then this gentleman finding this thing being removed, and finding that some bricks had fallen down, makes the complaint to the man he sees at work, and gets the answer that "it is a rich company, we can afford to risk the consequences that may ensue." That answer is given merely by a workman on the spot. There is no more formal application of any sort to the company themselves to know what they are about. And no mischief could have arisen from looking at the plans, which he might have seen if he had asked. Nobody did ask, and therefore the bill was hastily filed. There is a part of the matter also that I cannot overlook. Before bill filed the solicitor on the spot says, "A few bricks will put all this to rights." The plaintiff says, "Oh, that will never do." Now, I do not think this is a proper mode of initiating a suit of

this description. What takes place afterwards creates more difficulty as to whether or not some notice might have been necessary under the Building Act. What next takes place is on the day that the bill is filed. An attempt is made to move the brestsummer which is morticed into the wall. Moving a great beam like that must necessarily have had some effect on the wall, and it might be a question whether in itself it would not be a cutting into the wall. A very narrow construction should not be given to the Act in that respect. Whatever means you use to pull it out, it is said it is not to be deemed or taken to be a cutting of the wall. It has been said that something might be done more mischievous, something which might be irreparable, and although it may not be under the Act a cutting, it must be something that will be taken to be an interference with property in a serious manner, causing a dread of irremediable mischief, and under the Act, if it was such a thing, it would be dealt with accordingly. Had it been done before the bill was filed it might have justified a speedy filing of the bill in consequence of the rapid approach of danger. But the bill was thus filed. That being so, and it turning out that the attempt to remove the brestsummer did no mischief, upon the whole I cannot deal with the case as coming under the 83rd section. The plaintiff had, in fact, no right to file this bill. The order made was as follows:

This Court doth order that upon the defendants undertaking, if the plaintiff should require it, within one week to do the works in the report of Mr. John Whichcord mentioned to the satisfaction of said Mr. Whichcord, the plaintiff's bill be dismissed with costs.

Wood, V.C., May 29, 1866.

HOWARTH (otherwise MILLS) v. MILLS.

14 L. T. 544; L. R. 2 Eq. 389; 12 Jur. N.S. 794.

Disapproved of, *Occleston v. Fullalove*, [1879] E. R. A.; 43 L. J. Ch. 297; L. R. 9 Ch. 147; 29 L. T. 785; 22 W. R. 305 (L. J.).

Devise in favour of children, "legitimate or otherwise"—Marriage with deceased wife's sister.

WILL.—A testatrix, who had gone through the form of marriage with the widower of her deceased sister, by her will gave her property to her children, "legitimate or otherwise." At the date of the will she had only one child, the plaintiff, but had afterwards four other children by her assumed husband:—Held, that the plaintiff was solely entitled, and that the gift in favour of the other children was void.

Sarah Mills, by a will made in 1855, gave all her personal estate to her brother and sister upon trust, after sale and conversion, to pay to Edward Howarth 100l., and to pay and apply the residue in such proportion as her trustees might think fit towards the maintenance, education, and advancement "of each and every of her children, legitimate or otherwise, which should be living at her decease, until each of such children, legitimate or otherwise, should respectively attain the age of twenty-one years;" and she further directed that "as soon as either of her said children, legitimate or otherwise, should attain the age of twenty-one years, and as often as the same should occur, her trustees should pay unto such child its proportionate share" of the trust estate.

Sarah Mills, in July, 1851, had gone through the form of marriage with

Edward Howarth, the widower of her deceased sister, and at the date of the will she had one child, the present plaintiff, living. After the date of the will she had four other children by Edward Howarth, the three survivors of whom were the present defendants.

The testatrix died in January, 1864. The bill in the suit was filed in March, 1864, and prayed a declaration by the court that the plaintiff was entitled solely, or as to what persons, if any, other than the plaintiff were entitled.

W. W. Cooper, for the plaintiffs, contended that a gift to future illegitimate children was clearly void, as being *contra bonos mores*. He cited

Medworth v. Pope, 27 Beav. 71. *Burnett v. Tugwell*, 31 Beav. 332; 7 L. T. (n.s.) 121.

E. K. Karlake, for the defendants, contended that, inasmuch as directly the testatrix contracted a valid marriage the will would have been revoked, no other than illegitimate children could have taken under the will.

J. J. Jervis for the trustees.

The VICE-CHANCELLOR said there could be no doubt about the intention of the testatrix to provide for these children, and for their sakes it was to be regretted that the intention could not be carried out. Through the circumstances of the case before the Master of the Rolls were somewhat different from the present, yet there could be no difference as to the policy of the law. If it was held *contra bonos mores* for a third person to provide for the future illegitimate children of any woman, *a fortiori* it must be *contra bonos mores* where a woman herself provided for her own illegitimate children. Here there was no possible mode of providing for these children except by the mother's gift, and though stress had been laid on the fact that it was a case of marriage with a deceased wife's sister, yet, after the decision of the House of Lords in *Brook v. Brook* (9 H.L. Cas. 183, 4 L. T. (n.s.) 93), it was impossible for him to consider this state as anything but an immoral connection. He must therefore make a declaration that the plaintiff was solely entitled to the fund.

[IN THE QUEEN'S BENCH.]

May 31, 1866.

REG. v. STONE. *Re* THE METROPOLITAN RAILWAY COMPANY.

14 L. T. 552.

L. C. C. A., sect. 121.—*Notice to treat*.

COMPULSORY PURCHASE.—*Unless possession of premises is taken or demanded in the case of persons having no greater interest than as a yearly tenant, the mode of obtaining compensation is not that pointed out by section 121 of the Lands Clauses Act.*

Notice to treat served by a company is not a demand of possession.

This was a rule *nisi* for a *mandamus* to Alderman Stone, one of the magistrates for the city of London, to compel him to hear and determine Mr. Gibbs' claim for compensation, pursuant to the 8 & 9 Vict. c. 18, s. 121, which enacts:

“ If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, and

if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise affecting the same; and the amount of such compensation shall be determined by two justices, in case the parties differ about the same; and upon payment or tender of the amount of such compensation all such persons shall directly deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special Act."

The Metropolitan Railway Company had served (January 5, 1866) on Mr. Gibbs, as the occupier of premises in Coleman Street, in the City of London, a notice to treat under section 18 of the Lands Clauses Act, demanding, in the usual form, particulars of his estate and interest in the premises, and of his claim. Mr. Gibbs sent in a claim for 500*l.* compensation for his interest in the premises under a written agreement not under seal for the term of three years from January, 1866.

D. D. Keane, Q.C., showed cause.—This is not a case within section 121, for no part of the land has been taken, or possession thereof demanded:

Reg. v. The Sheriff of Middlesex, 31 L. J. 261 Q.B. *Reg. v. The Manchester S. and L. Railway*, 4 E. & B. 88.

Horace Lloyd in support of the rule.—The notice to treat served by the company was equivalent to a demand of possession. It operates injuriously, and prevents the tenant getting a renewal of his term, and his business plans are affected by it.

COCKBURN, C.J.—I am of opinion that the 121st section only applies where lands are in the possession of a person having no greater interest therein than as a tenant for a year, or from year to year, and that it is only when such person is required to give up possession of the land so occupied by him before the expiration of his term therein, that he can have the benefit of that enactment. In this case the company gave the notice to treat required by the 18th section, and they have done nothing more. It is said that that is equivalent to a notice requiring possession to be given up under section 121. I am clearly of opinion that it is not. Section 18 is an express provision that companies shall give notice to treat for lands required by their Act, with a view of enabling the company to deposit money in the bank as security before taking possession pursuant to section 85. In the present case the company were not in a situation to require the tenant to give up possession of his premises, nor was the tenant called upon to do so. Therefore, the 121st section does not apply to this case.

BLACKBURN, J.—I am of the same opinion. Unless the tenant has been called up to give up possession, the case is not within the 121st section. All that the company have done is to serve the notice to treat that is required by section 18, which is merely a demand of the particulars of the occupier's estate and interest in the land, and is very different from a demand of possession before the expiration of the tenant's term.

LUSH, J.—It is a condition precedent to the jurisdiction of the justices under section 121 that the tenant should be required to give up possession before the expiration of his term.

Rule discharged.

[IN THE QUEEN'S BENCH.]

June 6, 1866.

EUSTACE (*appellant*) v. SARGENT (*respondent*).

14 L. T. 552.

Cattle plague order—Removal of sheep—"Farm or place."

ANIMALS.—By an order of the Quarter Sessions of Buckinghamshire, it was declared that after a certain date no sheep, etc., should be "removed from any one farm or place in the said county of Buckingham to any other farm or place therein," except upon certain conditions:—Held, that the word "place" must be construed *ejusdem generis* with the word "farm," and that no violation of the order is committed by the removal of sheep from one part of a farm to another part of the same farm, even though in such removal a public highway has to be crossed.

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by two justices at the petty sessions at Buckingham, for a violation of an order of quarter sessions in removing certain cattle from one place to another without the licence of two justices of the county.

By an order of the Buckinghamshire Quarter Sessions, it was ordered that

"No cow, heifer, bull, bullock, ox, calf, sheep, lamb, goat, or swine, shall be removed from any one farm or place in the said county of Buckingham to any other farm or place therein, except upon the conditions thereafter specified, namely:

"1. That two justices sitting in petty sessions for the division in which the parish may be situate, into which it may be proposed to remove or bring any of the animals in this condition specified, may (if they think fit) grant a licence to the owner of any sheep, lambs, goats, or swine, to remove them from premises in his own occupation to other premises also in his own occupation."

It appeared that on the 8th February a servant of Eustace, the appellant, drove ninety-one sheep, without having obtained a licence from justices so to do as before mentioned, from an inclosed field in the occupation of the appellant, lying on the north of a certain public highway, on to and across the said highway to a certain inclosed yard lying on the south of the said highway, both the said inclosed field and inclosed yard being in the occupation of the appellant. The justices stated as follows:—"We being of opinion that the said appellant in taking the sheep across the public highway had removed his sheep from one place in the county of Bucks to another place therein, and that accordingly there had been an infringement of the order of quarter sessions, gave our determination against the appellant, and convicted him in the penalty of 5*l*. The question for the opinion of the court is, whether the removal, as aforesaid by the appellant or his servant, of the ninety-one sheep on the 8th February, was an infringement of the order of quarter sessions," etc.

No one appeared for the respondent.

Anstey appeared for the appellant, and contended that the conviction was bad; for that the provision in the order of sessions against the removal "from any one farm or place in the said county of Buckingham to any other farm or place therein" had not been violated, both the field and yard from and to which the sheep were removed being upon the same farm of the appellant, and the word "place" meaning some place not merely contiguous to or forming a portion of the same premises, but being *ejusdem generis* with the term "farm." [BLACKBURN, J.—The question is, what is

meant by "from place to place?"'] The term "place" must be taken as analogous to "farm." This was all one farm.

BLACKBURN, J.—The case does not find this to be so. The field and the yard may have been contiguous, or they may have been miles apart. The statement is ambiguous, and we cannot come to a decision upon it. The case must go back to the justices to find the fact, but with our opinion that the removal prohibited is from one farm or place to another farm or place *ejusdem generis*, and that if therefore the place to which the sheep were removed was a part of the same farm, they ought to acquit, but if it is a separate place, that is, not a part of the same farm, then they ought to convict.

To go back with the opinion of the Court.

STUART, V.C.

June 1, 1866.

Re COLEMAN'S TRUSTS.

14 L. T. 587.

Trust-fund—Lunatic—Workhouse authorities—Claim for maintenance disallowed.

POOR LAW.—*The Court, in ordering the dividends of a fund in court to be paid for the benefit of a pauper lunatic, refused to allow a claim made by workhouse authorities for past maintenance and support.*

This was a petition presented by Mary Ann Coleman, a person of unsound mind, although not found so by inquisition, by her next friend Arthur Hinton.

The petitioner, as one of the next of kin of Richard Coleman, who died intestate on the 2nd Jan., 1865, was entitled to 578*l.* 6*s.* 7*d.* This sum had been transferred into court, and now amounted to 649*l.* 9*s.* 5*d.*

The petitioner, who had no other property, had been temporarily placed in the City of London Workhouse, and the workhouse authorities claimed a sum of 40*l.* for her maintenance and support.

The petition prayed that the costs might be taxed, and when taxed, might, together with the sum expended by the workhouse authorities for the petitioner's maintenance and support, be paid out of the fund in court; and that the residue might be transferred to certain persons named as trustees, and the dividends to accrue be paid to the said Arthur Hinton, or to such other person as the court might think fit, and applied by him for the petitioner's maintenance and comfort.

B. B. Rogers in support of the petition.

Hill for the trustees.

THE VICE-CHANCELLOR.—There must be an order for payment of the costs and for the transfer of the residue of the fund to the separate account of the petitioner, Mary Ann Coleman. The dividends must be paid to Arthur Hinton during the life of the petitioner, he undertaking to apply them for her benefit. I shall not allow any portion of the fund to be paid to the workhouse authorities for past maintenance.

[IN THE QUEEN'S BENCH.]

May 1, June 11, 1866.

MEE v. PERREN.

14 L. T. 591 : affirmed, [1867] E. R. A. ; 15 L. T. 320 (sub nom. *Mee v. Parren*)
(Ex. Ch.).

Bill of sale—Property in a dwelling-house and in a house of business—What property included.

BILLS OF SALE.—A debtor who carried on his business at No. 111, Fore Street, London, but who resided at No. 10, The Grove, South Lambeth, executed a bill of sale to his creditors of all and singular the plate, linen, goods, and chattels which then were in or about the messuage and premises, No. 10, The Grove, South Lambeth. There was then a clause "that all the household furniture, plate, &c., of whatsoever nature which the said mortgagor now is, or during the continuance of the security shall become possessed of, shall be subject to the security hereby made, and it shall be lawful for the said mortgagee, &c., to enter into any messuage or premises, and to take possession thereof," &c. There were other provisions in the bill of sale inserted with a view to securing the mortgagee, but although the house No. 10, The Grove, was frequently mentioned, no mention in terms was made of the premises No. 111, Fore Street:—Held, that upon a proper construction of the bill of sale, it did not operate upon the property upon the premises No. 111, Fore Street, but operated alone upon the property upon the premises No. 10, The Grove.

This was a special case, stated with a view of obtaining the opinion of the court upon the operation of a bill of sale.

It appeared that one Henry Wheeler (afterwards a bankrupt) executed a bill of sale to the plaintiff. He was described as of "111, Fore Street, in the city of London, wholesale shirt and crinoline manufacturer," but who resided at 10, The Grove, South Lambeth. The bill of sale recited that Wheeler had agreed to suffer judgment to be entered in the Exchequer for 400*l.*, and that he might become further indebted to the plaintiff. He then assigns

All and singular the plate, linen, china, glass, pictures, prints, wines, liquors, and other goods and chattels which then were on or about the messuage and premises No. 10, The Grove, South Lambeth, and all his estate and interest therein.

The following clause then followed:

And it is hereby agreed and declared that all the household furniture, plate, linen, china, glass, pictures, wines, liquors, and all other goods, chattels, and effects of whatsoever nature which the said mortgagor now is or during the continuance of the security shall become possessed of, shall be subject to the security hereby made, and it shall be lawful for the said mortgagee, his executors, administrators, and assigns, to enter into any messuage or premises in which the same shall be and to take possession thereof, and by delivery or any act of assignment in the name of the said mortgagor, his executors or administrators, to transfer the property thereof to the said mortgagee, his executors, administrators, to transfer the property thereof to the said mortgagee, his executors, administrators, or assigns, or otherwise to subject the same to the powers and provisions herein contained.

The bill of sale then provided that if default should be made in payment of the 400*l.*, or any further advance at the expiration of one hour after demand, it should be lawful for the mortgagee, at any time thereafter, while the security remained in force, to take possession of "all and singular the said premises" thereinbefore expressed to be assigned or otherwise subject to the security for the purpose of enforcing the same, and to that end to have full liberty of ingress, egress, and regress to and from any messuage and premises in or upon which

the same may be. There was then a covenant that, so long as the security should remain in force, the mortgagor would pay to the mortgagee such sum as should be equal to 2l. 10s. per cent. on the gross sale of the mortgagor in the business then carried on by him in Fore Street, and in any other business that might be carried on by him, as or in lieu of interest on the total principal sum for the time being owing on the security by equal weekly payments, and that he would keep proper books of account and permit the mortgagee at all reasonable times to enter into any counting-house, warehouse, or other premises in which such books might be, to inspect and examine the same, and that he should not during the continuance of the security, without the mortgagee's consent, remove the premises before assigned from the said house, No. 10, The Grove, except when any of them should be removed for necessary repairs, or worn out, or consumed, and would replace, &c., so as at all times to keep up the total value of the furniture and other articles for the time being comprised in the security, and that it should be lawful for the mortgagee at all reasonable times to enter into the said messuage, No. 10, The Grove, or any other messuage or premises in which the same might be, to view the state of the furniture and other articles for the time being subject to the security, and to take inventories thereof and of any in want of repairs, &c.

It was also provided that the mortgagee should, during the continuance of the security, keep all the said furniture, chattels, and effects expressed to be thereby assigned or otherwise subject to the security insured against loss or damage by fire in the joint names of the mortgagor and mortgagee, in the sum of 500l. at least, &c.

The question raised for the opinion of the court was, whether this bill of sale operated over the property of the mortgagee at his place of business, No. 111, Fore Street, and at his house, No. 10, The Grove, or was confined alone to the latter premises?

Mellish, Q.C., appeared for the plaintiff, and contended that the terms of the bill of sale were sufficiently large to include the property of the mortgagor at both places.

J. Brown, Q.C., for the defendant, argued that the bill of sale, by its terms, was intended to operate over the property alone at No. 10, The Grove.

The following judgment is so copious that it is unnecessary to give the arguments at greater length.

Cur. adv. vult.

LUSH, J.—There was a case of *Mee v. Parren*, which was argued in the course of last term before my brother Blackburn, my brother Shee, and myself, in which I will now deliver the judgment of the court. The question in this case, and upon which we took time to consider, is, whether upon the true construction of the bill of sale, the plaintiff was entitled to seize and sell for his own use the stock-in-trade of the bankrupt Henry Wheeler. The bankrupt resided at No. 10, The Grove, South Lambeth, but he is described in the bill of sale as of 111, Fore Street, in the city of London, wholesale shirt and crinoline manufacturer, that being the place where he carried on his business at the date of that instrument, and from thence down to his bankruptcy. The bill of sale after reciting that Wheeler had agreed to suffer judgment to be entered against him in the Court of Exchequer for 400l., and that he might become further indebted to the plaintiff, the mortgagor, assigns to the plaintiff "all and singular the plate, linen, china, glass, pictures, prints, wines, liquors, and other goods and chattels," which then were in or about the messuage and premises No. 10, The Grove, South Lambeth, and all his estate and interest therein. Then follows the clause relied on by the plaintiff, which is in the following terms:—"And it is hereby agreed and declared that all the household

furniture, plate, linen, china, glass, pictures, wines, and liquors, and all other the goods, chattels, and effects of whatsoever nature which the said mortgagor now is or during the continuance of the security shall become possessed of, shall be subject to the security hereby made; and it shall be lawful for the said mortgagee, his executors, administrators, and assigns, to enter into any messuage or premises in which the same shall be and to take possession thereof, and by delivery, or any act of assignment in the name of the said mortgagor, his executors or administrators, to transfer the property thereof to the said mortgagee, his executors, administrators, or assigns, or otherwise to subject the same to the powers and provisions herein contained." It is then further declared and agreed that if default be made in payment of the 400*l.* or any further advance at the expiration of one hour after demand, it should be lawful for the mortgagee, at any time thereafter while the security remained in force, to take possession of "all and singular the said premises" thereinbefore expressed to be assigned or otherwise subject to the security, for the purpose of enforcing the security, and to that end to have full liberty of ingress, egress, and regress to and from any messuage and premises in or upon which the same may be, at all reasonable times, but valid possession should be so taken of the premises assigned or otherwise made subject to the security and should remain in the possession of the mortgagor. There is then a covenant by the mortgagor that so long as the security should remain in force he would pay to the mortgagee such a sum as should be equal to 2*l.* 10*s.* per cent. upon the gross sale of the mortgagor in the business then carried on by him in Fore Street and in any other business or businesses that might be carried on by him, either alone or in partnership with any other person, as or in lieu of interest on the total principal sum for the time being owing on the security, by equal weekly payments, and that he would keep proper books of account and permit the mortgagee at all reasonable times to enter into any counting-house, warehouse, or other premises in which such books might be, to inspect and examine the same, and that he should not during the continuance of the security, without the mortgagee's consent, remove the premises before assigned from the said house, No. 10, The Grove, except when any of them should be removed for necessary repairs or worn out or consumed, and would replace such as should be worn out or consumed by other articles of value, at least equal to the present value of the articles worn out or consumed, so as at all times to keep up the total value of the furniture and other articles for the time being "comprised" in the security; and that it should be lawful for the mortgagee at all reasonable times to enter into the said messuage No. 10, The Grove, or any other messuage or premises in which the same might be, to view the state of the furniture and other articles for the time being "subject to the security," and to take inventories thereof, and if any in want of repair or dilapidation, or other matter whereby the security should be impaired in point of value, and to give notice thereof. It is further agreed that the mortgagor should, during the continuance of the security, keep all "the said furniture, chattels, and effects," expressed to be thereby assigned, or otherwise subject to the security, insured against loss or damage by fire in the joint names of the mortgagor and mortgagee, in the sum of 500*l.* at least. Then follows a proviso that in case of default it shall be lawful for the mortgagee to sell "all and singular the said furniture, chattels, and effects," thereby assigned or otherwise made subject to the security, by public auction or private contract, either together or in lots, &c.; an agreement that the mortgagee might call in the moneys at any time, but that the mortgagor should not be at liberty to pay it off until the expiration of fourteen years; and, lastly, an agreement that the mortgagee should stand possessed of the judgment for the better securing principal and interest and the costs of execution thereof. Several cases were cited to show the extensive meaning given to the word "effects," especially when coupled with the words "of whatsoever nature," in wills; but we think that no assistance can be derived from them in construing this security. There is no doubt the words in question are large enough to

embrace the stock-in-trade; but we are to collect the intention of the parties not from any particular expression, but from the language of the whole instrument, and to construe that language in the sense in which the parties appear to us to have used it. It is to be observed, in the first place, that in this deed, the wording of which is full, and even redundant, and which enumerates with even unnecessary minuteness the various descriptions of household property, the words "stock-in-trade" are nowhere found, and yet this is the term usually employed, and the one which first occurs to the mind when that description of property is intended to be conveyed. Nor are the words "messuage or premises" used in the seizure clause to denote the place in which the effects to be appropriated to the security are supposed to be, such as we should expect to find in such a document as descriptive of the manufactory, warehouse, or shop. If that clause had been intended, as the plaintiff alleges it was, to refer to both dwelling-house and the place of business, the two places being entirely distinct and separate, it would have been much more in harmony with the style of the deed to have used words expressive of the distinction. And the omission is more significant when we refer to the clause which entitles the plaintiff to a percentage of the profits of the business. In that clause "the warehouse" and "the counting-house" are expressly mentioned. Again, the plaintiff has secured to himself the power to enter the counting-house and warehouse on the premises in which the account-books are kept, in order to ascertain what the sales have been, and to enter the messuage and premises No. 10, The Grove, South Lambeth, or any of the messuages or premises in which the furniture may be kept, in order to view its condition, and yet there is no power to enter the shop or manufactory to see that the stock is kept up. The absence of this power, coupled with the want of aptness and amplitude of description, both of the property itself and the place where it was to be found, which the deed contains with reference to the other property and other places, and the provisions for keeping alive the judgment, lead us to the conclusion that the stock-in-trade was not intended to be comprised in the security, but that the plaintiff relied upon the judgment as his means of reaching that part of the debtor's estate in case it should become necessary to have recourse to it. We therefore give our judgment for the defendant.

Judgment for the defendant.

[IN THE QUEEN'S BENCH.]

June 14, 1866.

KNOWLES v. NUNNS.

14 L. T. 592.

Warranty—Measure of damages.

DAMAGES.—*Upon a sale of two oxen the plaintiff told the defendant that if there was the least fear of disease he would not have them, as he wanted to put them with his other stock, whereupon the defendant replied that they were quite sound and free from disease. The plaintiff thereupon purchased them, and placed them with his other cattle; in a few days the two oxen died of the rinderpest, which they had upon them at the time of sale, and which disease they communicated to the other cattle of the plaintiff, nine of which died therefrom. Upon an action upon the warranty:—Held, in accordance with the rule laid down in Hadley v. Baxendale, that the plaintiff was entitled to recover for the loss not only of the two oxen purchased, but for that of the nine other beasts.*

This was an action brought upon a warranty of the soundness of two oxen

sold by the defendant to the plaintiff. The cause was tried at the Leeds Assizes, when a verdict was returned for the plaintiff for 30*l.*, with leave to the plaintiff to move the court to increase the amount to 23*l.* 10*s.* 4*d.*

It appeared that upon the defendant and the plaintiff being desirous of effecting a sale of two oxen, the plaintiff said to the defendant that if there was the least fear of disease he would not have them, as he wanted to put them with his other stock, upon which the defendant said that "*they were quite sound and free from disease.*"

The plaintiff accordingly purchased the two oxen for 30*l.*, and placed them with his other cattle. It turned out, however, that at the time of the sale they were affected with the rinderpest, of which they shortly died, having communicated the disease to the other cattle of the plaintiff, nine of which also died of that disease. At the trial the defendant denied having given the warranty; the jury, however, gave effect to the plaintiff's evidence, and returned a verdict for him as before stated. The rule was moved upon the ground that the placing of the two oxen with the other cattle of the plaintiff was clearly within the contemplation of the parties at the time the warranty was given, and so the damages arising from the loss of the nine head of cattle were fairly within the rule upon the subject.

Kemplay showed cause, and contended that the damages claimed in respect of the nine beasts could not be recovered, and that the damages should be confined to the particular cattle warranted; that the damages claimed could not be said to have been in the reasonable contemplation of the defendant when he gave the warranty; that if this were so, there would be no limit whatever to the liability of a party; that if the defendant had warranted that the plaintiff's cattle should not take any disease from the cattle sold, it would have been otherwise. [MELLOR, J.—A farmer buying stock must be supposed to intend placing it with other stock.] Then, where is to be the limit? The purchaser should take precautions to keep the cattle separate for a time. It should have been left to the jury to say whether the plaintiff himself was not guilty of negligence. [BLACKBURN, J.—That point was not made at the trial. The issue was simply whether or not there was a warranty.] This case, if decided in the plaintiff's favour, would carry the doctrine further than it has ever been carried before. [MELLOR, J.—The real question is, whether this was within the contemplation of the parties. The plaintiff, it seems, expressly stated that he wanted to put them with his other stock; and by the finding of the jury it appears that they credited his evidence rather than that of the defendant.] No man could venture to warrant if he could become liable to such extreme consequences. He cited—

Randall v. Raper, 1 El. Bl. & Ell. 84. *Hadley v. Baxendale*, 9 Ex. 341; 354 (Alderson B.'s judgment).

Manisty, Q.C., and *Willes*, in support of the rule, were not called upon.

BLACKBURN, J.—This case comes within the rule laid down in *Hadley v. Baxendale*, that the damage was within the contemplation of the parties, and the rule for increasing the damages must, therefore, be made absolute.

Rule absolute.

[BAIL COURT.]

LUSH, J., June 8, 1866.

Ex parte BLEWITT, *Re* THE JUSTICES OF SHROPSHIRE.

14 L. T. 598.

Power of Justices to adjudicate—Lack of evidence—Certiorari.

CERTIORARI.—*The Court will not grant a certiorari to bring up a conviction by Justices in a matter over which they have jurisdiction, even though it be alleged that they convicted without any evidence whatever.*

Garth moved for a rule for a *certiorari* to bring up a conviction by the Justices of Shropshire for removing four cows from Cranmere to Mirfield, contrary to an order of Petty Sessions, made on November 11th, 1865, under the authority of an Order in Council in pursuance of 11 & 12 Vict. c. 105. The ground of the present application was, that Blewitt was convicted merely on the faith of a charge by a police constable, without any hearing of the complaint, plea of guilty, evidence given, or witness called. The defendant's affidavit stated that the case was called on; the police superintendent stated the charge; the defendant told the Justices that he had heard that his son had sent some cows, but whether he had done so or not, he (the defendant) could not say. The magistrates, without hearing any evidence, then fined the defendant 10*l.* and costs, and this conviction it was now sought to bring up with a view of its being quashed. There was an affidavit by the son that he was the person who sent the beasts, and that his father knew nothing about it; another son confirmed this by a separate affidavit, as did also a reporter and five other persons who were present during the proceedings. On the other hand, there was an affidavit by the superintendent of police, saying that he laid the information, and had two witnesses in attendance to prove the charge. The case was called on in the usual way, and the information was read over, when the applicant admitted the offence, and said he was willing to pay a small fine. The Justices retired to deliberate, and on their return they fined him 10*l.* and costs, but he said nothing about appeal till after he knew the amount of the penalty. The Justices and their clerk made affidavits, in which they swore to the same version of the facts, but these were met by additional affidavits by a person who had been convicted of a similar offence at the same sitting, but whose case came on before that of the applicant, in which that person said that all the circumstances to which the Justices and their officers swore, really took place with respect to him, and not to Blewitt, the applicant.

Matthews objected to the use of these further affidavits.

Garth thought they should be used. The case was at first intended to go before the Judge at chambers.

LUSH, J. thought they might be used, the Justices to have a right to reply if they thought fit.

Garth then read the affidavit which set out the above facts, and stated that the applicant said he was not guilty. There were also similar affidavits from six or seven different persons.

LUSH, J. suggested that the Justices should have time allowed them to answer, when

Matthews said he thought the case might be got rid of at once. Even if the magistrates had convicted without evidence, the rule must be discharged,

as the remedy by *certiorari* was taken away, except where justices had acted altogether without jurisdiction—

Ex parte Hopwood, 15 Q.B. 121.

Garth contested this. It would be a monstrous thing, and contrary to all natural justice, if magistrates should have the power to convict without evidence. A *certiorari* had been allowed to issue in some cases notwithstanding the statute, as where a conviction had been obtained by fraud—

Paley on Convictions, 5th edit. 410. *Reg. v. Gillyard*, 12 Q.B. 527. *Tarry v. Newman*, 15 M. & W. 653. *Reg. v. Alleyne*, 4 E. & B. 186; 1 Jur. N.S. 869.

LUSH, J. thought these cases did not apply. The Justices had jurisdiction to enter upon the inquiry, and therefore the case was not one for *certiorari*. The proper course was by appeal. The rule, therefore, must be refused.

Matthews asked for costs, but

LUSH, J., acting on the ordinary rule that no costs were given when cause was shown in the first instance, declined to grant them.

Rule refused, without costs.

[BAIL COURT.]

June 8, 1866.

REG. v. POLLARD AND OTHERS (JUSTICES OF THE WEST RIDING OF YORKSHIRE).

14 L. T. 599.

Obstructing works of local board of health—Claim of private right—Duty of Justices to state a case.

MAGISTERIAL LAW.—*If a defendant be charged with obstructing the works of a local board of health, he is not necessarily entitled to have the case dismissed by the magistrates because the obstruction took place in assertion of a private right. Nor are Justices, under such circumstances, warranted in refusing as frivolous an application to state a case.*

Field, Q.C. and *Kemplay* showed cause against a rule obtained by the Cleckheaton Local Board of Health, calling on the defendant and others, Justices of the West Riding, to state a case under 20 & 21 Vict. c. 43. The defendants had refused an application made to them at the time as being frivolous. The board of health were carrying on some drainage works under the Public Health Act (11 & 12 Vict. c. 63), s. 45. One Nutter, a member of the Cleckheaton Co-operative Society, was summoned under section 148 of the same Act, for obstructing the works. All he did was, to fill up as fast as it was dug the trench which the complainants' workmen were digging on the premises of the society. This was manifestly not a "wilful obstruction" within the Act; and the magistrates had done rightly in dismissing the complaint and refusing the application for a case.

Maule and *Alfred Wills*, in support of the rule.—The offence was clearly proved, and no witnesses were called on behalf of the defendant Nutter. The magistrates mentioned several legal objections, and referred to 11 & 12 Vict. c. 63, s. 143, and ultimately dismissed the case. They then certified under 20 & 21 Vict. c. 43, s. 4, that the application to state a case was frivolous.

The affidavits were read, from which it appeared that the Justices thought the Act did not apply.

Kemplay, in reply, urged that the affidavits were insufficient, as they did not show that section 45 had been complied with. Also that the decision was manifestly on the facts and not on the law.

Lush, J. said :—The contrary appears. The Justices clearly had decided a matter of law, for they had based their opinion on the construction of the cited sections of the Act. The rule must be made absolute.

Rule absolute.

[BAIL COURT.]

June 8, 1866.

REG. v. BOYCOTT.

14 L. T. 599.

Construction of 5 & 6 Will. 4, c. 76, sects. 9 and 28—“ Occupy ” and “ inhabit.”

ELECTION LAW.—*To qualify under the above sections, it is sufficient if a municipal officer has bonâ fide a place of “ residence ” within the borough, even though, from fortuitous circumstances, he does not sleep there.*

Huddleston, Q.C. and Crompton Hutton showed cause against a rule obtained by *Griffiths* calling on the defendant to show by what authority he claims to exercise the office of alderman of Kidderminster. The rule had been obtained on several grounds, all but one of which had been answered by the defendant's affidavits. The other was a matter of legal construction, upon which depended the question whether the defendant was entitled to be on the burgess-list as one who was, on the 31st August, 1865, and for the whole of the two preceding years, an “ inhabitant householder ” within the meaning of the Act. By 5 & 6 Will. 4, c. 76, s. 28, an alderman must be entitled to be on the burgess-list. By section 9 of the same Act every one entitled to be on that list must be a person of full age, and must possess certain specified qualifications. He is not so entitled unless he has occupied a house, warehouse, counting-house, or shop within the borough, and has also been an inhabitant householder within the borough, or within seven miles thereof, on the last day of August in the year, and the whole of the two preceding years. There are also provisions as to payment of rates, about which no question arises. The defendant is a solicitor in Kidderminster, who has held office as alderman and as mayor under the qualifications now objected to. He is on the burgess-list, and is duly enrolled. He was objected to in 1862 by one *George Hathaway*, but the revising barrister decided in his favour. His premises consisted of a house, on the ground floor of which was his office, and above that were sitting and bed rooms in which he and all his family had till recently resided. Down to the present time his son and his friends had frequently, and his servants had constantly, slept in the house, and he had always had a bed there for himself, though, as it happened, it had never been occupied for the last three years. The only reason for this was that the defendant's wife's health forbade her residing in the town, and the defendant had taken apartments for her at Cheltenham and Malvern, and latterly Angborough and Frant, which last-named places are within two miles of the borough boundary, to and from which the defendant goes daily to his place of business in Worcester Street, Kidderminster. This is a perfectly good qualification. As to “ occupation ” there is no dispute, but it is good also as to “ residence.” The affidavits show that the defendant keeps his bed, his servants, his wines, and his library in the house; that he takes his meals there,

and uses it in all respects as his place of dwelling except that, for a temporary reason, he does not sleep there at nights. He is a householder by reason of the house he holds, and he is also an inhabitant living within the required distance. The policy of the Act seems to be to require the mayor and aldermen to be persons of some substance, and to live so near to the spot as to be within call when wanted. The defendant fulfils both these conditions. *Re Creek* (3 B. & S. 459) is the only thing in point, but Chitty's Statutes, 2nd vol. 964, says the occupier of a house, shop, &c., is not entitled to be on the burgess-roll, unless he also holds a house. But this defendant has the house in Worcester Street, Kidderminster.

LUSH, J.—And says that is his only fixed residence.

Crompton Hutton.—The only way the plaintiff can put his case is, that a man cannot be the occupier of the same tenement in respect of which he claims to be householder. The defendant is a householder in respect of the tenement in Worcester Street; and if he does not inhabit there he inhabits within seven miles, therefore *quâcunque viâ datâ*, the objection fails. But his lodgings are taken from week to week, and his holding them may cease at any moment. They are not his domicile. The plaintiff must go this length, that if a man, from delicate health or any cause, does not sleep in his usual place of abode, he loses his qualification.

Huddleston, Q.C.—And that would disqualify the whole corporation of London.

Griffiths, in support of the rule.—The question is narrowed to this: Does the defendant occupy a house, &c.? and is he, in addition, an inhabitant householder in the borough? The Act requires both. It is very singular, but the Act does not say occupy or inhabit any house, but "occupy any house," &c., "and during the same time shall also have been an inhabitant householder within the borough, or within seven miles thereof." There is a broad distinction between the two. Take the case of a lodging-house keeper, who has his furniture and servants in a house in town, but himself lodges away. He is occupier of the house, but not inhabitant.

LUSH, J.—I am inclined to be with you, that habitation must be *qua* householder, and not *qua* lodger. But is it not enough to hold a house and inhabit it constructively? The registration cases seem to show that it is.

Griffiths.—The words of the statutes differ. Suppose a barrister takes chambers, and puts a bed there; that would not give him a right to say he inhabits.

LUSH, J.—Your argument involves the proposition that a man must actually sleep in the house he inhabits. Suppose he sleeps there only one night in the two years.

Griffiths.—That will not do.

LUSH, J.—Then how many will?

Griffiths.—It is for the jury. The whole question is whether inhabiting is colourable or real.

LUSH, J.—The rule must be discharged. The defendant is occupier of an entire house, and is therefore within section 9 if he also inhabits the house. I agree with Mr. Griffiths that he must inhabit a house within the borough, or within seven miles; and looking at the facts, I am of opinion that Mr. Boycott does so inhabit this house in Worcester Street, Kidderminster. He has no other fixed residence; he takes his meals there, has his furniture, wines, and library there; his son, his friends, and his servants sleep there, and he only does not sleep there himself because of the state of his wife's health. It is impossible to say that a man must always sleep in the house he inhabits, and the rule must therefore be discharged with costs.

Rule discharged, with costs.

[BAIL COURT.]

June 8, 1866.

REG. v. HEYWORTH AND OTHERS (JUSTICES OF THE WEST DERBY HUNDRED).

14 L. T. 600.

Unlicensed slaughterhouse—Conviction for using.

LOCAL GOVERNMENT.—A conviction for “using” an unlicensed slaughterhouse under 10 & 11 Vict. c. 34, s. 126, cannot be sustained against a person who merely pays the owner of the premises for being allowed to kill animals there.

Brown, Q.C. showed cause against a rule obtained by *Charles Russell*, calling on the defendants to state a case under 20 & 21 Vict. c. 43. *Richard Harold* was charged with unlawfully “using” as a slaughterhouse a certain place which had not been licensed as required by 10 & 11 Vict. c. 34, s. 126. Section 125 gives power to the Public Health Commissioners to register existing slaughterhouses; section 126 imposes a penalty of 5*l.* for using or suffering to be used an unlicensed place, and 5*l.* for every subsequent day during which it shall be so used. *Harold*, a workman employed by *Bennett*, a butcher, drove some cattle to an unlicensed slaughterhouse belonging to the New Cattle Market Company, to whom he paid 2*s.* per head for the use of the place and the necessary tackle. There were other persons on the premises, and *Harold* had access only to part of the building. It was objected that *Harold* was not the occupant of the slaughterhouse, and also that the information should have been laid against the slaughterhouse company. But this had already been done, and the company had been convicted in a penalty of 50*l.* and costs. They applied for a case, which was granted, but which has not yet been argued. The Justices had refused as frivolous an application by *Harold* for a case. His point was that no one but the tenant or occupier of the slaughterhouse could be convicted under 10 & 11 Vict. c. 34, s. 126, reading the words “used and occupied” as in an action for use and occupation. But this would make the entire evasion of the statute perfectly easy. The company occupy but do not use, and the butcher uses the place to slaughter his sheep but does not occupy it, so that neither of them can be convicted, and the Act becomes a nullity. The statute means that any one is liable to a penalty who “uses” the place for slaughtering purposes, but the other side say that no one can be convicted unless he holds the place as a tenant.

LUSH, J.—The licence in these cases is given to the place, as was held in *Reg. v. Strugnell* (13 L. T. R. N.S. 433), which was held in respect of a licence for dramatic entertainments. The owner “uses” the place by letting it out. The licence is not to the person, but to the place, and the penalty is not imposed on every person who shall slaughter cattle in an unlicensed place, but on every person who “uses” a place without a licence. Section 127, as well as the two preceding sections, show that the licence is given to the place only. The rule must be made absolute.

Aspinall, Q.C. and *Chas. Russell*, in support of the rule, were not called on.

Rule absolute to state a case.

[COURT OF ADMIRALTY.]

DR. LUSHINGTON, Aug. 5, 1866.

THE THOMAS POWELL v. THE CUBA.

14 L. T. 603.

Collision—Inevitable accident.

SHIPPING.—*In order to constitute an inevitable accident it is necessary that the accident should not have been capable of being prevented by ordinary skill and diligence—not extraordinary skill or extraordinary diligence—by that degree of diligence and skill which is generally to be found in persons who properly discharge their duty.*

Milward, Q.C. and E. C. Clarkson for the *Thomas Powell*, and Brett, Q.C. and Vernon Lushington for the *Cuba*.

Dr. LUSHINGTON gave judgment in this case, which was an action brought by the screw steamship *Thomas Powell*, 401 tons, against the Cunard company's steamship *Cuba*, 1,534 tons, to obtain compensation for the loss arising from the two ships coming into collision in the river Mersey about half-past seven p.m. of the 19th February last. The *Thomas Powell* stated the wind as N.N.W., and the weather as blowing a gale, and clear but dark. The *Cuba* represented the wind as N., and the weather a gale. The case for the *Thomas Powell* was, that on the 17th February she had arrived at Liverpool with a cargo of coal, and proceeded into the Huskisson Dock to discharge such cargo into a steamship called the *City of Baltimore*, which was then in that dock; that in the afternoon of the same day the *City of Baltimore* left the Huskisson Dock and proceeded into the river Mersey, and there brought up, and that the *Thomas Powell*, which had discharged a part only of her cargo, followed the *City of Baltimore*, and made fast alongside her and continued to discharge her cargo into the *City of Baltimore* until the afternoon of the following day, 18th February, when, in consequence of the weather, she was compelled to cast off and steam away; that at the time and on the day in question the *Thomas Powell* was lying at anchor in the river Mersey in a proper berth between Seacombe and Egremont; that the tide was ebb, and of the force of about six knots an hour, and that the *Thomas Powell* had a bright globular light on her foremast, and another on her mizen-boom, both of which were burning brightly, and a proper watch was being kept on board her; that in this state of things the *Cuba*, which had come in from sea, and had passed up the Mersey above the *Thomas Powell*, owing to the negligence or want of skill of her owners or those on board her, came into collision, and with her stem carried away the bowsprit of the *Thomas Powell*, and then fell alongside her on her port side, and did her a great deal of damage, and remained in contact with her until about eight p.m., when she went clear. It was then alleged that the helm of the *Thomas Powell* was ported before the collision, in order, if possible, to avoid it; that the collision was wholly the default of the defendants or their servants, and that it was not in any way occasioned by the *Thomas Powell* or those on board her. The defence for the *Cuba* was, that on the day in question she was on her homeward voyage from New York with mails and passengers; was off the port of Liverpool, but that, in consequence of the heavy weather, no pilot was able to board her until off Waterloo, in the Crosby Channel, when Thomas Lewis, a duly licensed pilot, succeeded in boarding her, and assumed the command; that about seven o'clock the *Cuba* was brought to an anchor with her best bower and seventy-five fathoms of chain, in about mid-river, off Seacombe, as it was not practicable for the vessel to proceed to her usual anchorage higher up the river; that the sea was so heavy that the tender could not come alongside to take the mails; that the tide was

about two hours ebb, and running at the rate of five knots an hour; that the berth so taken up by the *Cuba* was a perfectly clear berth, and in particular was well clear of the steamer *Thomas Powell*, which had been observed whilst coming to anchorage, and which lay a considerable distance to the North-west of the *Cuba*; that the *Cuba* carried the Admiralty regulation lights duly exhibited and brightly burning, and also a white light on the signal staff, her steam was kept up, a good look-out was being maintained, and the pilot continued on deck and in charge; that in consequence of the heavy gale blowing against the tide, the *Cuba* would not ride quietly to her anchor, and in about half-an-hour from the time of anchoring broke her shear, and drove to the east side of the river dragging her anchor, and approached the Waterloo Pier; that in doing so the *Thomas Powell* was observed following the *Cuba* across the river, and about 7.30, having no steam up, she drove into the *Cuba* with her stem, striking the *Cuba's* stern; that by this collision, and in clearing, the *Thomas Powell* suffered some damage; that the *Cuba* sustained little or no damage by the collision, and afterwards steered across the river and dropped a second anchor, and the next morning proceeded to her proper anchorage. It was then alleged that the collision was not caused by any negligence of those on board the *Cuba*, but was an inevitable accident; that if the collision was in any degree caused by those on board the *Cuba*, it was occasioned by the pilot, who was employed by compulsion of law, and that the collision was caused by the negligence of those on board the *Thomas Powell*. On these pleas the first thing to be considered was the averment made on behalf of the *Cuba*, that the collision was an inevitable accident. To constitute an inevitable accident it was necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence. We were not to expect extraordinary skill or extraordinary diligence, but that degree of skill and and that degree of diligence which is generally to be found in persons who discharge their duty. The evidence agreed with the preliminary act, that it was a very tempestuous night, and that the wind was blowing with considerable severity. Looking at all the circumstances, and considering where the vessels were anchored, the questions to be decided were, whether the collision was or was not the result of an inevitable accident, or whether any fault was imputable to the pilot of the *Cuba*, or whether, in the fair discharge of his duty, there was either a want of skill or gross negligence to which the blame of the collision could fairly be attributed? It had been said that the collision might have been avoided if the *Thomas Powell* had had steam power. As a fact there could be no doubt whatever that she had not steam power in a proper and usable condition; but whether that was neglect (looking at the circumstances of the case, and considering she was anchored and the state of the night), and an absence of reasonable precaution, are open questions. If the evidence of the pilot of the *Cuba* is to be believed, it was the *Thomas Powell* that came down upon the *Cuba*, and not the *Cuba* upon the *Thomas Powell*; but, on the other hand, it was but fair to observe there was the evidence of the mate of the *Thomas Powell*, who deposes just as strongly that the *Thomas Powell* never did break her shear, and that the collision was occasioned by the *Cuba* breaking her shear and coming down upon her. Under all the circumstances of the case, and on full consideration of the evidence on both sides, the court was of opinion that the *Cuba* was to blame for the collision, and that the blame was imputable to the pilot of the *Cuba*.

The Court was assisted by Captain Were and Captain Weller.

LORD ROMILLY, M.R., June 23, 1866.

Re 27 & 28 Vict. c. 112, "An Act to amend the Law relating to Future Judgments, Statutes, and Recognisances."

Re WILLIAM KIRBY. Ex parte THE OFFICIAL LIQUIDATOR OF THE LEEDS BANKING COMPANY.

14 L. T. 615.

Contributory—Order for payment of calls—Elegit—Lands delivered in execution—Petition for sale, and payment of calls out of proceeds—27 & 28 Vict. c. 112.

EXECUTION.—*In this matter a contributory was indebted to the company for calls, and an order was made for the payment of them. A writ of elegit was afterwards duly sued out under the provisions of the 27 & 28 Vict. c. 112, and lands belonging to the contributory were delivered in execution to the official liquidator of the company. The official liquidator then presented a petition praying an order for the sale of the lands, and payment out of the proceeds of such sale of the calls due from the contributory, and for other relief:—Held, that there must be an inquiry what interest the contributory had in the lands when they were delivered in execution to the official liquidator of the company and what other parties (if any) were interested in the lands; further consideration of the petition being reserved.*

In this matter a petition was presented by the official liquidator of the above-named company praying for an order that the interest of a Mr. William Kirby of and in certain lands and hereditaments situate in the parishes of Tadcaster and Spensall, in the county of York, which had been delivered in execution to the petitioner (as hereinafter mentioned), might be sold; and that the money arising from such sale might be applied in paying to the petitioner what was due to him, under an order of this court, dated the 11th January, 1866; or if there were any other charges on the interest of the said William Kirby in the said lands and hereditaments, that the proceeds of the said sale might be applied in payment of what was due to the parties entitled to charges on such interest according to their respective priorities; and that, for effectuating the purposes aforesaid, all proper and necessary accounts might be taken, directions given, and inquiries made.

The facts of the case, as they appeared from the petition, were shortly these:—

The Leeds Banking Company was a joint-stock company formed for the purpose of carrying on the business of banking, under the provisions of the Act passed in the 7 Geo. 4, c. 46. William Kirby was in the year 1864 the holder of twenty shares in the company, and in the month of June, 1864, he took twelve further shares in the company. At the time when the order of the 13th of October, 1864 (hereinafter mentioned), was made, William Kirby was the holder of the said twenty shares, which were standing in his name in the books of the said company, and was entitled to the said twelve further shares.

By an order of this court, dated the 13th October, 1864, made in the matter of the Companies' Act, 1862, and in the matter of the Leeds Banking Company it was ordered that the said Leeds Banking Company be wound-up under the provisions of the Companies' Act, 1862.

By an order of this court, dated the 31st October, also made in the matter of the Companies' Act, 1862, and in the matter of the Leeds Banking Company, William Turquand was duly appointed official liquidator of the said banking company.

In the month of February, 1865, William Kirby was settled on the list of contributories of the said company in respect of the said twenty original shares held by him as aforesaid.

By an order of this court, also made in the matter of the last-mentioned Act, and in the matter of the Leeds Banking Company, and dated the 25th February, 1865, after referring to the chief clerk's certificate, by which William Kirby was, with other persons, settled on the list of contributories as hereinbefore mentioned, it was ordered that a call of 70*l.* per share be made on all the contributories of the company whose names were included in the chief clerk's certificate, including the name of William Kirby; and it was ordered that each such contributory should, on or before the 11th March, 1865, pay into the branch bank of the Bank of England at Leeds, to "the account of the official liquidator of the Leeds Banking Company," the amount which would be due from him or her in respect of such call.

By an order of this court, also made in the matter of the last-mentioned Act and in the matter of the Leeds Banking Company, and dated the 29th July, 1865, it was ordered that a further call of 40*l.* per share should be made on all the contributories of the company referred to in the said certificate, including William Kirby; and it was ordered that each such contributory should, on or before the 1st September, 1865, pay into the branch bank of the Bank of England at Leeds, to "the account of the official liquidator of the Leeds Banking Company," the amount which would be due from him or her in respect of such call.

By an order of this court, also made in the matter of the last-mentioned Act and in the matter of the Leeds Banking Company, and dated the 11th January, 1866, it was ordered that William Kirby should, on or before the 15th January, 1866, or within four days after the service of the said order, pay to the official liquidator of the company the sum of 2,120*l.*; such sum being the amount due from William Kirby in respect of the said calls of 70*l.* per share and 40*l.* per share, made by the said orders dated the 15th June, 1865, and 29th July, 1865. The said order of the 11th January, 1866, was duly served on William Kirby, but he did not pay the said sum of 2,120*l.*, or any part thereof.

At the time when the said order of the 16th January, 1866, was made, William Kirby was absolutely entitled to the fee-simple and inheritance of certain messuages and lands called Ouston Farm, in the parish of Tadcaster, in remainder expectant upon the death of Willis Kirby Goodbarne and failure of his issue male; and William Kirby was also entitled in possession to the fee-simple and inheritance of a close of land in the parish of Spensall. On the 3rd March, 1866, the petitioner, being desirous of enforcing payment of the last-mentioned sum, sued out a writ of *elegit* directed to the sheriff of Yorkshire, to enforce payment of the sum of 2,120*l.* which the order of the 11th January, 1866, directed to be paid. In pursuance of the said writ, the sheriff of the county of York duly caused an inquisition to be made as to the goods and chattels, lands, tenements, and hereditaments in the county of York, of which William Kirby was seised or possessed on the 11th January, 1866, or at any time after that day. By the said inquisition it was found that William Kirby was seised of and entitled to the before-mentioned lands and hereditaments for the said estate and in the manner hereinbefore mentioned; that the said farm in the parish of Tadcaster was of the value of 370*l.* a-year; and the said close in the parish of Spensall was of the value of 5*l.* a-year. The said sheriff caused the said lands and hereditaments to be delivered in execution to the petitioner as such official liquidator as aforesaid, subject as to the lands and hereditaments in the parish of Tadcaster to the estate therein of the said Willis Kirby Goodbarne and his issue male. The return of the sheriff to the said writ was duly made and filed in this court. No part of the said sum of 2,120*l.* was ever paid or satisfied, and the last-mentioned sum and interest thereon from the 11th January, 1866, was due to the petitioner as such official liquidator as aforesaid.

The said order of the 11th January, 1866, was duly registered in the Court of Common Pleas at Westminster, and at Wakefield in the county of

York. The said writ of *elegit* was also registered at Wakefield aforesaid; and on the 18th May, 1866, it was duly registered in the Court of Common Pleas in manner required by the above-mentioned Act, 27 & 28 Vict. c. 112. William Kirby was entitled to the said farm and hereditaments in the parish of Tadcaster, and also, as far as the petitioner could ascertain, to the said close of land in the parish of Spensall, under and by virtue of the will of Robert Kirby, deceased. The said Robert Kirby was, at the time of his death, the holder of twenty shares in the said Leeds Banking Company, which, at the time when the said order of the 13th October, 1864, was made, still remained part of his estate. William Kirby was the executor of the said Robert Kirby, and had been settled on the list of contributories of the said banking company as representative of the said Robert Kirby in respect of the said twenty shares held by the said Robert Kirby, and calls had been made on William Kirby as executor of the said Robert Kirby in respect of the last-mentioned shares. Those calls had not been paid; and under those circumstances the estate of the said Robert Kirby was indebted to the petitioner, as such official liquidator as aforesaid, in the sum of 2,120*l.* in respect of the said calls, and was liable to the petitioner as such official liquidator for further sums in respect of the said twenty shares. The petition then stated that the petitioner had lately filed a bill to administer the real and personal estate of the said Robert Kirby, and to obtain payment thereof of what was due by his estate to the petitioner as such official liquidator as aforesaid, and the estate and interest of William Kirby of and in the lands and hereditaments to which he was entitled under the will of the said Robert Kirby, was subject to the claims of the petitioner in the said suit. The petition then prayed to the effect already stated.

Cotton appeared for the petitioner.

T. A. Roberts for Mr. Kirby.

LORD ROMILLY.—I am of opinion that in this case there must be an inquiry as to what interest the debtor, William Kirby, had in the lands taken in execution at the time of the levy; and what other parties (if any) were and are interested therein. I must reserve the further consideration of this petition.

WOOD, V.C., March 20, 21, 1866.

STEELE v. STUART.

14 L. T. 620; L. R. 2 Eq. 84.

Contract—Proceeds of bills to be appropriated against consignment of goods—Bankruptcy—Notice—Common partner—Advance by third party.

BANKRUPTCY.—A merchant in England proposed that his consignees, merchants in Sydney, should make advances against bills to be drawn by him for the amount of goods shipped to their care, and that the proceeds of the sales above the advances should be placed in liquidation of an old claim which they had against him.

This was assented to, and by letter they stated that "they should retire the acceptances to bills from the proceeds of the sales."

Afterwards the consignees, being in want of money, directed that a firm of bankers (in whose partnership they had a common partner) should receive

in satisfaction of advances made by them to the consignees, the proceeds of the sales of the goods so sent to the consignees by the merchant.

The consignees became bankrupts:—Held, that the bankers had, by the action of the common partner, notice of the arrangement as to the proceeds of the sales of the goods consigned, and that remittances in the hands of the bankers were to be appropriated first to the payment of the merchant's acceptances, and subject thereto to the discharge of the old claim of the consignees.

This was a bill filed by Ed. Steele, a merchant at Liverpool, against the defendants Towns and Stuart, merchants at Sydney, carrying on business under the style of Towns and Co.; and it prayed for a declaration that the proceeds of the sales of certain parcels of soap were effectually appropriated in equity to meet the bills against which advances had been drawn by the consignor (Steele); and that James and Joseph Gordon Stuart were respectively, or at all events that James Stuart was, liable to make good to the plaintiff all moneys received by him or his late firm of Stuart Brothers, in respect or on account of the proceeds of the sales, with interest; for an account against R. Towns and Co. and Stuart Brothers; and that defendants might be decreed to make good the amount to be found due, and that such amount might be secured and applied, under the direction of the court, in the first place in satisfaction of the bills, and that the surplus might be paid to plaintiff. The bill also prayed for a receiver if necessary.

The course of business seems to have been the following: The plaintiff in shipping goods to R. Towns and Co. used to send them the bill of lading and the invoice, with instructions to remit the proceeds to Messrs. T. M. Staig and J. G. Stuart, the agents of Messrs. Towns and Co., at Kirkaldy. The plaintiff used to advise Staig and Stuart of the shipments, and used to give them one or two bills of lading of the set. They were usually forwarded by Staig and Stuart to Towns and Co. The plaintiff or Staig and Stuart, as the case might be, used then to draw against the shipments. These drafts, when accepted, were discounted by Staig and Stuart, and the proceeds were remitted by them to the plaintiff by way of advance against the shipments.

J. G. Stuart was in partnership with his brother James Stuart as bankers, in London, under the firm of Stuart Brothers, and they were the agents and London correspondents of Staig and Stuart.

The contract upon which the question turned was embodied in two letters—one sent by the plaintiff to Stuart Brothers, dated the 19th June, 1860, and the answer of the following day; these were as follows:

We (that is the plaintiff) beg to ask you whether you have yet account sales of the small lot of soap consigned by us to Messrs. R. Towns and Co., per *Telegraph*, about twelve months ago. We applied to you on this point in May last, but you could not then say, your book-keeper being at the time absent. Our letter was dated the 22nd May, to which we beg to refer you; also in respect to an inquiry respecting a concession promised us by Towns and Co. when here two years ago. We have some intention of resuming shipments to Sydney, seeing that our manufacture meets a ready sale at good prices at Melbourne, Adelaide, &c., and that we have occasionally considerable orders for Sydney from London houses, for which good prices are paid us. We have understood that Towns and Co. are more agents for shipping than the sale of goods; but we presume they would manage our business as well as any other house at Sydney, notwithstanding our proposition would be to ship to them from time to time crown and second brown soap, the advance required on which would be 22*l.* and 16*l.* per ton, as paid by us to Messrs. Dalgetty and Co., Mr. Elder, and others; and that "the proceeds above the advances should, till acquitted, go to the liquidation of the old claim."

The answer was as follows:

20th June, 1860.—The cheapest way of making the advance is for you to take our three or four months acceptance for it, which we shall pay, advancing the money for you at ordinary interest, and 1 per cent. commission; or, if you prefer it, we will give you cash on receiving bills of lading, and take your six months' acceptance for the same, with interest at 5 per cent., and commission at 1 per cent., and we shall retire that acceptance from proceeds of the sales.

The other facts of the case are stated in the judgment.

W. M. James, Q.C., and *Druce*, in support of the plaintiff's bill, cited—

Jacaud v. French, 12 East, 317. *Porthouse v. Pocher*, 1 Camp. 83. *Powles v. Page*, 3 C. B. 30.

Rolt, Q.C., and *Freeling*, for the defendant James Stuart, contended that the plaintiff had no charge upon the remittances; that, if he ever had, it had been extinguished by the dealings between him and Staig and Stuart, and that they had been held out as sole owners of the proceeds of the shipments, and that the disposition of those proceeds could not now be questioned by him. They cited—

Jombart v. Woollett, 2 Myl. & Cr. 389.

Bagshawe for Towns and Co.

The VICE-CHANCELLOR said:—The contract in itself is very simple. It is properly set out in the bill as contained in the two letters of the 19th and 20th June, 1860. There is one exception, however—that that portion of the agreement is not mentioned which, now that the whole evidence is before the court, appears clear, viz., that after the appropriation of the returns made from Australia to the particular advances which should be made in respect of the shipments, any balance that might remain was to be applied towards liquidation of the old debt due from the plaintiff to Staig and Stuart. [The Vice Chancellor here read the two letters set out as the terms of the contract.] Now there are two propositions: the agreement is, "that the proceeds above the balance should, till acquittal, go to the liquidation of the old claim." But that involves the proposition that the proceeds are first to be applied to the advances until they are satisfied. If it is said that the proceeds of the sale above advances shall be applied to a specific purpose, it is a necessary implication that they shall be first applied to the advances, then to the specific purpose. This does not appear to me to be an alternative proposition, as it has been argued; but was merely as to the mode in which the advances should be made. The plaintiff says, "I undertake to pledge all proceeds to make good all advances, and more than that, to pay you the surplus towards payment of the old debt." The answer is, "We adopt that." But there are two ways of carrying that into effect: the one, of making advances for you to draw on us, for you to accept, and we to negotiate; the other, that we shall draw on you, and you shall accept; and they add, "If you take that course, we shall pay the acceptance out of the proceeds;" and they further say, "We shall have a claim on you if you draw on us, and we shall apply the proceeds to liquidate the advances we made to you." It would have been the same had it proposed to be a cash transaction. Then the question arises as to the notice. It is not disputed that, there having been remittances by the house in Australia to the firm of Staig and Stuart, if Staig and Stuart had been disposed to deal in a way not honest and not consistent with the duty which they had undertaken of applying these remittances in repayment of their advances, they might have made a good title to a purchaser without notice. If the statement in the defendant Stuart's answer, which avers "that there was no notice to Stuart Brothers,"

was true, the remedy against them would have been gone. On the other hand, the averment being proved of notice made by the bill, the whole question is at an end. I conceive that averment distinctly proved. Stuart Brothers must be held to have had notice because one member of their firm and of the firm of Staig and Stuart was the same person, and the notice cannot be separated. By the two letters, Stuart Brothers were bound, and the whole argument has been, what was the effect of these two letters? If a man places goods in the hands of an agent and says, "Sell them for the best amount you can, because I want to raise money upon them, and remit me the proceeds;" if the agent fails, everybody who has bought from the agent has a good title to the goods so sold to him. Although aware that he is a mere agent, it must be assumed that he had full authority. On the other hand, if you know that he is a mortgagee, and has only a qualified interest, and is under an obligation to appropriate the proceeds in a particular way, you may take the pledge from him, on the terms of applying it as he was bound to appropriate it, and if there is any surplus you will get it. Had there been a surplus of these proceeds after paying the advances, and had there been an old debt of Staig and Stuart existing, they would have had the benefit of claiming to that extent out of the surplus, after the taking up of their bills. The plaintiff says, "The proceeds are pledged for your advances; you take them for a specific purpose, and for that purpose you have a right to apply them. You can transfer that pledge to any one you like—honestly if you tell them the nature of the pledge; dishonestly if you do not inform them of the obligation imposed. But if you make a transfer to a person who in this court must be taken to have full knowledge of your position, he must take up the bills just in the same way as you would have had to have taken them up." As to Towns and Co., they do not appear to me to have been necessary parties. Under the circumstances, however, detailed in their answer I cannot give them costs, but shall not order them to pay any.

Declare that the returns made by Towns and Co. in respect of the plaintiff's shipments of the 19th and 20th June, 1860, were appropriated by the letters to the payment of all advances made to the plaintiff by Staig and Stuart, and to the taking up of all bills drawn or accepted by plaintiff in respect of such advances, and subject thereto to make good the balance, if any, now due to Staig and Stuart in respect of the dealings between them and the plaintiff prior to the 19th June, 1860. Direct the necessary accounts on the footing of this declaration. Liberty to apply.

STUART, V.C., June 20, 1866.

DAWSON v. MEDHURST.

14 L. T. 622.

Stamp—Mortgage-deed containing other matter.

STAMPS.—*A mortgage-deed, which was expressed to be made in consideration of the advance, and also for the purpose of resettling the property, and reserved the equity of redemption to the mortgagor and his wife, or the survivor, was:—Held, not to require an extra stamp for a settlement in addition to the ad valorem stamp on the mortgage.*

This was a suit for a specific performance by the purchaser of a reversionary share in a sum of consols sold by mortgagees under a power of sale in their mortgage.

The mortgage recited a certain indenture of mortgage and settlement, dated 25th July, 1855. The share was put up for sale by auction on the 12th May, 1865, and was purchased by the plaintiff. One of the conditions of sale was, that if the purchaser should fail to comply with them the deposit-money should be forfeited.

The defendant's solicitor delivered an abstract of title to the plaintiff, on which the plaintiff's solicitor made the following requisition:

The indenture of the 25th July, 1855, being a mortgage, and also a settlement, is clearly liable to both an *ad valorem* duty on the amount secured, and also a deed stamp of 1*l.* 15*s.* This further stamp duty must be paid and the deed properly stamped before the purchase is completed.

To this requisition the solicitor of the defendant made the following reply:

If this be so, the proper stamps will be affixed, and no delay need take place on this account. The authorities will determine the point.

The deed of 25th July, 1855, which was alleged to be both a mortgage and a settlement, was a deed by which G. Boorn (who was entitled to a share of property under a will), in consideration of 60*l.* 10*s.*, and "for resettling the property thereafter referred to," assigned his share to the mortgagee, reserving the equity of redemption to "G. Boorn and Elizabeth his wife, or their assigns, or to the survivors of them, or the executors, administrators, or assigns of such survivor, as by the same parties might be required."

Some correspondence then ensued between the solicitors of the parties, which resulted in a positive refusal by the defendant to have any further stamp impressed on the deed. On the 4th August, 1865, the solicitor of the defendant sent the following letter to the solicitor for the plaintiff:

Mr. Minter begs to inform Mr. Hart that no further stamp will be impressed on the deed of the 25th July, 1855. Mr. Minter appoints Monday morning, the 7th instant, at eleven o'clock, for completion at his office. Unless the purchase is completed at that time deposit money will be declared forfeited, and the property forthwith offered for sale. Mr. Minter has given Mr. Dawson notice.

The plaintiff then filed his bill on the 15th August praying for specific performance, and for an injunction to restrain the defendant from reselling the property. The only point was as to whether the deed of the 25th July, 1855, had been properly stamped.

Rolt, Q.C., and W. P. Jolliffe, for the plaintiff, contended that, under the circumstances, the only course for the plaintiff to take was to file a bill. They referred to the schedules to the Stamp Acts:

55 Geo. 3, s. 184. 13 & 14 Vict. c. 97, s. 2, under the titles Mortgages and Settlements. Coventry on Stamps, 475.

Willcock, Q.C., and Hallett, for the defendant.

The VICE-CHANCELLOR said it was only the common case of parties acting on an opinion taken on a disputed point. The case did not depend upon the *bona fides* of the parties; if the party acting on an opinion afterwards found it turned out to be wrong, he must, of course, pay the costs. The defendant had shewn a good title on the 3rd June, and the only question in dispute was as to whether the plaintiff was right in demanding the extra stamp. It was very unfortunate that there should have been this litigation about so small an amount as 1*l.* 15*s.* His Honour then referred to the correspondence between the solicitors, and said he thought the defendant was quite justified in taking the course he had, and resorting to the most speedy remedy in his power. It was clear from the Acts that only one duty was payable. The plaintiff must pay the costs of the suit.

The defendant submitted to a decree for specific performance, on payment of the costs of the suit by the plaintiff.

[COURT OF ADMIRALTY.]

DR. LUSHINGTON, July 25, 1866.

THE WILHELM.

14 L. T. 636.

Liability of ship for deferred delivery of cargo—Detention by frost.

SHIPPING.—*The master of a ship, whilst waiting for cargo, omitted to take in sufficient stores and provisions for his voyage, and whilst subsequently taking in such provisions and stores the frost set in, and the ship was frozen in port and detained from the beginning of October until the breaking up of the ice in the ensuing year:—Held, that the owners of the ship were responsible to the owners of the cargo for any loss accruing from such detention; it being, by maritime law, the duty of the master to convey the cargo to its port of delivery with all expedition; and if by neglecting to avail himself of all fair opportunity the voyage is delayed and damage accrues to the owners of the cargo, the owners of the ship are liable to make good the sum.*

Deane, Q.C. and Murphy, for plaintiff.

Brett, Q.C. and E. C. Clarkson, for defendant.

DR. LUSHINGTON gave judgment in this case, which was an action brought on behalf of Messrs. Fontaines and Wilson, merchants of London, as consignees of 584 barrels of tar, part of the cargo of the brig *Wilhelm*, against the owners and master of that ship, to recover for the loss arising from the non-delivery of the tar. The petition set forth that by a charter-party dated in London the 1st April, 1862, between the master of the brig and the plaintiffs, the brig, then in the Baltic, proceeded to Archangel on the 11th August, and on the 16th the master gave notice to the plaintiffs' agent that he was ready to commence loading; that a full cargo was ready to be shipped immediately, but that the shipment thereof, through the negligence or default of the master, was not completed until the 19th September, when the brig got under weigh and proceeded down the river on her intended voyage; that the master, instead of putting to sea, as he could and ought to have done, shortly after leaving Archangel, brought the brig up off Modon Kerlde, where he remained without making any effort to prosecute his voyage, although the navigation was perfectly open and free from obstruction, until the middle of October, when the river was closed by ice, and the brig, with the plaintiffs' cargo on board, was detained there until the breaking up of the ice in the following spring. It was then alleged that, if due diligence had been used by the master in loading the brig and proceeding on his voyage, the brig, with the plaintiffs' cargo on board, part of the master, the brig did not reach England until the 18th July, 1863; that, in consequence of the negligence, mismanagement, or other default on the part of the master, the brig did not reach England until the 18th July, 1863; that such negligence, mismanagement, and default were a breach of duty and a breach of contract on the part of the master, and by reason of such breach of duty and of contract the plaintiffs had sustained considerable loss. The answer for the defendants pleaded that, by a charter-party dated the 1st April, 1862, it was mutually agreed between the master of the above-named brig *Wilhelm*, then in the Baltic with leave to take a cargo from Memel to Waterford, and the plaintiffs, that the brig, being tight, staunch, strong, and every way fitted for the voyage, should, with all convenient speed, sail and proceed to Archangel, or as near thereunto as she might safely get, and there load from the factors of the plaintiffs a full and complete cargo of tar in barrels, and about 1,000 mats; ship to be provided with a deck cargo of tar which the plaintiffs bound themselves to send or cause to be sent alongside the vessel at her port or place of loading aforesaid, and to be taken from alongside the vessel at her place or port

of discharge free of expense to the master, and being so loaded should proceed therewith to Bristol, London, Newcastle-on-Tyne, Sunderland, or Hartlepool, as ordered on signing bills of lading, or so near thereunto as she might safely get (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind soever, during the said voyage, always excepted), and by the said charter-party it was agreed that twenty-eight running days should be allowed to the plaintiffs for loading the ship and discharging; that the *Wilhelm*, after completing her voyage from Memel to Waterford with all convenient speed, sailed and proceeded to Archangel, where she arrived on the 11th August, 1862, but was not able to obtain a berth whereat to discharge her ballast until the 13th; that on the 14th and 15th the ballast of the *Wilhelm* was discharged, and on the 16th the *Wilhelm* was ready to take in cargo, and her master on that day gave notice thereof to the agents of the plaintiffs at Archangel, and made the necessary arrangements with the view of taking in her cargo; that the plaintiffs neglected to furnish the cargo of the *Wilhelm* in accordance with the aforesaid charter-party, and notwithstanding the requests and representations of the master, delayed furnishing the cargo, and in consequence of such neglect and failure, and not through any negligence or default of the master, the shipment of the cargo was not completed until the 18th September following; that on the 19th the *Wilhelm* left Archangel and proceeded to Modosko Roads for the purpose of proceeding over the bar, but owing to the strong winds and the shallowness of the water on the bar, the *Wilhelm* was unable to pass over the bar, and she remained detained by strong winds and bad weather until the 8th October, when the *Wilhelm*, requiring provisions before proceeding to sea, was taken to Lupomoko Roads, and her master proceeded to Sollenburgh to obtain such provisions, and on the next day the ice set in, and the *Wilhelm* was taken to Lupomoko harbour, and although every endeavour was made to get her to sea, she was unable to proceed to sea, and became and remained frozen up, and was unable to reach England until July, 1863. It was further pleaded that the *Wilhelm* was prevented by the dangers and accidents of the seas, rivers, and navigation, and by the negligence and default of the plaintiffs, from proceeding to sea before she became so frozen up, and that the master was not guilty of any breach of duty or breach of contract. The merits of the case were in a very narrow compass. As regarded the plaintiffs the court think that the lapse of four days after the running days could be imputed to them as blame, or for the recovery of damages if otherwise entitled. As regarded the defendants, it is satisfactorily shown on the contrary, that having got into the Modosko Roads on September 22nd, they were unable to pass the bar from that day to October 8th. After the vessel had been taken to Lupomoko harbour, it was impracticable for the vessel to proceed to sea. It was equally clear that, on the 8th or 9th October, if the *Wilhelm* had remained in the Modosko Roads, she might have crossed the bar and proceeded on her voyage. The question for the decision of the court is whether the alleged want of provisions which prevented the master's departure from the Modosko Roads did not amount to such as is contemplated by the Admiralty Act, 1861, and gave the plaintiffs a just right of action. It was the duty of the master to convey the cargo to the port of delivery with all due diligence and expedition, and if, by unreasonable delay or neglect to avail himself of the means in his power, the voyage was delayed and damage accrued to the consignees of the cargo, the owners were responsible. Amongst the duties to be performed by the master, the due provisioning his crew was one of the most apparent and most indispensable. This duty was especially stringent in a case like the present—of a voyage from a northern port at a late period of the year, where the opportunities of getting out into the open sea were necessarily rare, and the loss of an opportunity might lead to the detention of a vessel and her cargo for a whole winter. It was clear that the interests of commerce strictly regarded obedience to these rules, for upon the due arrival of the cargo might entirely depend the success of the adventure. It was true, it might be said in

this case that it was the interest of the master to complete his voyage with all celerity. Such assertion might be true, but it was no answer to the complaint, if proved, for it only showed what was of frequent occurrence, that even self-interest would not insure due diligence. If the master wanted provisions he was most culpable in having neglected to have a proper supply. If the provisions required were merely fresh provisions, articles not of necessity but of comfort, for the purpose of obtaining them the master was not justified in quitting the Modosko Roads. The Court was of opinion that the delay in prosecuting this voyage, and consequent loss to the plaintiffs, was to be attributed to the negligence or want of due diligence on the part of the master, and that, consequently, the plaintiffs were entitled to a decree for the damage, with costs.

STUART, V.C., June 8, 1866.

Re THE CONSOLIDATED BANK.

14 L. T. 656.

Company—Winding-up—Petition in two branches of the court—Order as of right.

COMPANY.—Where a petition was pending for winding-up a company in one branch of the court, and an official liquidator had been provisionally appointed, but the petitioner had failed to prosecute the petition within the time limited:—The Court, in the interim, granted to a second petitioner, in another of its branches, an order to wind-up the company.

This was a petition by two creditors of the Consolidated Bank, as well upon a deposit account at interest as upon a current account, praying that the affairs of the bank might be wound-up under an order of the court.

The petition had been duly advertised under the general orders of the court in the *London Gazette* and the London daily morning newspapers, and the affidavits in support of it had been filed on the 29th May.

It appeared that on Monday, the 28th May, a petition to wind-up the company had been presented by the directors and taken before Kindersley, V.C., who had, under section 85 of the Companies Act, 1862, appointed provisionally an official liquidator of the estate and effects of the company; but it was stated at the bar on behalf of the present petitioners that such petition was not now in a position to be heard, inasmuch as it had not been advertised at all, or, at any rate, seven clear days before this day.

Malins, Q.C. and *Cracknall*, in support of the petition, contended that, as the bank had proved their inability to pay the petitioners their debt by having dishonoured their cheque for 1,000*l.*, the petitioners were entitled as of course to an order to wind-up the company. The directors of the company had had ample time to prosecute the petition which they had attached to V.C. Kindersley's branch of the court, and the pendency of that petition before that branch of the court would not preclude this branch of the court from making the present order.

Greene, Q.C. and *Swanston*, for the bank, contended, first, that inasmuch as proceedings to wind-up the company before Kindersley, V.C. were now actually pending, what might be termed the comity of the courts would suggest that this petition should be heard before Kindersley, V.C.; secondly, negotiations were now going on with the view of the immediate re-opening of the Consolidated Bank for business, and if an order to wind-up were made on this petition. these

negotiations would be put an end to; and thirdly, there was no pretence for saying that the Consolidated Bank were unable to pay their debts.

The VICE CHANCELLOR said that, if any evidence had been brought before the court to justify it in considering that the bank would be immediately re-opened for business he should certainly not now make any order to wind-up the affairs of the company; but the statement respecting the prospects of the immediate re-opening of the bank had only been made at the bar after many objections which were futile had been taken to the petition. The right of the petitioners was perfectly clear, and there must be an order to wind-up the company.

IN THE COURT OF EXCHEQUER.

May 31, 1866.

SUTHERLAND v. ALLHUSEN AND ANOTHER.

14 L. T. 666.

See *Hobson v. Riordan*, 1886, 20 L. R. Ir. 255 (C. A.).

Pleading—Assumpsit—Contract for sale of goods—"Free on Board"—Naming the ship—Condition precedent to delivery.

CONTRACT.—Assumpsit on a contract for the sale of fifty tons of bicarbonate of soda at "11l. per ton in 1 cwt. kegs; or, if taken in 10 cwt. casks, the price to be 10s. less per ton; free on board, to be delivered in equal monthly quantities during April, May and June, 1865." Averment, that defendants duly delivered divers portions of the goods according to agreement, and that plaintiff was not required by defendants to accept delivery of the residue. Breach, non-delivery of the residue. Plea, that defendants were ready and willing to deliver the said residue according to the agreement; whereof plaintiff had notice, and that plaintiff was not ready and willing to accept, and would not accept, and did not require delivery of the same:—Held (on the authority of *Armitage v. Insole*, 14 Q.B. 728; 19 L. J. (N.S.) 202, Q.B.), that before the defendants were bound to deliver the goods, the plaintiff was bound to name the ship or the place where he desired the goods to be delivered, and that a tender of the goods by the defendants was not a condition precedent to their delivery, or to the ship or place being named by the plaintiff.

This was an action for the non-delivery of fifteen tons, the balance or residue of fifty tons, of bicarbonate of soda in pursuance of a contract. The declaration stated that it was agreed that plaintiff should buy of defendants fifty tons of bicarbonate of soda of defendants' own manufacture, and that defendants should sell the same to plaintiff at certain prices therein named, and should deliver the same to plaintiff in such quantities as plaintiff should require, not exceeding one-third of the whole of the said goods in each of the respective months of April, May and June next ensuing the date of the said agreement, and that plaintiff should, if required by defendants, accept the said goods in the respective quantities within the respective times in that behalf aforesaid.

Averment, that defendants, duly delivered divers quantities of the said goods under and according to the said agreement, and that plaintiff was never required by defendants to accept the residue or any part of the said residue of the said goods in the respective quantities, &c., and that all conditions were performed, &c. to entitle plaintiff to have the said residue delivered and to maintain his action in respect of the breaches therein as alleged; yet defendant

did not, nor would deliver to plaintiff the said residue, &c., and allegation of damage therefrom.

Pleas:—1. *Non assumpsit*. 2. Defendants were ready and willing to deliver the residue according to the agreement, whereof plaintiff had notice, and that plaintiff was not ready and willing to accept, and would not accept, and did not require a delivery of the same according to the agreement. 3. Exoneration and discharge of defendants from performance before breach.

At the trial before Mellor, J., at the last Spring Assizes at Newcastle-upon-Tyne, it appeared that plaintiff, a commission agent at Newcastle, had contracted to buy from defendants, who were alkali manufacturers, fifty tons of bicarbonate of soda. The bought note, as proved at the trial, was in the following terms:

Newcastle-on-Tyne, 24th November, 1864.

I have to-day bought from you fifty tons bicarbonate of soda of your own manufacture; price 11*l.* per ton, in 1 cwt. kegs; or, if taken in 10 cwt. casks, the price to be 10*s.* less—say 10*l.* 10*s.* per ton. Free on board. Terms cash, in fourteen days after each delivery, less 5 per cent. discount. Delivery in equal monthly quantities during April, May, and June, 1865.

(Signed) B. J. SUTHERLAND.

The sold note signed by defendants, which was also in evidence, was, *mutatis mutandis*, in the same terms, except that it did not contain the words "free on board." It was proved also that portions of the fifty tons were from time to time delivered during the months of May and June, 1865, each delivery being preceded by an order from the plaintiff indicating a particular wharf or ship where he wished to have the goods delivered. At the end of June a balance of fifteen tons remained undelivered. In August following plaintiff sent an order for the balance. At that time defendants' stock was exhausted, and they refused compliance, in consequence of which the action was brought. The market price of bicarbonate of soda had risen between June and August from ten guineas to 13*l.* 10*s.* per ton. In the declaration as originally framed there was an allegation that the parties had agreed by parol for an extension of time for delivery. After the decision of *Noble v. Ward* in the Ex., 13 L. T. 639; 4 H. & C. 149; 35 L. J. 81 Ex.; 1 L. R. 117, the declaration was amended, after issue joined, by striking out this allegation.

The contract being proved, evidence was given of the facts on which plaintiff relied as extending the time for performance of it. These facts were denied by the defendants, but the learned judge, being of opinion that the case turned wholly on the construction of the contract, no evidence was given by defendants, and a verdict was taken for the plaintiff with agreed damages (if any) at 40*l.*, leave being reserved to defendants to move. Accordingly a rule was obtained in Easter Term to set aside the plaintiff's verdict, and to enter it for defendants, pursuant to leave reserved, on the ground that upon the evidence the defendants were entitled to the verdict, and against that rule.

Temple, Q.C., and *T. Jones*, for plaintiff, now showed cause, and contended that the onus was on defendants to offer to deliver. It was contended on the part of defendants, on the motion for the rule, that, plaintiff having an option as to the manner in which he would take the goods, it was a condition precedent to defendants tendering them that plaintiff should exercise his option, and point out the place of delivery, and indicate in what sized casks he would take the goods. But that was not so. And, even assuming plaintiff to have failed to do his part, yet before defendants could take advantage of such failure, they should have insisted on plaintiff's taking the goods: (*Carpenter v. Blandford*, 8 B. & C. 575). Was the option in the vendors or the vendee? If in the former, they should have tendered; if in the latter, yet, nevertheless, defendants were bound to deliver, according to the contract, in the smaller casks, unless before the time of delivery plaintiff notified his election to take the goods in the larger casks. The only duty on the face of

the contract on plaintiff's part was to be ready to pay on delivery, and defendants' entire duty was to deliver goods on board. [*Manisty, Q.C.*, contra, for defendants, refers to *Armitage v. Insole* (14 Q.B. 728; 19 L. J. 202 Q.B.), and the judgment of Coleridge, J., there. MARTIN, B. refers to *Startup v. Macdonald* (12 L. J. 477 Ex.; 7 N. R. 269; 6 M. & G. 593).] The present case was not like, or affected by, *Armitage v. Insole*. There it was a contract to deliver on board a ship lying at Cardiff. But defendants ought, at any rate, to be ready and willing to deliver on board that ship. After part performance the objection was not good. All that defendants were entitled to do on plaintiff's omission to name a ship was to rescind altogether, but that could not be done where part had been performed. Having had the benefit of the contract in May and June, they could not now rescind. Their remedy was an action for breach by plaintiff of a condition precedent to the performance, not of the whole contract but, of the remaining part of it. They cited also

Behn v. Burness, in the Exchequer Chamber, 8 L. T. 207; 82 L. J. 204 Q.B.; 3 B. & S. 751.

Manisty, Q.C., and *Hugh Shield*, for defendants, in support of their rule, were stopped.

POLLOCK, C.B.—I believe that we are all of opinion that it is not necessary to hear counsel in support of the rule. I am disposed to agree with my brother Martin that it would have been more agreeable to the court to have discharged this rule; but, on the authorities that have been cited and the facts before us, I own I concur with the rest of the court in thinking that it must be made absolute. The action is upon a contract, and the expression "free on board" does not necessarily import that the goods should be put on board ship; it would be competent to the parties to prove that the goods were to be delivered somewhere else. The buyer may have them on board a ship or may have them at a railway-station, or may have them at any other place pointed out by him. The only question here is, was it incumbent upon the defendants to tender the goods, or was it incumbent on the plaintiff to tender the ship or point out the place where they were to be delivered, and, if on board ship to specify the ship by description and name? It has been decided, in a case where the expression "free on board" was used, that it is the duty of the person who seeks to have the goods to point out the ship, or specify the place where they are to be delivered, before he can complain that the goods are not on board the ship. I think the spirit of that decision clearly applies *in omnibus* to the present case, and that the plaintiff was bound, if he meant these goods to be delivered on ship board, to name the ship, and, if elsewhere, he was bound to name the place where he desired them to be delivered, and that it was not necessary for the defendants to tender the goods, as a sort of condition precedent to their delivery or to the ship being named, or the place being designated by the plaintiff. That being so, it appears to me, looking at all the facts and the point reserved, that the rule obtained to set aside the verdict, or to enter it for the defendants must be made absolute.

MARTIN, B.—I also regret that I am constrained to give this judgment. The case has nothing to do with the construction of a contract, but with the performance of a condition precedent, with regard to which the case which has been referred to is directly in point. This contract was for the sale of fifty tons of bicarbonate of soda, and the deliveries were to be in the stipulated quantities during the months of April, May, and June, 1865, and those deliveries were to be "free on board" in the Tyne, and the price was to cover that. Therefore, what the vendee, that is the plaintiff, contracted for was, that there was to be delivered to him fifty tons of bicarbonate of soda in the months of April, May, and June, in equal quantities "free on board

in the Tyne," at a certain price. One's common sense, therefore, would point out that before the party can complain of the non-delivery of those goods the vendor ought to be told where on the Tyne, or on what ship on the Tyne side they were to be put. The case cited seems to me directly in point. At one time it could not be done, but now it is necessary that there should be a performance of all conditions precedent which are essential to be set out in the declaration. On a contract for a certain quantity of coal to be ready on board, with no averment of performance, and a breach of the condition that the goods had not been delivered according to contract, Pattleson, Coleridge, and Wightman, JJ. were all of opinion that, for the purpose of enforcing the contract, it was necessary for the vendee to name the ship to the vendor: (*Armitage v. Insole*.) I cannot distinguish between that case and the present; and the circumstance that now parties are bound to aver performance of conditions precedent cannot alter the law as to the effect and the nature of the contract when once we know what the contract is. I therefore think the defendants are entitled to succeed, though I regret it.

BRAMWELL, B.—I am of opinion that this rule should be made absolute. The contract being to do a certain thing, the defendants were not bound to deliver till the plaintiff told them where they were to deliver. The plaintiff did not tell them where they were to deliver before the day of delivery arrived, and consequently the defendants never were bound. That seems the plain and fair meaning of it upon the authorities.

CHANNELL, B.—I am of the same opinion. This does not arise on a question as to the right to rescind the contract. I am of opinion, notwithstanding what has been urged upon us by counsel, that there might have been, as against the vendee, as to part of the goods, an acceptance and performance of the contract. The contract here is for the sale of goods, and the plaintiff insists on shipment on board a certain ship in the Tyne, and in order to make out the case he is bound to indicate the ship before he can bring an action for the non-acceptance and non-performance of the contract, which raises the question whether the defendants were ready and willing to deliver and the plaintiff ready and willing to accept.

Rule absolute.

June 19, 1866.

WILSON v. WILSON; the QUEEN'S PROCTOR intervening.

14 L. T. 674; L. R. 1 P. & D. 180; 15 W. R. 22.

Wife's petition for dissolution of marriage—Intervention of Queen's Proctor—Collusion and adultery charged—Withdrawal of the first and failure in proving the other—Costs—23 & 24 Vict. c. 144, s. 7.

DIVORCE AND MATRIMONIAL CAUSES.—On a petition for dissolution of marriage by the wife who had obtained a decree nisi, the Queen's Proctor intervened and charged collusion and adultery. At the trial he withdrew the charge of collusion and failed to prove adultery:—Held, that the Court was bound by the decision of the House of Lords in *Latour v. Latour*, and that, as it could not order the costs of a successful intervention to be paid by the petitioner, so neither could it order the costs of an unsuccessful intervention to be paid by the Queen's Proctor.

This was a petition by the wife for dissolution of marriage. The husband

appeared and filed an answer. The cause was heard before the Judge Ordinary and a jury; the verdict was for the petitioner, and a decree *nisi* was granted. Before the decree *nisi* was made absolute the Queen's Proctor intervened, under the direction of the Attorney-General and by leave of the court, and alleged that the petitioner had been guilty of collusion and the suppression of material facts, and of adultery. The charge of collusion was withdrawn. The issue of adultery was tried by the Judge Ordinary without a jury, and the Judge Ordinary came to the conclusion that the petitioner was not guilty of the charge, and that the decree *nisi* must stand.

Dr. Swabey, for the petitioner, moved, on the 19th June, that the decree *nisi* be made absolute, and that the Queen's Proctor be condemned in the costs of the intervention. The court was not bound by the judgment of the House of Lords in *Latour v. Latour*. There the question was, whether the petitioner should be condemned in costs; here it was the Queen's Proctor. Besides, as a general principle, every court had the power to condemn the unsuccessful party in costs. He cited—

Latour v. Latour, 33 L. J. 89, P. & M.; and 10 H. of L. C. 685; 6 L. T. N.S. 396. *Bolton v. Bolton and Page*, 2 Sw. & Tr. 551. *Gray v. Gray*, 2 Sw. & Tr. 554; 4 L. T. N.S. 218. *Forster v. Forster and Berridge*, 3 Sw. & Tr. 157.

The Solicitor-General (*Dr. Spinks* with him) for the Queen's Proctor.—The intervention of the Queen's Proctor was an intervention on the part of the Crown. He intervened as a public officer under the direction of the Attorney-General, and by leave of the court, and if in the first instance it were an intervention on the part of the Crown, it could not cease to be so because he did not prove any particular part of his case. It was quite true that, under the 7th section of the Act (23 & 24 Vict. c. 144), if he proved collusion he was entitled to costs, but on the other hand, it nowhere appeared in the Act that failing to prove the charge he should pay costs. Assuming that he appeared in his public capacity, as was the case in this instance, the court had no jurisdiction to order him to pay costs, although in certain cases, according to *Latour v. Latour*, it had the power to say that he should not receive them.

Dr. Swabey.—You can only construe the 23 & 24 Vict. c. 144, by reference to the 20 & 21 Vict. c. 85, the 51st section of which gives the court power to make such order as to costs as may seem just.

WILDE, J.O.—I think I am bound by the decision of the House of Lords in the case of *Latour v. Latour*. In that case the late Judge Ordinary seems to have been of opinion that, under the original Divorce Act, he had the power of awarding costs to the successful party. Acting on that impression, he did make an order that the Queen's Proctor should have his costs, he having alleged material facts which were not before the court, but which he did bring before the court and prevented its granting a decree, although he did not prove collusion. From that decision there was an appeal to the House of Lords. It is often said in courts of justice, that a decree of the House of Lords in these matters is binding, but that all that falls from the House on such occasions is not binding, and therefore the court has to look to what is done, not to what is said. In the case of *Latour v. Latour*, the thing that was done there was this. The Judge Ordinary having condemned the petitioner in costs, the House of Lords determined that the Judge Ordinary had no such power. That is precisely the present case. If the issue of the case had been just the contrary to what it has been—if the adultery had been proved, and I had condemned the petitioner in the costs of proving it, I should have gone directly in the face of that decision. That being so, there remains the question as to the jurisdiction of the court the

other way, namely, its power to condemn the Queen's Proctor in costs under like circumstances. The question is not susceptible of argument. If it cannot order the costs of a successful intervention to be paid by the petitioner, neither can it order the costs of an unsuccessful intervention to be paid by the Queen's Proctor. Whatever opinion I may have formed myself of the original power conferred on the court by the Divorce Act, I feel bound by the decision of the House of Lords in *Latour v. Latour*, and must reject the application.

Decree absolute, but without costs.

COURT OF ADMIRALTY.

DR. LUSHINGTON, Nov. 20, 1865.

THE HANNAH PARK AND THE LENA.

14 L. T. 675.

Collision—Admiralty regulations as to rules of the road.

SHIPPING.—17th, 18th, and 19th regulations: "Every vessel overtaking any other vessel shall keep out of the way of the vessel being overtaken, and where by such rules the one ship is to keep out of the way, the other ship shall keep her course, due regard being had, in the observance of both these rules, and their observance being subject, to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from such rules necessary in order to avoid immediate danger." Plea: "That a steamer overtaking a sailing vessel could not comply with the first of the above regulations in consequence of the state of the weather, and the neglect on the part of those on board the sailing vessel to take proper precaution to avoid a collision":—Held, that the proof of such a plea was entirely on the steamer, who must make out in her defence that it was impracticable for her, in consequence of the state of the weather, to have seen the sailing ship in time to have avoided her; and that the steamer was pursuing her course at a reasonable speed, such weather considered.

Deane, Q.C., and E. C. Clarkson appeared for the *Hannah Park*.

Brett, Q.C. and Vernon Lushington for the *Lena*.

DR. LUSHINGTON gave judgment in this case, which was an action brought against the owners of the steamship *Lena*, 875 tons, from Cronstadt for London, by the owners of the late brig *Hannah Park*, 250 tons, from the same ports of departure and destination, to recover for a total loss resulting from a collision between them in the Gulf of Finland, about 4 a.m. on the 15th September last. On the part of the brig the wind was represented as N.W. by N. to N.N.W. and the weather clear and fine, blowing fresh with a strong sea; for the steamer, the former was stated as N.N.W., and the wind as blowing strong, with a heavy sea and a dark night. The case for the plaintiff was, that the brig was steering from W. to W.½S. close-hauled on the starboard tack, exhibiting her regulation lights brightly burning, when the masthead light of the *Lena* was seen astern of her, distant three or four miles; that the *Lena* approached and brought both her side lights also into view, whereupon those on board the brig loudly hailed the steamer, notwithstanding which she ran stem on into the brig's stern with such violence as to cause her to sink in about two hours. The defence of the *Lena* set forth, that she was steering S.W. by W.½W., and was proceeding under steam about eight

and a half knots, carrying her proper lights brightly burning, when the brig was descried six lengths ahead of her, no light of any kind being visible on board her to those in the steamer; that, upon the brig being seen, the helm of the steamer was put hard a-port, and her engines were stopped and reversed, but nevertheless the steamer's port bow came in contact with the brig's starboard quarter; that, after the collision the brig's crew boarded the steamer, and the brig sunk after daylight. There were three questions raised here: first, whether the collision was the result of inevitable accident; secondly, whether the steamer was solely to blame; and, thirdly, whether the brig herself was to blame, either for omitting to shew a light, or, after the collision, in consequence of neglecting to do that which was incumbent upon her to do for the preservation of the property. It is agreed that the steamer was following very nearly, though not precisely, in the wake of the brig; and the Admiralty regulation states that "Every brig overtaking any other vessel shall keep out of the way of the said last-mentioned vessel." It is also provided that the vessel which preceeds shall keep her course. It is manifest, the collision having actually taken place, this regulation was not strictly complied with; and on behalf of the steamer it is said that she could not comply with it in consequence of the state of the weather and the neglect of those on board the brig. The duty of proving that defence is clearly and entirely upon the steamer. She must make out affirmatively that it was impracticable for her, in consequence of such state of the weather, to have seen the brig in time to have avoided her; and, moreover, she must shew that she was pursuing her course at that reasonable rate of speed, considering the state of the weather, that there was no impropriety of conduct in that respect which could avail against her. Regarding the conflict of evidence as to the darkness of the night, undoubtedly it was very great. The time of collision may be fairly taken at a few minutes, five or ten minutes, before four, and it is admitted the day was breaking at that time. There is one matter that ought to be taken into consideration, viz., that on board the steamer it was said the brig was seen seven to eight ship's lengths off. Taking it at seven, that is 1,400 feet, which is more than 400 yards. As to whether it was the duty or not of those on board the brig to have hoisted a light, as a general proposition it must be admitted that it is the duty of those who see any chance of an approaching collision to take all reasonable means in their power to avoid it; but this must depend on the circumstances of the case. The third point is, whether or not after the collision occurred there was a dereliction from duty on the part of the master of the brig, in not adopting those measures which it is said could have been adopted to save the vessel. A case was cited where there was a collision with Her Majesty's ship *Flying Fish*, and the ship that came in contact with her was run ashore in the Bay of Rye some hours after the collision. The question arose then whether or not great damage had not accrued from the improper conduct of the master in not accepting the services offered to him by being towed off in that bay. I refused to hear that question discussed in the principal collision case; and I think when I come to look at the result I acted wisely, for when the matter came on as to the propriety of running her on shore, and the propriety of getting her off, fourteen or fifteen witnesses were examined, whose evidence was all contradictory and conflicting, when the question I should have put to the Trinity Masters would have been, whether the running her on shore was right or wrong. But whenever I meet with such a case again I will make a separate case of it. This is totally different, because all the witnesses here can speak to the facts, and no other witnesses could be produced. It has been said that the master of the brig was to blame for not having taken measures to prevent the ship sinking, that those measures could have been adopted, and with safety to the parties on board, and that the loss would have been avoided. In the first place, when the collision actually occurred, the master was left on board the vessel with, as he says, himself, a boy, and

two seamen only. We must recollect, after a vessel of 876 tons, a steamer, has come immediately into collision with a brig of 259 tons, you cannot immediately expect that all on board the vessel run into are in entire possession of their wits so as to take all measures for their safety. Rational measures they must take. But at the same time they must not be expected to be very acute in their judgment, and it does not appear to me that after the collision anything could be done in the first instance. We will suppose that the rest of the crew were brought back from the steamer, and that the master had the power of getting all of his hands on board the brig; and that he had all his original crew. It has been said that the vessel remained afloat for the period of an hour and fifty minutes; the strong probability therefore is, under the circumstances, that she might have been saved. That that is a circumstance well deserving consideration I do not doubt, but it appears to me the main point in the case is the extent of damage which was actually done, because it must depend upon that whether there was danger of immediate sinking, or a probability that the danger could be temporarily repaired so as to bring the vessel into a state of safety. There is very little evidence from the steamer as to the extent of damage, and none that is satisfactory to my mind. The master of the brig described the hole as about as big as one of the windows of the court, and so large that the sea undoubtedly did from time to time get in. It was for the Trinity Masters, who assisted the court to say whether, under the circumstances, it was proved satisfactorily on the part of the steamer that the master of the brig neglected his duty; and by not doing that which might have been done with facility and safety, occasioned the ultimate sinking of his vessel, and the loss that has accrued. After carefully weighing the evidence on both sides, and upon the facts adduced, the court, under the advice and with the concurrence of the gentlemen who assisted it, is of opinion that the steamer was solely to blame for the collision.

The Court was assisted by Capt. Pigott and Capt. Weller, of the Trinity-house

LORD CRANWORTH, L.C., June 6, 1866.

Re THE UNIVERSAL BANK (LIMITED).

14 L. T. 691; L. R. 1 Ch. 428; 12 Jur. N.S. 477.

See *In re National Funds Assurance Co.*, [1877] E. R. A.; 46 L. J. Ch. 183; 4 Ch. D. 305; 35 L. T. 689; 25 W. R. 151 (C. A.).

Companies Act, 1862, s. 124—Practice—Petition of appeal.

COMPANY.—*The 124th section of the Companies Act, 1862, which directs that no rehearing or appeal shall be heard, unless notice be given within three weeks after the order complained of has been made, does not apply to appeals from orders made on the original petition for winding-up the company.*

This was an application for an order directing the Lord Chancellor's secretary to receive a petition of appeal under the following circumstances:—The Master of the Rolls having dismissed a petition for winding-up the Universal Bank (Limited), with costs, the petitioner appealed against that order; but the Lord Chancellor's secretary objected to receive the petition of appeal on the ground that by the 124th section of the Companies Act, 1862, notice of the appeal must be given within three weeks after the order complained of, and that the three weeks had already expired.

Darby, for the appellants, quoted the section of the Act, which is as follows :

" Rehearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any court having jurisdiction under this Act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be heard from any order or decision of the same court in cases within its ordinary jurisdiction; subject to this restriction, that no such rehearing or appeal shall be heard, unless notice of the same is given within three weeks after any order complained of has been made in manner in which notices of appeal are ordinarily given, according to the practice of the court appealed from, unless such time is extended by the court of appeal." He submitted that the appeal " from any order or decision " applied only to appeals from orders or decisions made in the course of the winding-up of a company already ordered to be wound-up, and not to any appeals from any order directing or refusing a winding-up. Kindersley, V.C., in *Re The Anglo-Californian Company* (1 Dr. & S. 628; 5 L. T. 739), held that the 3rd section of the Winding-up Act of 1849 (12 & 13 Vict. c. 108), which enacted that no notice of motion for a rehearing of any order under that Act should be given after the expiration of three weeks after the order complained of, only applied to proceedings under an existing winding-up order, and not to the rehearing of the original petition.

The LORD CHANCELLOR thought that the principle laid down by Kindersley, V.C. applied in the present case. The 124th section of the Act, in his opinion, applied to orders under an existing winding-up, and not to decisions as to whether there should or should not be an order for winding-up. He should direct his secretary to receive this petition of appeal.

LORD ROMILLY, M.R., July 2, 1866.

BROWN v. BROWN.

14 L. T. 694; L. R. 2 Eq. 481.

Referred to, *Codrington v. Lindsay*, [1873] E. R. A.; 42 L. J. Ch. 526; L. R. 8 Ch. 578; 28 L. T. 177; 21 W. R. 182 (C. A.): affirmed, with variation (*sub nom. Codrington v. Codrington*), [1876] E. R. A.; 45 L. J. Ch. 660; L. R. 7 H. L. 854; 34 L. T. 221; 24 W. R. 648 (H.L.).

Marriage—Infant—Covenant to execute settlement—No settlement—Inquiry as to election by infant plaintiff.

ELECTION.—Where a man married an infant, and by an indenture executed before the marriage covenanted to settle all the real and personal estates to which the wife might during her coverture become entitled; no further settlement was executed; the wife died without having done anything to affect her rights, leaving the plaintiff her only child, an infant, and a suit was instituted on behalf of the child to compel the father to settle the personal estate according to his covenant in that behalf:—It was Held, that the case of *Anderson v. Abbott* (23 Beav. 457) applied, and that there must be an inquiry whether it was for the benefit of the infant plaintiff to elect or not.

Campbell v. Ingilby (21 Beav. 567; 25 L. J. 761 Ch.; and s. c. 27 L. T. 51) observed upon.

The plaintiff in this suit was an infant, and the heiress-at-law of her mother. The object of the suit was to obtain a decree for a settlement of the personal estate belonging to the plaintiff's late mother, in pursuance of a covenant entered into by the infant's father prior to his marriage with her mother.

The facts of the case were very shortly these:—

In the month of September, 1853, the defendant Mr. Brown married a Miss Smyth, then an infant. By an indenture executed previously to the marriage by Mr. Brown, he covenanted with certain persons therein named as trustees of a settlement to be thereafter executed, that he, Mr. Brown, would in manner therein also mentioned duly settle the real and personal estates of or to which Miss Smyth was then or should thereafter during the coverture become seised or entitled, upon her for her life, for her sole and separate use, and after her decease upon Mr. Brown for his life; and after his decease upon the ordinary trusts for the children of the marriage.

No further settlement was ever executed. Mrs. Brown died in 1859 without having done any act to affect her rights, and leaving the plaintiff the only child of her marriage.

W. Pearson appeared for the plaintiff, and contended that, as Mrs. Brown was an infant when she married Mr. Brown, and as she had died without doing any act to affect her rights in the properties, the indenture executed by Mr. Brown prior to the marriage was inoperative as to her real estate; further, that the plaintiff could not be now put to her election whether she would take under or against the trusts in the indenture; and lastly, that Mr. Brown was now bound to settle his wife's personal estate upon the plaintiff (subject to his own life-interest) according to his covenants in that behalf. He cited *Campbell v. Ingilby* (21 Beav. 567; 1 De G. & J. 393; 25 L. J. 761 Ch.; 26 L. J. 654 Ch.; s. c. 27 L. T. 51).

Freeling, for Mr. Brown, *Anderson v. Abbott* (23 Beav. 457).

Graham Hastings appeared for the trustees of the proposed settlement.

LORD ROMILLY.—I am of opinion that the case of *Anderson v. Abbott* applies to this one, and not that of *Campbell v. Ingilby*. Some of the expressions I made use of in that case appear to me upon reflection to go a little further than perhaps they ought. Those cases go to establish this: if the person who claims the estate as the heir-at-law of the infant does not come in directly under the settlement, *Campbell v. Ingilby* applies. It makes no difference that the person claiming the estate takes some benefit under the settlement; but if the person claiming it comes in directly under the settlement, and calls for the execution of those of his trusts which are for his own advantage, then *Anderson v. Abbott* applies, and a case of election arises. As the plaintiff here is an infant, there must be an inquiry directed in chambers, whether it will be for the benefit of the infant plaintiff to elect or not.

LORD ROMILLY, M.R., July 2, 3, 1866.

Re THE NORTHFIELD IRON AND STEEL COMPANY (LIMITED).

14 L. T. 695.

Distinguished, *Ex parte Great Western Railway*, [1883] E. R. A.; 52 L. J. Ch. 734; 22 Ch. D. 470; 48 L. T. 196; 31 W. R. 419 (C. A.).

Company—Contract for carriage of goods—Petition for winding-up order—Carrier's lien for previous debt on goods delivered for carriage subsequent to the presentation of the petition—Summons.

CARRIERS.—*The N. Iron and Steel Company was indebted to the M. Railway*

Company for goods carried by the latter for the former. A petition was presented praying for a winding-up order of the N. company. That company then sent other goods to the M. company for carriage by them, after which an order was made to wind-up the N. company. The M. company then refused to deliver to the official liquidator of the N. company the goods in their hands, claiming a lien on them for the debt previously due for the carriage of the other goods. The official liquidator of the N. company then took out a summons in chambers to obtain delivery of the goods to him on payment of the money due for the carriage thereof:—Held, that the summons must be dismissed, and that the official liquidator of the N. company must pay the debt due to the M. company if he wished to obtain possession of the goods in their hands.

This matter came on to be heard upon a summons adjourned from chambers. The summons was originally taken out by the official liquidator of the Northfield Iron and Steel Company (Limited) for an order directing the Midland Railway Company to deliver to him certain goods sent by him by the Midland Company's line on payment of the sum due to that company for the carriage thereof. The Midland Company claimed to have a lien upon the goods for a debt due to them from the Northfield Iron and Steel Company; and therefore refused to surrender them.

The facts of the case were very shortly these:—In December, 1863, the Northfield Iron and Steel Company entered into a contract with the Midland Railway Company for the carriage of certain goods. The agreement provided that the Northfield Company should have a monthly credit; that all accounts should be settled before the close of the month following that for which the account was to be rendered; and further, "that if the accounts were not paid in accordance with the above condition, the Midland Company were to have the right at any time to detain any goods or waggons in their possession by way of lien, to secure the general balance to them." On the 22nd March, 1866, a petition was presented praying for an order to wind-up the Northfield Iron and Steel Company. At that time the Northfield Iron and Steel Company was indebted to the Midland Company for goods carried by them; but no goods of the Northfield Iron and Steel Company were then in the hands of the Midland Railway Company. On the 27th March the official liquidator of the Northfield Iron and Steel Company sent certain goods to the Midland Company for carriage by them.

On the 21st April, 1866, an order was made to wind-up the Northfield Iron and Steel Company. The Midland Railway Company thereupon insisted that they had a lien on the goods of the Northfield Iron and Steel Company in their hands, for the debt then due in respect of the previous carriages.

In that state of things the summons was taken out as above stated. The chief clerk had found thereon for the official liquidator of the Northfield Iron and Steel Company.

By the Companies Act, 1862, section 84, it was provided that a winding-up of a company by the Court should be deemed to commence at the time of the presentation of the petition for the winding-up; and by section 100, that the Court might, at any time after making an order for winding-up a company, require any contributory, for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the court directed, to or into the hands of the official liquidator, any sum or balance, books, papers, estate, or effects, which happened to be in his hands for the time being, and to which the company was *prima facie* entitled.

Jessel, Q.C. and *Wickens* appeared for the official liquidator of the Northfield Iron and Steel Company, and contended that, inasmuch as at the time of the commencement of the winding-up (Companies Act, 1862, s. 84) the Midland Company had no goods in their hands belonging to the official liquidator of the

Northfield Iron and Steel Company, the goods which had since then come to their hands had so come to them as agents for the official liquidator of the Northfield Iron and Steel Company, and that he, being in the position of a trustee of all the property of his company for the creditors thereof, the Midland Company, as his agents, were bound to deliver to him the goods in question.

Roxburgh appeared for the creditors of the Northfield Iron and Steel Company.

Selwyn, Q.C., Speed, and Hance, for the Midland Railway Company.

LORD ROMILLY.—Mr. Jessel, I am of opinion that the chief clerk is wrong, and that the summons in this case must be dismissed. I am not going to dispose of the case on the question of agency. I think that if the official liquidator wants the goods which are now in the hands of the Midland Railway Company, he must pay to that company the debt due to it for the carriage of the goods before the winding-up order. The official liquidator continued to send goods, and it must therefore be implied that he sent them under a continuation of the original contract between the parties. But if that is so, he was bound to give the Midland Railway Company express notice if he wished to determine the contract. Perhaps, indeed, if he had done so, the railway company would have declined to convey the other goods, except on the terms of being paid for those previously carried. It is possible that the goods could not have been conveyed by other agents, except at a greater cost; but I think that the Midland Company could not have been compelled to carry them, except upon the terms I have mentioned. The summons must therefore, as I have said, be dismissed. The costs of all parties must come out of the estate of the Northfield Iron and Steel Company.

CRANWORTH, L.C., June 23, 1866.

Ex parte CHRIST CHURCH, OXFORD.

14 L. T. 719; L. R. 1 Ch. 526; 12 Jur. N.S. 537.

Jurisdiction—Visitor.

This was an application to the Lord Chancellor under the following circumstances:—

The original stipend of the Regius Professor of Greek in the University of Oxford was 40*l.* a-year, and it was now proposed by the Dean and Chapter of Christ Church, Oxford, to augment the stipend out of funds belonging to them. The commissioners under the Oxford University Act of 1854 had no authority in the matter, but the Queen as visitor had; and the present motion was that the Lord Chancellor, as representative of the Queen, would authorise the Dean and Chapter to make the proposed augmentation.

The *Attorney-General* and *Bateman* supported the motion.

The LORD CHANCELLOR.—I think this is a very proper application, and will therefore give the authority asked for.

CRANWORTH, L.C., June 28, 1866.

Ex parte WIDEMANN.

14 L. T. 719; 12 Jur. N.S. 536.

EXTRADITION.—*French extradition treaty—Habeas corpus—Notice.*

This was an application made on behalf of a French subject named Widemann, for a writ of *habeas corpus* to bring him up from the Clerkenwell house of detention, where he was kept as a prisoner preparatory to his being delivered up to the French authorities under the Extradition Treaty, as a fraudulent bankrupt.

McMahon supported the motion.—The prisoner was brought up to Bow Street in May last, and had since been remanded from time to time. He submitted that the Act under which the prisoner was detained (6 & 7 Vict. c. 75), together with the convention between this country and the French Government, on which it was based, had terminated. The Act contained a recital to the effect that it was by the convention stipulated and agreed that the convention should be in force till the 1st January, 1844, after which date either of the high contracting parties should be at liberty to give notice to the other of its intention to put an end to it, and it should altogether cease and determine at the expiration of six months from the date of such notice. A notice had been served on the English Government on the 4th December last, signifying the intention of France to determine the treaty on the expiration of six months, which time had now elapsed; but there was this difficulty in the case, that on the 24th May last, before the expiration of the notice, an agreement had been come to between the two Governments that the notice should be withdrawn, and a second notice was given which had not yet expired. He contended, however, that the Act had expired as a necessary consequence of the first notice, and that a new Act of Parliament would be necessary to revive its powers.

The *Solicitor-General* (Sir R. Collier) and *Hannen* appeared for the Crown.

The LORD CHANCELLOR said he would not trouble the counsel for the Crown in this case. There could be no doubt that, so long as the convention was in operation, the Act was in force, and therefore the only question was, whether the convention had been put an end to. In December last, the French ambassador gave notice of the termination of the treaty on the 5th of the present month, but it appeared that before the expiration of the notice, an agreement was come to by both parties to treat the notice as commencing on the 24th May last. If the six months had expired before the original notice was withdrawn, it might be that the Act could not have been revived, but such was not the case, and therefore the motion must be refused. It was perfectly competent for the high contracting parties to enter into the second arrangement and therefore the convention was in force, and as a consequence the Act of Parliament also.

CRANWORTH, L.C., June 25, 1866.

BELANEY v. BELANEY.

14 L. T. 720.

Practice—Signature of one counsel to appeal.

This was an application for leave to have the petition of appeal admitted with the signature of one counsel.

Charles, for the applicant.—The point in dispute was as to the construction of a will, and one counsel only had been engaged in the court below. He submitted that under these circumstances the signature of one counsel was sufficient. Such, he believed, had been the usual practice.

The LORD CHANCELLOR said he would give leave, in this instance, as it seemed to have been done in other cases, but he thought there ought to be a general order on the subject. If the signatures of two counsel were requisite, he did not see why they should be dispensed with.

CRANWORTH, L.C., July 9, 1866.

Re FULCHER.

14 L. T. 720; L. R. 1 Ch. 519.

BANKRUPTCY.—*Bankruptcy—Trust-deed—Registration—Bankruptcy Act, 1861, s. 192, c. 3.*

This was an appeal from a decision of the registrar, who had objected to the registration of a deed of inspectorship, on the ground that one of the debtors had executed the deed by attorney, and that the execution of the power of attorney had not been attested by a solicitor in accordance with the requirements of the third condition of section 192 of the Bankruptcy Act, 1861.

Horton Smith, for the parties, submitted that as the deed of inspectorship itself was attested by a solicitor, it ought to be admitted to registration.

The LORD CHANCELLOR was of opinion that the statute applied only to the execution of the deed, and therefore ordered it to be registered.

July 6, 1866.

*Re INTERNATIONAL CONTRACT COMPANY (LIMITED),**Ex parte SPARTALI AND TABOR.*

14 L. T. 726.

Company—Winding-up—Companies Act, 1862.

COMPANY.—*A company made a call upon its shareholders, payable in two months' time; but in the interim, being unable to pay its debts, two petitions, one by a shareholder and the other by a judgment and execution creditor, were presented for winding it up.*

The Court, notwithstanding the opposition of a majority of the share-

holders, and an allegation on the part of the company that it would be in a position to meet all its engagements as soon as the call had been paid, made an order to wind-up the company on both petitions.

These two petitions were presented for winding-up the above company under the following circumstances:—

The company was registered in May, 1864, under the Act of 1862, with a nominal capital of 4,000,000*l.*, in 80,000 shares of 50*l.* each; its object being (*inter alia*) to take contracts for railways and public and private works.

Nicolas Demetrius Spartali, one of the petitioners, was a holder of 400 shares in the company, and he alleged that he was one of its creditors to the amount of 400*l.*, in respect of dividends which had been declared by the company, but which had not been paid. On the 28th May, 1866, the company made a call of 5*l.* per share, payable on or before the 31st July following; and it appeared that 2,000*l.* was due by Spartali to the company in respect of such call, and would be payable by him on that day.

The other petition was presented by William Tabor, a judgment and execution creditor of the company to the amount of 6,508*l.* The sheriff of London was in possession of the effects of the company under Tabor's execution, and it was alleged that they were insufficient to satisfy his claim.

The managing director of the company deposed to the effect that, so soon as the call made on the 28th May should be paid, the company would not only be in a position to meet all its engagements, but would have a large balance in hand. The company had entered into contracts of a most profitable description, and a winding-up order at the present moment would be most disastrous to the interests of the shareholders. He also stated that Tabor's claim had been partly arranged to his satisfaction before the presentation of Spartali's petition, and but for this latter circumstance, would have been paid or otherwise satisfied.

Bacon, Q.C., and Swanston, for Spartali, submitted that, as the company was in debt, and had no means of satisfying its creditors, the petitioner was entitled to ask for the usual winding-up order.

Malins, Q.C., and J. N. Higgins, on behalf of Tabor, said that he would be willing to allow his petition to stand over provided Spartali would consent to do the same with his; otherwise they asked that one order might be made on both petitions.

Bacon, Q.C., objected to Spartali's petition standing over.

Greene, Q.C., and Roxburgh, for the company, contended that, if the company were ordered to be wound-up, no company would be safe. These proceedings were a most improper attempt to interrupt the operations of the company, and if the order asked for were granted, ruin would result to the shareholders. Tabor's claim had been arranged, and the great majority of the shareholders were willing and ready to pay the call made upon them; but Spartali was not ready to do so. The company was by no means insolvent, it had power to make further calls, to the extent of 35*l.* a share; and the evidence of the manager showed that large contracts had been entered into of a most profitable description. If Tabor's petition had not been presented there would have been no case for winding-up the company. By section 86 of the Companies Act, 1862, the court had discretionary power to make such order as might appear just, and as the company was in a position to go on it ought not to be wound-up compulsorily. No doubt the state of the money-market had caused a temporary embarrassment, but the company and the great majority of the shareholders were satisfied that the company could go on and pay both Tabor's and every other debt in full. They therefore asked that under these circumstances Spartali's petition might be dismissed with costs, and that of Tabor ordered to stand over for a week.

Craig, Q.C., for some of the shareholders, also opposed the petitions.

The VICE-CHANCELLOR said that in applications of this kind it was not at all of course that a company should be ordered to be wound-up. The duty of the court was to consider the facts before it carefully, and to be well satisfied of the propriety of such an order before making it. The provisions of section 79 of the Companies Act, 1862, relating to the winding-up of a company by the court, were very clear, and one of them was to the effect that "whenever a company should be unable to pay its debts," the court might order its affairs to be wound-up. Now the evidence showed that this company was unable to pay its debts. But it had been said that Mr. Tabor had made terms with the company. He did not, however, think that that circumstance, having regard to the other circumstances of the case, was an objection to his petition. That gentleman also would consent to his petition standing over if Mr. Spartali would agree to the same arrangement with reference to his petition, but if not, Mr. Tabor, as first execution-creditor, asserted his right to an order to wind-up the company. The company, also, had no balance at its bankers. It was his duty to make an order to wind-up the company. There would be one order on both petitions, and as Mr. Spartali's had been called on for hearing before Mr. Tabor's, he must have the carriage of the order. An official liquidator would be appointed in chambers.

Wood, V.C., June 23, 1866.

Re GOFF'S ESTATE. SIDDAL v. NICHOLSON.

14 L. T. 727; (sub. nom. *Goss's Estate*) 12 Jur. N.S. 595.

Chancery Amendment Act (15 & 16 Vict. c. 86) s. 22—Power of attorney—Execution—Notary—British colony.

COLONY.—Where a power of attorney has been executed before a notary public in a British colony, an affidavit verifying the notarial signature is not necessary.

In this suit a decree had been made upon petition, ordering payment out of court to various legatees. Some of the legatees resided in Honduras, and in 1863 they had executed powers of attorney authorising persons over here to receive the money for them. The execution of these powers had been attested by witnesses in the presence of a notary public, who had certified such execution under his hand and seal. The registrar had some doubts as to their validity, and had considered that an affidavit verifying the signature of the notary was necessary.

Bedwell now applied for the opinion of the court on the following points: first, whether there was sufficient proof of the notarial signature without an affidavit: secondly, whether, as some of the powers of attorney were executed in 1863, an affidavit of no revocation was necessary. In the case of *Armstrong v. Stockham*, before Stuart, V.C. (26 L. J. 176), an affidavit had been made by a person resident in this country, that the person so stating himself to be a notary public was such, and verifying his handwriting. He also cited *Re Earle's Trust* (4 K. & J. 300); and referred to the Chancery Amendment Act (15 & 16 Vict. c. 86), s. 22.

The VICE-CHANCELLOR, after referring to section 22 of the Chancery Amendment Act, said he thought he ought not to require an affidavit verifying the notarial signature. The usual doctrine of the court was that faith should

be given to the notarial seal. *Earle's Trust* (4 K. & J. 300) was a case where an affidavit had been sworn before a foreign notary, and Stuart, V.C., in *Armstrong v. Stockham* (26 L. J. 176) had not decided that an affidavit as to the notarial signature was necessary. With regard to the other point it would be sufficient if there was an affidavit made by a solicitor that none of the powers had been revoked, and that the parties who executed them were living.

Wood, V.C., July 5, 1866.

Re THE COMPANIES ACT, 1862.

THE RUSSIAN (VYKSOUNDISKY) IRON WORKS COMPANY (LIMITED).
(WEBSTER'S CASE).

14 L. T. 728; L. R. 2 Eq. 741.

See, *In re Overend, Gurney & Co.*; *In re Oakes*; *In re Peek*, [1867] E. R. A.; 36 L. J. Ch. 233, 413; L. R. 3 Eq. 576; 15 L. T. 652; 15 W. R. 397 (V.C.): on appeal, [1867] E. R. A.; 36 L. J. Ch. 949; L. R. 2 H.L. 325; 16 L. T. 808; 15 W. R. 1201 (H.L.).

Contributory—Enlargement of objects of association as described in prospectus.

COMPANY.—*Where there is a serious departure from the prospectus of a company, upon which an applicant applies for shares and they are allotted to him, and the subsequent articles of the association, as ultimately registered, disclose that the operations to be carried on by the company are of a much more extensive character, the allottee may have his name struck off the register.*

Stewart's case (14 L. T. 659), followed.

This was a similar application to that in *Stewart's case*, as above reported, to have the name of a Mr. Webster taken off the register of members.

The facts of the case were very similar.

In April, 1865, Mr. Webster applied for fifty shares, after seeing the prospectus circulated, and before the articles of the association were registered. He paid a deposit of 50*l.* into the bankers. On a subsequent day Mr. Webster received a letter of allotment for fifteen shares, upon which he paid the further sum of 25*l.*, thus making the full amount of 5*l.* per share on all his shares, as required by the prospectus. The bankers' receipts were subsequently exchanged for a certificate, dated the 20th June, 1865. This certificate stated that Mr. Webster was the proprietor of fifteen shares in the Russian (Vyksoundisky) Iron Works Company (Limited), *subject to the provisions of the memorandum and articles of association, and to the rules and regulations of the said company.* Mr. Webster never attended any meeting of the company and never saw the articles of association or heard of their contents until the end of last May, when the affairs of the company were being subject to an investigation by a committee.

G. M. Giffard, Q.C., and J. Napier Higgins, in support of the motion, relied upon the decision in *Stewart's case*, 14 L. T. 659.

Rolt, Q.C., Druce, and Waller endeavoured to distinguish the present case from that. The contract in this case was not completed till the receipt of the certificate, and that distinctly referred to the memorandum and articles

of association then registered, and Mr. Webster had consequently due notice of their contents.

No reply.

The VICE-CHANCELLOR said he could not distinguish this from the principle which he had laid down in *Stewart's case*, comparing the present to a case analogous where the prospectus of a fire insurance company proposed to limit their operations to that business, and subsequently filed articles of their association which would include life insurance. The certificate did not inform the applicant that he had entered into any new contract, or that there was anything different contemplated from that contained in the prospectus, upon the faith of which he had applied for and had obtained his shares. The name of Mr. Webster must be taken off the list of members, with costs.

Order accordingly.

IN THE EXCHEQUER CHAMBER.

APPEAL FROM THE EXCHEQUER.

WILLES, BYLES, BLACKBURN, KEATING, M. SMITH, and SHEE, JJ.*

May 14, 1868.

RIDEOUT v. LUCAS.

14 L. T. 738: affirmed (sub nom. *Lucas v. Rideout*), L. R. 3 H.L. 153 (H.L.).

Lessor and lessee—Agreement—Construction of—Meaning of “if R. then leaves the house.”

LANDLORD AND TENANT.—*A lease of a house, &c., was granted by S. to defendant for twenty-one years from Christmas, 1856, determinable at the end of the first seven or fourteen years upon six months' notice by either party, with power of re-entry if the lessee assigned possession without the lessor's consent. In October, 1861, defendant (the lessee) agreed in writing, without the lessor's consent, to sell his interest in the premises to plaintiff, the terms of which were (inter alia) that plaintiff was to pay 1,800l. for defendant's improvements, which sum was to be repaid to plaintiff if he were ejected by the lessor in the first instance; and “if the lessor exercised the power of determining the lease at Christmas, 1863, and if plaintiff then leaves the house,” 1,100l., part of the 1,800l., was to be returned to plaintiff. The lessor gave notice of determining the lease at Christmas, 1863, and subsequently granted a new lease at a largely increased rent to C., the aunt of plaintiff, who had resided with him in the house since October, 1861, and with whom plaintiff continued to reside in the same house under the new lease, so that he did not actually and as a matter of fact “leave the house”:—Held, by the Exchequer Chamber, reversing the judgment of the majority of the Court of Exchequer (11 L. T. 737), that plaintiff was entitled to recover the 1,100l., inasmuch as the lease to C. was a new lease to a different person for a different term, and at a different rent from the original lease, and plaintiff had not got the equivalent for which he bargained as a consideration for the 1,100l., as he had lost his interest in the house as tenant, which, by a reasonable construction, amounted to “leaving the house” within the terms of the agreement between him and defendant.*

This case came before the Court of Error by way of appeal from the judgment of the Court of Exchequer, in the form of a special case stated for

* Lush, J. left the court during the course of the arguments in this case.

the opinion of the Court of Exchequer Chamber, which had been settled by Martin, B., the parties having differed.

The questions in dispute between the parties turned upon the following facts:—

By an indenture, dated 5th January, 1857, Stephen Lyne Stephens, since deceased, demised to the defendant a messuage and premises, being a dwelling-house and grounds and garden attached at Roehampton, for a term of twenty-one years from Christmas, 1856, at a rent of 400*l.* a year, subject to a proviso that the demise should be determinable by either party at the expiration of the first seven or fourteen years upon giving a six months' previous notice. There was a condition for re-entry in the lease in the event of the defendant assigning or transferring possession of the house to any person without the consent of the lessor.

The defendant entered into possession of the premises under this agreement, and spent a considerable sum in improvements and in furnishing the house.

In October, 1861, a negotiation took place between plaintiff and defendant for the purchase of the latter's interest in the house, the result of which was that they came to an agreement, unknown to and without the consent of the lessor, which was put into writing. It was dated 10th October, 1861, and headed "Terms on which Mr. J. Rideout is to have possession of Mr. Thomas Lucas's house at Roehampton." The terms were, amongst others, that plaintiff Rideout should pay 865*l.* 7*s.* 6*d.* for the furniture at a valuation, and 1,800*l.* for defendant Lucas's improvements. It also provided that, if plaintiff was ejected by the lessor in the first instance, the furniture was to be sold and the loss to be divided, and the 1,800*l.* be repaid to Mr. Rideout. It then went on to state that, if the lessor exercised the power of determining the lease in December, 1863, and "if Mr. Rideout leaves the house," 1,100*l.* of the 1,800*l.* was to be returned to Mr. Rideout; and if at Christmas, 1863, the *tenancy of Mr. Rideout was continued*, the 1,800*l.* was to be retained by Mr. Lucas.

The concluding part of the agreement was that the arrangement should be embodied in a formal deed if either party required it, but neither party seemed to have taken any steps to that effect.

Under this agreement the 1,800*l.* was paid by plaintiff to the defendant, and the plaintiff Mr. Rideout and his aunt Mrs. Crompton entered into possession and occupation of the premises, and continued to reside in them up to Christmas, 1863, previous to which date Mr. Lyne Stephens, the original lessor to defendant, having died, his widow Mrs. Lyne Stephens, as owner of the reversion and in conformity with the powers in the lease, gave a notice in writing determining the lease at that period (Christmas, 1863). Thereupon negotiations ensued between Mrs. Lyne Stephens and plaintiff and his aunt Mrs. Crompton, the result of which was that Mrs. Lyne Stephens granted a new lease of the premises to Mrs. Crompton at an increased rent of 600*l.* a year, being an increase of 200*l.* a year on the original rent of 400*l.* At Christmas, 1863, neither Mr. Rideout nor Mrs. Crompton actually and in fact left the house, but continued to reside in it as before. Under these circumstances Mr. Rideout, the plaintiff, claimed from the defendant, Mr. Lucas, the return of 1,000*l.*, part of the 1,800*l.*, and defendant having refused payment of it, plaintiff brought an action in the Exchequer to recover the amount. The case came on for trial at the sittings after Michaelmas Term, 1864, at Guildhall, before Martin, B., and a special jury, when the learned judge directed a nonsuit, but gave leave to the plaintiff to move the court to set it aside and enter a verdict for him for the 1,100*l.* Accordingly a rule was obtained for that purpose and argued at considerable length in a subsequent term before Pollock, C.B., and Martin, Channell, and Pigott, BB. On that occasion the majority of the court (Pollock, C.B., and Martin and Pigott, BB.) thought, as Mr. Rideout did not leave the house at Christmas,

1863, but continued to reside there as before, that the case ought to be treated as if the new lease from that period had been granted to him, observing that he and Mrs. Crompton were so connected together in point of interest that they might, as regarded the question to be decided, be considered as the same person. They were therefore of opinion that plaintiff was not entitled to recover the 1,100*l.*, and that the nonsuit was right. From that judgment, however, Channell, B., dissented, and thought the plaintiff was entitled to judgment, because, though he did not actually leave the house at Christmas, 1863, he did not continue to reside there as tenant, nor possess any interest, legal or equitable, in the premises; and really had no more interest in them than a guest or any other person who might happen to be staying with Mrs. Crompton. But the learned baron being in a minority the rule to enter a verdict for the plaintiff was discharged: (see report below, 11 L. T. 737).

From that decision of the majority of the court the plaintiff Rideout appealed.

Plaintiff's point.—The 1,100*l.* was to be returned to the plaintiff in the event of his not being continued tenant at the rent payable under the original lease.

Defendants' points:—1. The judgment ought to be affirmed. 2. Defendant is entitled to the verdict on the issue on the third plea, inasmuch as plaintiff's tenancy and occupation of the premises in question continued after Christmas, 1863, to be substantially the same as before that date. 3. According to the meaning of the agreement of 10th October, 1861, plaintiff was not entitled to have the 1,100*l.* returned to him on the determination of the lease by Mrs. Lyne Stephens at Christmas, 1863, unless he thereupon actually left the house, which he did not do.

Karslake, Q.C. (*T. Jones* with him) now appeared to argue the case on behalf of the plaintiff, and contended that the judgment of Channell, B., below was right, and that the judgment of the majority of the Court of Exchequer ought to be reversed. The lease granted by Mrs. L. Stephens at Christmas, 1863, to Mrs. Crompton was an entirely new and different lease from the original one. It was made to a different lessee, for a different term and at a different rent. Plaintiff's lease and his interest in the premises were at an end. Mrs. L. Stephens had one way or another got the benefit of the 1,800*l.* which was intended for plaintiff's benefit, and the event had occurred in which the 1,100*l.* was to be returned to the plaintiff. The tenancy of Rideout referred to in the agreement as to be continued after Christmas, 1863, meant the identical holding, the legal or equitable tenancy settled by that agreement.

Bovill, Q.C. (with him *Mellish, Q.C.*, and *Bushby*) for defendant, contra, supported the judgment of the majority of the court below, which they contended was right, as plaintiffs had not as an actual matter of fact left the house.

During the argument *WILLES, J.*, referred to the cases of *Upton v. Townend* and *Upton v. Greenlees* (17 C.B. 30; 25 L. J. 44, C.P.), where the Common Pleas held that, to constitute an eviction of a tenant which would operate as a suspension of the rent, it was not necessary that there should be an actual physical expulsion from the premises; and *Karslake, Q.C.*, referred to *Locke v. Mathews* in the same court (7 L. T. 824; 32 L. J. 98, C.P.; 13 C.B. 753).

WILLES, J.—I am of opinion that the judgment pronounced by my Brother Channell in the court below in this case was right, and we are all, I believe, prepared to adhere to that judgment, and consequently to reverse the judgment of the majority of the Court of Exchequer. It appears that Mr. Lucas, the defendant, had obtained a lease from Mr. Lyne Stephens,

afterwards represented by Mrs. Lyne Stephens, for twenty-one years to date from Christmas, 1856, at a rent of 400*l.* a year, determinable, however, at the end of the first seven or fourteen years by notice to be given by either party. In the year 1861 Mr. Lucas entered into an agreement with Mr. Rideout the plaintiff, for a sale of that lease. One of the provisions of the agreement relates to the furniture, and with that provision our judgment has nothing to do, because the sum paid for the furniture was to be adjusted in an equitable manner between the parties, in the event only of the landlord, upon the sale of the lease, taking advantage of the condition for re-entry by an assignment without licence; and, inasmuch as that provision was not taken advantage of, it became unnecessary to appeal to the part of the agreement which provided for an equitable arrangement in respect of the furniture by the sale of it, and by the parties dividing between them the loss which should occur, taking the price paid and the price received at the sale. There was another matter to be provided for, which arose thus: Mr. Lucas had expended upon the place a sum of money larger than he was at all certain of having any return for, because it was expended in permanent improvements, and the only return he could expect was the enjoyment of the benefit of those improvements during the lease; and it would seem that certainly it was taken as the basis of the agreement between the parties that the tenant having made these improvements could not reap the benefit of them unless he were allowed to continue until the end of the first fourteen years. He had expended a sum of money in respect of which it would seem from the agreement of the parties, 1,800*l.* remained to be accounted for, and 1,800*l.* remained in respect of that of which the tenant could have no benefit, except by enjoyment up to the end of the first fourteen years. The agreement having been entered into in October, 1861, there remained two years and a quarter between the date of the agreement and Christmas, 1863, the expiration of the first seven years of the term for which the agreement was made; not only could the landlord, if he had thought proper to have objected, have evicted the lessee on the ground of the assignment without licence, but there was also a power in the lease for putting an end to the term by notice of six months by Christmas, 1863. The agreement entered into contained provisions by which the purchaser of the lease was to pay a sum of money down for the furniture to be sold in case of eviction, and then he was to pay down 1,800*l.* for improvements. In case of immediate eviction the clause which relates to the furniture was to come into force, and also there was to be returned the 1,800*l.* which was to be paid for improvements in respect of which in that case Mr. Rideout would have derived no benefit whatever. If however the landlord, or at that time the landlady, did not exercise the power of determining the lease at once, or take advantage of the provisions for re-entry, but allowed it to continue till Christmas, 1863, determined by six months' notice at that time, then it was provided that 1,100*l.* should be returned to Mr. Rideout; and at present I think I need not refer to the precise words in which that condition was made, but I must do so presently. On the other hand, it was provided that if Mr. Rideout's tenancy was continued beyond Christmas, 1863, then the whole of the 1,800*l.* was to be retained by Mr. Lucas; no provision was made with reference to the tenancy being put an end to at the end of the first fourteen years. Now nothing can be clearer than these facts, and nothing can be clearer than the fact that 1,800*l.* was, so to speak, to be worked out by the enjoyment under the lease; that 1,800*l.* would not be completely worked out unless the enjoyment under the lease should be continued for seven years after 1863; it could be in part worked out though the lease continued only up to Christmas, 1863. Moreover there was a chance—you may call it a tenant right if you will—there was that chance which everybody knows to exist, that the landlord would be more disposed to keep a good tenant upon an existing lease, than he would be to seek a new tenant with the risk that might belong to his new engagement, and a certain allowance

appears to have been made for that chance, and accordingly a sum of 700*l.* was to be considered as worked out in the two years and a quarter up to Christmas, 1863; and the whole sum was to be considered not worked out until seven years after Christmas, 1863, or at the expiration of the first fourteen years of the first contemplated tenancy. Now what are the terms in which provision is to be made for that?—"If Mrs. Lyne Stephens exercises the power of determining the lease at Christmas, 1863, and Mr. Rideout leaves the house, then 1,100*l.* is to be returned to Mr. Rideout." Now I take these words alone. What is the meaning of them? Determining a lease of course means determining it under the six months' notice at the end of the first seven or fourteen years clause. What is the meaning of "if Mr. Rideout leaves the house?" Several meanings may be given to it. It may mean, if Mr. Rideout happened to walk out of the house at the end of the term with his family, and leave it unoccupied; that may be the meaning of the condition of the return of the 1,100*l.*; that is a possible construction, but it seems a very strange and artificial construction of it, because one cannot help coming to the conclusion that the rights of the parties were probably to be determined at Christmas, 1863, and it was then to appear whether the 1,100*l.* was to be paid back or not; and it would be an extraordinary construction to say that 1,100*l.* was to be paid back, but it was not to be paid back until the day after Christmas, 1863, at which time Mr. Rideout might, by arrangement for his own convenience, be allowed to remain for a week or a month, or actually remove himself and his family from the place; that would be a very strange construction. The more natural construction would be that which reconciles "leaving the house" as meaning the leaving the house at the termination of the tenancy at Christmas, 1863. Now there are various meanings which may be given to "leaving the house" which will reconcile it with that more reasonable and probable view of the intention of the parties. One of them is this: Suppose that Mrs. Stephens gave a six months' notice, but between the period of giving it and its expiration she made an arrangement with Mr. Rideout by which he was to continue for seven years at the same rent and on the same terms, to begin at Christmas, 1863, then he would not have left the house at the end of the term according to my notion, even if he chose to walk out of it, and to let somebody else come in as the assignee of the new lease. The additional condition on Mr. Rideout leaving the house seems to me to provide against such a contingency as that, and that he would have had the same beneficial right to the house as he would have had if he had remained in the house, the lease not having been put an end to. Whether he enjoys that by himself by his actual presence in the house, or whether he could have enjoyed it by his assignee, would seem perfectly immaterial between the parties. Supposing that before the end of the six months' notice he had purchased the freehold instead of taking the new lease; supposing he had purchased Mrs. Lyne Stephens' reversionary interest in the house, and continued there, that would be a case in which the parties would, in all probability, provide for (using the same expression) working out the remainder of the expenditure of which he made payment to Mr. Lucas. Therefore, the construction of "leaving the house" does not mean that Mr. Rideout was to walk out with his baggage; but what it does mean is, that he loses the interest in the house which it was contemplated originally by the agreement he might have, and in respect of which only could he get the benefit of the expenditure which he had made; that would seem to be the most sensible construction. But not only is that so upon the first clause affecting this matter, but it is somewhat more clear when you turn to the alternative, or as Mr. Bovill called it, "the correlative clause." According to the argument, as to that advanced on the part of the defendant, there must be some further case which, as it were, slips through these provisions, and as to which the parties had not said anything at all, and the case before us must be that case. But is it necessary to arrive at such a conclusion? What

is the alternative? "If at Christmas, 1863, the tenancy of Mr. Rideout is continued, then the 1,800*l.* to be retained by Mr. Lucas." The alternative of "leaving the house" is, "if the tenancy of Mr. Rideout is continued." I by no means go the length of saying that, if Mr. Rideout had got a lease which was substantially the same as the lease under which it was contemplated by this agreement that he would enjoy, that if he had got such a lease as that, I am far from saying that in that case his tenancy would not have continued, or that the 1,100*l.* would be repayable. There were two ways in which his tenancy might be continued: the one by the landlady abstaining from exercising the power of determining the lease; and the other was by her exercising that power by the new agreement entered into between her and Mr. Rideout, by which he should have the tenancy under her, which was substantially equivalent, so to speak, to the tenancy which it was intended he should have under the agreement. I am far from saying, if that state of things had arisen, that the 1,100*l.* could be recovered, because the tenancy in all its terms was not the same; but I cannot fail to see that the alternative of "his leaving the house" was the continuance of his tenancy substantially under Mrs. Stephens. Now, if that be the true construction of the agreement, let us see what has happened, and how the facts found by the case are operated upon by the agreement so construed. The fact was, when Mr. Rideout entered into the agreement with Mr. Lucas, he contemplated having his aunt Mrs. Crompton to live at home with him in the house; and accordingly they both went and lived in the house and remained until the six months' notice was given by Mrs. Stephens. At the time of its expiration approaching, Mrs. Crompton took a lease from Mrs. Stephens, not upon the terms of the former lease, but upon much more onerous terms, namely, at the rent of 600*l.* a-year, the rent in the first lease being 400*l.* a-year. Assuming that Mrs. Crompton and Mr. Rideout were identical, I should feel great difficulty in arriving at the conclusion that Mr. Rideout had got an equivalent as a consideration for defendant's retaining the 1,100*l.*, for that which was contemplated by the agreement is a continuance of his tenancy; he would have obtained the lease for the seven years, but at an additional rent of 200*l.* a-year. But I think, as reference has been made to the red ink in the agreement, it may not be an inapt illustration to discount 200*l.* a-year by the times at which the several portions would have to be paid, to discount the 1,400*l.* by the periods at which the several sums of 200*l.* a-year would be payable, and to see what, between solvent persons, would be the present value of the house; and if we were allowed to enter into such a discussion, I think it would be found that the rent would come to something rather more than 1,100*l.* which Mr. Lucas is called on to return; but I disclaim founding an argument upon such a calculation as that. If we were to have an inquiry as to what people contemplate entering into every time a draft is settled, we should be involved in interminable contradiction; and professional men, who have to prepare drafts, would be put into a most awkward position, and would have to refer, not only to the drafts themselves, but perhaps to make full commentaries on what passed in parol when every alternative was introduced. I only refer to it for the purpose of taking off the edge of an observation made by Mr. Bovill, to the effect that this was a hardship; but, as at present advised, I do not see that it was a hardship at all. In the present state of things, assuming that Mrs. Crompton and Mr. Rideout are identical, what is the evidence that there is an identity of interest in these parties at all? What is the evidence to shew that Mrs. Crompton holds the lease of the house, such as it is, at the bidding of Mr. Rideout as his trustee, and that he has any control over that lease? Having carefully attended to the letters as referred to on the part of the defendant, and having read the case, I cannot find anything beyond the fact that she was nearly related to him that should induce us to arrive at that conclusion. Upon the whole it would seem that Mr. Rideout has paid 1,100*l.* which he wants to get back if he has not had the benefit of

the agreement that was entered into in 1861. He has not had that benefit, and he cannot claim that benefit to himself under the lease to Mrs. Crompton. Therefore the money which he has paid, and for which the consideration has failed, ought to be returned, and the judgment ought to be reversed.

The rest of the learned Judges concurred.

Judgment of the Exchequer reversed.

LORD ROMILLY, M.R., July 7, 1866.

Re CORK AND YOUGHAL RAILWAY COMPANY.

14 L. T. 750.

Companies Act, 1862—Orders of 11th November, 1862 (r. 2) Winding-up—Petition—Advertisements.

COMPANY.—Where it appeared that the advertisements required by the Orders of the 11th November, 1862 (r. 2), were duly published on the morning and evening of the 29th June, 1866, but the petition referred to by them was actually presented to the court between the times of the two publications, it was nevertheless—Held, that the petition was properly presented, and a winding-up order was made upon it accordingly.

This was a creditor's petition, and it prayed for an order to wind-up the above-named company.

The facts of the case were very shortly these:—

By the General Orders of the 11th November, 1862, regulating the mode of proceeding under the Companies Act, 1862 (r. 2), it was ordered that every petition for the winding-up of a company should be advertised seven clear days before the hearing, once in the *London Gazette*, and once at least in two London daily morning newspapers, and that the advertisements should state the day on which the petition was presented; and the name and address of the petitioner, and of his solicitor or London agent (if any).

By the Cork and Youghal, and Great Southern and Western Railway Companies Act, 1866 (with which was incorporated the Companies Act, 1862), this court was empowered, on the petition of any creditor of, or proprietor of shares in, the company to make an order for the winding of it up. That special Act received the Royal assent about four o'clock p.m. on Thursday, the 28th June last. On the morning of Friday, the 29th June, advertisements appeared in two of the London morning newspapers that a petition had on that day been presented praying for an order to wind-up the company, and the like advertisements appeared in the *London Gazette* of that evening. The evidence in the case showed that the petition referred to in the advertisement was not presented till eleven o'clock on the 29th June; that was to say, after the publication of the morning advertisements stating that it *had been* presented to the court. The question was, whether all the advertisements ought not to have been published before the petition had been actually presented?

Selwyn, Q.C. and *Graham Hastings* appeared for the petitioner, and contended that, as the petition was presented on the same day as that on which all the advertisements appeared; and as the court knew no fraction of a day, the rule of the court, as to advertisements, had been sufficiently observed.

Roxburgh appeared for some creditors of the company.

Baggallay, Q.C., and *Surrage*, for the company.

J. N. Higgins appeared for the official liquidator of the company (who had been appointed under a former order), and contended that, as the general order required the advertisements to state when the petition was presented, it had not been complied with in this instance. Moreover, the company was insolvent, and therefore security ought to be given for the costs of these proceedings.

LORD ROMILLY.—I am of opinion that in this case the usual winding-up order must be made. All that the terms of the general order require is, that the day on which the petition is actually presented should be stated. The mere fact that the petition was presented a few hours after the publication of the advertisement cannot possibly make it invalid. As to the finding security for the costs, that is an objection to the petition which, in the existing state of things, cannot now be taken. It requires notice to be given of its going to be taken. The winding-up order must therefore be made as prayed by the petition; and the costs of the parties who have appeared upon it must be paid out of the estate.

LORD ROMILLY, M.R., July 21, 1886.

Re THE COMPANIES ACT, 1862.

Re THE GENERAL INTERNATIONAL AGENCY COMPANY (LIMITED).

Ex parte ABEL CHAPMAN.

14 L. T. 752.

Company—Winding-up—Director—Contributory.

COMPANY.—*A. C. was one of the original directors of a company, and as such had signed the memorandum and articles of association. The articles provided that the qualification for a director should be the holding of twenty-five shares in the company. A. C. applied for the requisite number of shares, and paid the deposit on them, but before any allotment of the shares sent in his resignation as a director, and was repaid his deposit. In settling the list of contributories to the company the chief clerk inserted A. C.'s name:—Held, that A. C. was not a contributory to the company's liabilities, and that his name must be struck off the list of contributories accordingly.*

In this matter an application was made by Mr. Abel Chapman for an order directing his name to be struck off the list of contributories of the company, which was in the course of winding-up. Mr. Chapman had been put on the list in respect of twenty-five shares—a director's qualification. It appeared that Mr. Chapman was one of the original directors of the company, and had signed the memorandum and articles of association. The articles of association provided that a director's qualification should be twenty-five shares. Before any allotment of shares was made Mr. Chapman sent in his resignation as a member of the board of directors, which was accepted; and the deposit which he had paid upon the twenty-five shares, which he had previously applied for, was returned to him. Mr. Chapman had nothing more to do with the company. Notwithstanding these circumstances the chief clerk had put Mr. Chapman's name upon the list of contributories.

E. Charles appeared for Mr. Chapman, and contended that his name ought to be struck off the list.

Southgate, Q.C. and *Brooksbank* appeared for the official liquidator, and opposed the application on the ground that a director who held himself out to the public as possessing the necessary qualification ought to be bound, just as though

the shares constituting such qualification had been duly allotted to him. They further relied on the circumstance that Mr. Chapman had never actually withdrawn his application for shares.

LORD ROMILLY.—I am of opinion that Mr. Chapman cannot be fixed as a contributory in respect of these twenty-five shares. I must follow the Lords Justices' decision in the *Marquis of Abercorn's case*. I may observe that that case has been compromised by the marquis paying the sum of 10,000*l.*, and so the appeal in it has not reached the House of Lords. That case decided that the appointment of a party as a director of a company does not amount to an agreement by him to take the shares constituting the qualification. This application must therefore be granted, and the name of Mr. Abel Chapman struck off the list of contributories accordingly.

STUART, V.C., July 5, 1866.

GRIFFITHS v. THE CRYSTAL PALACE AND SOUTH LONDON
JUNCTION RAILWAY COMPANY.

14 L. T. 753; 12 Jur. N.S. 560.

Practice—Possession of land by railway company—Purchase-money—Order for payment into court before answer—Lands Clauses Consolidation Act, 1845.

COMPULSORY PURCHASE.—Where a railway company contracted for the purchase of land, and pending the negotiation entered into possession, but subsequently delayed to complete:—The Court, on motion, in a bill for specific performance, ordered the purchase-money to be paid into court before answer.

This was a motion for an order to compel the defendants, the Crystal Palace Railway Company, to pay into court within fourteen days after service thereof the purchase-money of certain lands belonging to the plaintiff, together with interest and costs.

The facts as stated by the bill were these:—

In July, 1863, the defendants being desirous of taking the property in question for the purposes of their railway, served the plaintiff with a notice to treat for the same. On the 10th December, 1863, the defendants, after having executed a bond and otherwise complied with the provisions of the Lands Clauses Consolidation Act, 1845, took possession of the property and constructed part of their line thereon.

After a long negotiation as to the sum to be paid for the property, and upon which point the parties were unable to agree, the plaintiff, on 23rd December, 1865, sent in his claim for compensation to the defendants. The amount of the purchase-money was eventually decided at an inquisition held by the sheriff of Surrey on the 6th February, 1866, and the defendants were then ordered, in accordance with the provisions of the Lands Clauses Act, 1845, to pay to the plaintiff the sum of 1,500*l.* The costs of the inquisition were subsequently taxed, at the sum of 224*l.* 5*s.*

The defendants, however, still delayed to complete the contract, and the plaintiff on the 2nd July, 1866, filed the present bill, praying (*inter alia*) that the defendants might be decreed to pay into court the purchase-money of 1,500*l.* with interest at 5 per cent. from the date of their entering into possession, and also the said sum of 224*l.* 5*s.*, and for an injunction to restrain the defendants from continuing in possession of the property until the purchase-money had been paid.

The defendants had not put in any answer.

Bacon, Q.C., and Edmund James appeared in support of the motion.

Kekewich, for the company, said that the bill was filed only three days ago, on the 2nd July; that leave to make the motion was obtained on the 3rd, and that the plaintiff's affidavit was not delivered until late on the 4th. He therefore asked that the motion might stand over for a week.

The VICE CHANCELLOR, in accordance with the notice of motion, ordered the defendants to pay into court within fourteen days after the service of the order the purchase-money and interest, and also the sum of 224*l.* 5*s.*, the costs of the inquisition.

Wood, V.C. July 14, 16, 1866.

Re THE COMPANIES ACT, 1862, AND *re* THE ORIENTAL COMMERCIAL BANK (LIMITED).

14 L. T. 755.

Joint-stock company—Winding-up—Compulsorily or voluntarily under supervision of the court.

COMPANY.—*The wishes of the majority of the creditors as to whether a company shall be wound-up voluntarily or compulsorily are to be first considered, and where these are properly expressed by public meeting or otherwise, effect will be given to them.*

Where therefore a majority of the creditors of a company desired that the affairs of such company should be wound-up compulsorily under the supervision of the court, although the directors and a considerable number of the shareholders were opposed to it, the Court made the order on a petitioning creditor's application to wind-up the affairs compulsorily.

This was the petition of certain of the directors of this banking company, praying that the affairs of the company might be wound-up under the Act compulsorily, "or in such other manner as the court might direct."

It appeared that the bank was incorporated in December, 1864, as a limited liability company with a capital of 3,000,000*l.*, and the object was to take over the business of a company called the Oriental Commercial Company (Limited), and the National Financial Company (Limited), for the purpose of carrying on mercantile, exchange, banking, and agency business of all kinds. The number of shares which had been issued was 43,000 and upwards, upon which 4*l.* per share had been paid or credited in respect of 22,753; 5*l.* per share credited upon 12,319 shares, and 7*l.* per share on 8,125.

In March, 1865, 25,000 additional shares had been created for the purpose of purchasing the business of another company called "The Financial Corporation Company (Limited)." These additional shares were to be allotted to the Corporation Company on which 6*l.* (credited as 5*l.* per share) was to be made up by the Corporation, the bank advancing 87,000*l.* to "protect its liquidation."

Considerable confusion seemed to exist as to the exact nature of this transaction, and a bill in this court was shortly afterwards filed to set it aside altogether. On the 18th May last, the bank stopped payment, and on the 28th of that month an order was made on a petition for winding-up the affairs of the Financial Corporation.

The present petition was filed on the 5th July inst.

It should be mentioned that a prior petition had been presented by an individual creditor who was subsequently bought off and the petition withdrawn.

On the 12th July an extraordinary general meeting was held, at which shareholders representing 29,176 shares out of 56,398 were present, and resolutions were passed to wind-up the affairs under supervision. An affidavit of the manager of the bank had been filed stating that eighteen creditors of the bank whose debts amounted to 236,000*l.* concurred in this view.

Rolt, Q.C., and *Little*, in support of the petition.

Lindley, who appeared in support of a petition by the chairman of the company, and representing 23 shareholders, took the same view.

Dickinson, for creditors amounting to 228,568*l.*, being holders of 22,614 shares, also took the same view.

W. M. James, Q.C., and *Karslake* appeared on a petition of the Alliance Bank, who were creditors of the Oriental Commercial Company to the amount of 9,200*l.*, and opposed the winding-up, desiring an order to wind-up the affairs compulsorily.

Eddis, T. A. Roberts, and *Roxburgh*, for parties creditors and shareholders, supported the application for a compulsory winding-up.

Rolt in reply.—The course to be pursued was that which should be the best for the general interest of all the shareholders, and not in compliance with the wishes of certain creditors. They had no rights independently of the general body of the proprietary.

The VICE CHANCELLOR, after stating the question raised and the parties who respectively required a voluntary or compulsory winding-up, said he could only repeat what he had often before said, that the spirit of the Act of Parliament under which these orders were made was to enable the court to deal with every party interested, as formerly was the case where a bill had been filed to wind-up an ordinary partnership. The 149th section of the Act was explicit, and governed the practice in all these cases. Here a considerable number of creditors appeared to be desirous that the affairs should be wound-up voluntarily. The cases before the Master of the Rolls showed that that branch of the court also considered that the scheme of the Act was to give all persons interested in the assets of a company the first right to be heard as to the mode in which the property, which was in truth theirs, should be disposed of. The rule in bankruptcy was the same. Where the wishes of the majority of the contributories were in favour of a voluntary winding-up, those wishes should be acceded to. This was laid down in the case of the *Imperial Mercantile Credit Association*, before him on the 25th June. In the present case, if it had been clear that a large majority of the creditors had been opposed to the petition of the Alliance Bank, he should have given weight to those wishes. But the wishes of the opposing creditors had not been expressed in a satisfactory manner. It had been suggested that further time should be given, but it had been already two months before the contributories. They had not before expressed any wishes upon the subject. Without calling any meeting, they now at the last moment did so. The court, doubtless, had the power to order a further meeting to be held, but there were three grounds why he thought he ought not to adopt that course: first, it was high time that the affairs of the company should be put in a train to be wound-up. Secondly, the creditors who opposed the compulsory winding-up were only eighteen in number. They, however, were said to represent 236,000*l.* But on the other hand there was a numerous body of the creditors, including one, the Alliance Bank, a creditor for 9,000*l.* and upwards, who were desirous of a compulsory winding-up. Thirdly, the circumstances were singular, to say the least of them, under which the bank, within three months of its commencement, had bought over the business of a company which itself had within the year become insolvent. Although he did not impute fraud, still the payment over of so large a sum as 87,000*l.* of the company's money was startling. It might admit of an

explanation, but it required a thorough investigation, and this could only be had under a compulsory winding-up. An order would be made on the several petitions for the winding-up in the usual form. The present liquidator, Mr. Cannan, could act as an interim liquidator. The Vice Chancellor then gave some special directions as to the costs; only two counsel were to be allowed for the Alliance Bank, one set of costs for the creditors and another for the shareholders.

PROBATE.

June 12, 1866.

ZEALEY v. VERZARD AND BRIDLE.

14 L. T. 769; L. R. 1 P. & D. 195.

County Court jurisdiction—New trial—Practice—21 & 22 Vict. c. 95, s. 10—20 & 21 Vict. c. 77, ss. 55—59.

WILL.—Where a case has been transferred to the County Court under the provisions of the Act, the Court of Probate ceases to have seisin of it, and its jurisdiction in respect of such cause extends only to the hearing of appeals from the decision of the County Court judge on points of law, or upon the admission or rejection of evidence.

The plaintiff, Arthur Zealey, propounded the will, dated 29th September, 1865, of James Verzard, who died on the 30th October, 1865, as the sole executor.

The defendant, the next-of-kin and heir-at-law, pleaded undue execution, incapacity, that the testator did not know and approve of the contents, and undue influence.

An affidavit was filed by the plaintiff that the personal estate of the deceased was under 200*l.* in value, and that at the time of his death he was not seised of or entitled beneficially to any real estate of the value of 300*l.*, and that he had his fixed place of abode in one of the districts specified in schedule A. to the Court of Probate Act, 1857.

The case was thereupon transferred to the County Court of that district, and was tried at Bridport by the County Court judge before a jury, who found that the will had been procured by the undue influence of the plaintiff.

On the 29th May a rule *nisi* was granted, on the motion of *Dr. Spinks*, for a new trial, on the ground that the verdict was against the weight of evidence.

Searle, for the defendants, showed cause against the rule, and contended that the Court of Probate had no jurisdiction in any case transferred under the Act to the County Court, unless the case was brought before it by way of appeal from the decision of the County Court judge upon a point of law. He referred to 20 & 21 Vict. c. 77, ss. 55, 59; 21 & 22 Vict. c. 95, s. 10; and the County Court Rules and Orders, 4th February, 1858.

Dr. Spinks, in support of the rule, argued that the court had a general authority to see that probate was not granted improperly, and to order matters of fact to be reinvestigated if it thought it desirable. Hitherto the same practice had been followed in cases tried in County Courts, as in issues directed to common law courts:

Thompson v. Crowder, 2 Sw. & Tr. 501.

SIR J. P. WILDE.—The question hardly admits of argument. It seems to have been taken for granted in some previous cases that the court has the same

power in cases tried in the County Courts as in cases in which issues are sent to be tried in the Superior Courts of common law, but now that attention has been called to the statute it is plain that it has not. The meaning of the statute is very clear. If the circumstances are such as to bring the case within the jurisdiction of the County Court, it is sent to the County Court; that court has seisin of the case, and is empowered to make a decree and to send such decree to the district registrar, who will fix the seal of the court to the document. It is said that in that state of things this court has a power of reviewing the investigation of facts which has taken place in the County Court, and of ascertaining whether the verdict was against the weight of evidence. It would be a sufficient answer to say that the case is within the jurisdiction of the County Court for all purposes, but section 58 is still stronger in the same direction, and removes all doubt, because it enacts, that "any party who shall be dissatisfied with the determination of the Judge of the County Court in point of law, or upon the admission or rejection of any evidence in any matter or cause under this Act, may appeal from the same to the Court of Probate in such manner, and subject to such regulations as may be provided by the rules and orders to be made under this Act, and the decision of the Court of Probate on such appeal shall be final"—a provision which would be unnecessary if this court had still seisin of the cause, and a new trial could be granted, as in the case of an issue directed to a superior court. The rule must, therefore, be discharged; but, as there has hitherto been some confusion in the practice, there will be no order as to costs.

LORDS JUSTICES, Jan. 26, 27, 29, 30, Feb. 20, 21, May 29, 1866.

BURKE v. ROGERSON.

14 L. T. 780; 12 Jur. N.S. 635: varying, 13 L. T. 415 (M.R.)

Suretyship—Vessel—Cargo—Munitions of war—Belligerent risk—Concealment of—Discharge of surety—Evidence—Pleadings—Correspondence not in issue.

PRINCIPAL AND SURETY.—*The defendant R. agreed to sell two steamships to the A. D. Steam Navigation Company, of which the plaintiffs were two of the directors, and it was agreed that the purchase-money should be paid partly in shares and partly in bills of exchange accepted by the company, and that the vessels should be mortgaged to R. to secure the remainder of the purchase-money. The plaintiffs then agreed to indorse certain of the bills, and in consideration of that guarantee, R. agreed that they should be owners of two-thirds of the property mortgaged. The vessels were never formally transferred to the company, and no mortgage was ever executed, but soon after the agreement R., acting as agent of his own firm, and assuming to act as agent of the company, dispatched the vessels to Constantinople, and thence dispatched one of them to Trebizond, laden with munitions of war for the Circassians, who were then at war with Russia:—Held, that, as the dangerous nature of the cargo, which exposed the vessel to extraordinary risk, was concealed from the company by R., he could not have enforced the agreement against the company, and (on this ground affirming the decree of the Master of the Rolls) that the plaintiffs were entitled to be relieved from their liability.*

Correspondence between R. and the company's manager at Constantinople, which tended to show that R. had dealt with the vessels when at that port as his

own absolute property, and had contemplated a sale there of one or both of them, was admitted as part of the evidence, although neither the correspondence itself nor R.'s alleged intention to sell was put in issue by the pleadings.

This was an appeal by the defendant Rogerson from a decree of the Master of the Rolls, the hearing before whom is reported 13 L. T. R. (N.S.) 115.

From that report, and the judgment below of Turner, L.J., the circumstances of the case and the nature of the contention sufficiently appear.

Southgate, Q.C. and *Locock Webb*, for the plaintiffs, supported the decree.

Selwyn, Q.C. and *Marten* argued the case on behalf of the appellant.

Fooks, jun., for the defendants, the Anglo-Danubian Steam Navigation Company, and for the defendant Couchman, took no part in the argument.

Southgate, Q.C., replied.

Judgment was reserved until the 29th May, when

LORD JUSTICE TURNER said:—The plaintiffs in this suit are two of the directors of the Anglo-Danubian Company, a limited company, which was formed in the year 1862 for the purposes, amongst others, of navigating the river Danube by steamships, and of working some coal-fields at Dobra, in the neighbourhood of that river. The nominal capital of the company was 220,000*l.* divided into twenty-two thousand shares of 10*l.* each, and at the first meeting of the company it was resolved that there should be five directors and that three of the directors should constitute a quorum of the board. The company had before the 28th May, 1863, two steamers, called the *Papin* and the *Bellet*, working on the Danube, and on the 28th May, 1863, John Rogerson, a shipowner, carrying on business in London and Newcastle under the firm of J. Rogerson and Co., made the following tender to the company: "To the directors of the Anglo-Danubian Steam Navigation Company,—We hereby offer to supply you with the three following steamers now in full working operation on the river Tyne, viz., *Chesapeake*, 2,000*l.*; *Louise Crawshay*, 5,500*l.*; *Harry Clasper*, 7,500*l.*—15,000*l.* The *Chesapeake* to be allowed to take on our account a quantity of goods to a port in the Black Sea at 4*l.* per ton freight on weight.—John Rogerson and Co." At the same time and in connection with this tender John Rogerson made an offer to lend money to the company and to take shares in it. This offer was as follows: "To the directors of the Anglo-Danubian Steam Navigation Company (Limited). I am willing and hereby offer to lend your company the sum of 11,000*l.* at 5 per cent. interest upon the company's acceptances for that sum to be drawn for in such proportionate amounts in each bill as I may require; one-half the amount to be drawn and accepted for at four months' date, and the other half at six months. The company to be entitled to require renewed bills at four and six months respectively, according to the tenor of the original bills to be drawn for one-half of each bill as it arrives at maturity upon payment in cash of the other half. The amount due upon such bills to be further secured by a mortgage in the usual form on the ships *Harry Clasper*, *Louise Crawshay*, and *Chesapeake*, and also by such deed of mortgage or charge upon all calls upon shares in the company now made, and due and owing, or to be hereafter made, such deed to be prepared by my solicitor and settled by counsel, and to contain all such clauses, agreements, and powers for my protection as counsel shall advise. A certified list of shareholders, amount paid on shares, and calls due to be forthwith furnished to my solicitor, as instructions to prepare the deed. I am willing also to take at par and pay in cash for 400 fully paid-up shares in the company, on the conditions hereinbefore contained being complied with. All legal expenses incurred by me to be repaid me by the company in any event." Upon this tender and offer being made, the directors of the company, at a meeting held on the same 28th May, resolved to accept the tender, subject to the approval of the boats, and to accept the offer subject to certain conditions and qualifica-

tions; but no final arrangement was come to at this meeting. Subsequently, and on the 1st June, 1863, Rogerson made a further tender to the company in these terms:—"To the directors of the Anglo-Danubian Steam Navigation and Colliery Company (Limited).—Gentlemen, we propose to sell you the following steamboats to be delivered in good working order in the river Tyne: the steamboat *Chesapeake* for 2,000*l.*; ditto *Louise Crawshay*, 5,500*l.*; ditto *Harry Clasper*, 7,500*l.*—15,000*l.* Payment in cash on delivery. The *Chesapeake* to take out for our account to a port on the Black Sea at 4*l.* per ton freight a quantity of goods. The *Chesapeake* and *Louise Crawshay* to be paid for now. The *Harry Clasper* to be paid, 2,000*l.* on account, and the balance on receipt of your order to send this boat out, which must be given within twelve months. The *Harry Clasper*, until this notice is given, to be worked by us for our sole benefit, and to be delivered over on demand in good working condition." The ships were then surveyed and reported on, and another meeting of the directors of the company was then held on the 2nd June, 1863, at which the following resolutions were passed:—"The board having taken into consideration the amount in arrear for deposits and calls upon all the shares, as well those that have been forfeited as those that have not been forfeited, and having also considered the amount that yet remains to be called up upon the non-forfeited shares, are of opinion that this company will be justified in purchasing two boats and accepting a loan of 5,500*l.* on the following terms, viz., to purchase (subject to inspection) the boat called the *Louise Crawshay* for 5,500*l.*, and the *Chesapeake* for 2,000*l.*, making together 7,500*l.*, to be paid for as follows: 2,000*l.* to be paid by Mr. Rogerson on his taking 200 shares in the company, which are to be deemed as fully paid up shares, and by the company's acceptances for 1,000*l.* and 1,000*l.* and 750*l.*, in all 2,750*l.*, payable at four months after that date, and also the company's acceptances for 1,000*l.*, and 1,000*l.* and 334*l.* and 416*l.*, making in all 2,750*l.*, at six months after date; but the payment of all such acceptances to be deemed satisfied, if the board shall so desire, by half the amount of such acceptances being paid in cash when due, and the other half by acceptances of the company, payable at four and six months, as the case may be, according to the tenor of the original acceptances. The due payment of these acceptances to be collaterally secured by a mortgage of the two boats above mentioned, with power of sale not to be exercisable until after default, and after fourteen days' written notice to the company, and also to be secured by a mortgage of the calls already made and unpaid, and hereafter to be made, on the shareholders whose names are stated in a list to be furnished to Mr. Rogerson or his solicitors, with liberty, however, for the directors to apply a sum not exceeding 1,500*l.* out of such arrears or calls towards the debts and liabilities of the company. Mr. Rogerson also to provide funds as and when required to the extent of 1,000*l.* for the purpose of dispatching and working the two boats above mentioned, and also for working the boats called the *Papin* and the *Bellot*, and for working the coal-fields at Dobra under arrangements to be made to the mutual satisfaction of Mr. Rogerson and the directors. The directors defer the consideration of the purchase of the boat called the *Harry Clasper*. Mr. Rogerson having expressed his approval of the above, it was therefore resolved that the purchase of the two boats called the *Chesapeake* and the *Louise Crawshay* be carried out, and the payment for the same effected in the manner and upon the terms above mentioned, but subject to legal approval." Then they read the letter of the gentleman who inspected the ships, who reported in favour of the vessels, and then it was further resolved, that simultaneously with the above arrangements being carried out to the satisfaction of the legal advisers of the company, and of Mr. Rogerson, the latter should be empowered, subject to the limit of expense after mentioned, to get ready and insure and dispatch to the Danube, for and on behalf of the company, the two boats called the *Louise Crawshay* and the *Chesapeake*, and also to provide and send out by these boats proper materials for working the colliery, and that he also be empowered to send out for the company and maintain seven men for working the collieries, he also, for the company, to pay their wages. It was

further resolved " that the court will reimburse Mr. Rogerson for any necessary expenses that he may incur to the satisfaction of the directors for the above purposes to the extent of 1,000*l.*, Mr. Rogerson on his part undertaking to provide the necessary funds to that extent as and when required, it being understood that such reimbursements may be made, if the directors shall so desire, by acceptances of the company to be given from time to time according to the outlay actually made and approved, and to be payable respectively at four months after date." It was further resolved, " that Mr. C. Lankasky be appointed manager of the boats and collieries, and of the traffic and business of the company, at the weekly salary of 3*l.*, in addition to his reasonable and necessary travelling expenses. Mr. Lankasky to act in accordance with written instructions to be furnished to him through the secretary of the company."

In pursuance of these arrangements, 200 shares in the company were, on the 6th June, 1863, allotted to John Rogerson, and he paid 2,000*l.* for the shares and received it back again in part payment of the purchase-money for the ships. In further pursuance of these arrangements, seven bills of exchange drawn by John Rogerson upon the company for sums amounting in the whole to 7,500*l.* were accepted by the company, three of these bills being at four months for the sums of 1,000*l.*, 1,000*l.*, and 750*l.*, and the other four bills being at six months for the sums of 1,000*l.*, 1,000*l.*, 416*l.*, and 334*l.*; and on the 11th June, 1863, all these bills thus accepted were handed over to John Rogerson. On the same day the secretary of the company, at the request of John Rogerson, addressed to him a letter which was in these terms: " I am instructed by the board of directors to authorize you to dispatch the two steamers, the *Chesapeake* and the *Louise Crawshaw*, to the Danube immediately, together with such materials as you may deem requisite to work the boats and conduct the traffic of the company on the river, and the Theiss and Save. I am further directed to authorize you to send out such a number of miners, and such quantities of tools and materials, as you may deem requisite to work the mines of the company at Dobra." In the meantime an arrangement had been come to between the plaintiffs, and John Rogerson for the plaintiffs, indorsing the bills upon terms agreed upon between them. These terms were contained in two letters of guarantee bearing date respectively the 5th June, 1863, and were as follows: " Gentlemen,—In consideration of your agreeing to guarantee the payment of the acceptances of the Anglo-Danubian Steam Navigation Company drawn for the purpose of paying for the boats to the extent of two-thirds of the 5,500*l.*"—that is the difference between the 7,500*l.* and the 2,000*l.* which Rogerson paid to Kearns and received back in respect of the ships—" to the extent of two-thirds of the 5,500*l.*, that is 3,667*l.*, I engage that you shall not be called upon to pay under that guarantee except upon the following date, viz., twelve months from the dates of the bills 1,833*l.* 10*s.*, eighteen months from the dates of the bills 1,833*l.* 10*s.*, you agreeing to indorse new bills to take up those first drawn until they will come to the dates named, that is, twelve and eighteen months respectively, at which date you become owners of two-thirds of the property mortgaged to Jno. Rogerson and Co. It is further understood that you will accept bills to raise the funds to work the boats and colliery, you being liable, in event of the company not paying, to the extent of two-thirds of the amount, which is not to exceed 1,000*l.*" The other letter of guarantee of the same date was signed by Rogerson and Co., Burke and Kearns, and it is in these terms; it is addressed to Mr. Rogerson: " Sir,—We agree to the contents of your letter dated 5th June, 1863; that is, we guarantee payment of the acceptances of the Anglo-Danubian Steam Navigation Company to the extent of 3,667*l.*, in event of the company not paying them, in twelve months, say for 1,833*l.* 10*s.*, at eighteen months for 1,833*l.* 10*s.*, and we also agree to keep our indorsement on bills to keep them negotiable until they mature. We also agree to accept bills to raise the funds to work the boats and colliery, and to be liable for two-thirds in event of the company not paying the same to the extent of 1,000*l.*, John Rogerson and Co. being responsible for the remaining one-third to the bank." The

company also afterwards accepted two other bills drawn upon them by Rogerson for the sums of 500*l.* and 300*l.* in part of the 1,000*l.* agreed to be advanced by him.

The two steamships, the *Chesapeake* and the *Louise Crawshay*, were dispatched by John Rogerson and Co. from Newcastle and proceeded to Constantinople. They reached that place at the following times, the *Chesapeake* on the 20th August, and the *Louise Crawshay* on the 23rd September, 1863. They were not sent on to the Danube. The *Chesapeake*, when she left this country, and indeed when she was agreed to be sold to the company, had on board a considerable quantity of munitions of war for the use of the Circassians in the war in which they were then engaged with Russia, and after her arrival at Constantinople she proceeded with this cargo to the neighbourhood of Trebizond, where she delivered the cargo, and then returned to Constantinople, arriving there on the 18th September. Her crew was soon afterwards discharged by Rogerson, and she was berthed at Constantinople. The crew of the *Louise Crawshay* was also discharged soon after her arrival at Constantinople, and she was also berthed there. The three bills for 1,000*l.*, 1,000*l.*, and 750*l.*, which were drawn payable at four months, became due on the 8th October, 1863. They were not paid by the company, and on the 9th and 12th October, 1863, John Rogerson commenced an action at law against the plaintiffs upon these bills. The plaintiffs thereupon, on the 22nd December, 1863, filed the bill in this cause against John Rogerson, William Scott, who was his partner in the firm of J. Rogerson and Co., and John William Couchman, another of the directors of the company who had taken part in the resolutions of June, 1863, and in the indorsement of the bills by the company, and also against the Anglo-Danubian Company, setting forth in detail a great variety of circumstances connected with the purchase of the ships by the company, the indorsement of the bills by the plaintiffs, the guarantee given to them by Rogerson and Co., the dispatch of the vessels from this country, their being berthed at Constantinople, and their having been, as alleged, subsequently employed by Rogerson, and therefore praying "that it might be declared that, under the circumstances, the plaintiffs were altogether discharged from liability on the bills so indorsed as aforesaid, and that the defendants John Rogerson and William Scott are severally bound and ought to indemnify the plaintiffs against the actions of Messrs. Lambton and Co."—there was an action brought by Messrs. Lambton and Co. upon one of the bills which had been indorsed, and which the plaintiffs had been compelled to pay—"or that the defendants J. Rogerson and W. Scott may be decreed specifically to perform the agreements of the 2nd and 5th June, 1863, the plaintiffs being ready and willing, and thereby offering specifically to perform such agreements on their part. That an account may be taken under the directions of the court of all moneys received by J. Rogerson and W. Scott, or either of them, or by any other person for their or his use, and of all moneys, if any, agreed to be paid to John Rogerson and William Scott, or either of them, and not yet received for or in respect of the conveyance of passengers or freight conveyed by or otherwise for or in respect of the use or employment of the steamers the *Chesapeake* and *Louise Crawshay* respectively, since the 2nd June, 1863, and of the profits realised by J. Rogerson and W. Scott, or either of them, for the adventure or speculation. That it may be declared that what upon taking such account may be found to be due from J. Rogerson and W. Scott respectively, ought to be applied, so far as may be necessary, in satisfaction of the sums due on the seven several bills of exchange;" and then the bill prays for an injunction to restrain the actions commenced in the indorsement of the bills.

The bill, which is most loosely and inaptly drawn, rests, as I understand it, on the right of the plaintiffs to be relieved from their liability upon the bills on several grounds. First, that the agreement by the company for the purchase of the ships was made upon the faith of representations on the part of Rogerson which were not well founded, and of promises on his part which were not performed, and amongst other such representations and promises, it alleges

that he promised that the ships, if the company would purchase them, should be forthwith vested in the company, and he would procure the company to be duly registered as the owners of them, and the ships should be immediately dispatched to the Danube, which the bill alleges was of great importance to the company, with a view to their securing the benefit of the autumn trade on the river in that year; but that in fact Rogerson had not at the time any title to the ships, and that the ships were never in fact sent to the Danube; secondly, that the mortgages stipulated for by the agreement of the company to be made to Rogerson, were not in fact procured by him to be made; and, thirdly, that the defendant Rogerson was not entitled under the agreement for the purchase by the company to take any freight to any port on the Black Sea, and that he took on board the *Chesapeake* the munitions of war above mentioned with full knowledge of the purpose for which they were intended, and thereby exposed that vessel to the risk of being seized and confiscated by the Russians, and that he wholly concealed from the plaintiffs the fact of the vessel being laden with such munitions of war.

The defendant Rogerson, by his answer, insists in effect that he had a good title to the ships, and that the ships were not sent to the Danube in consequence only of the necessary funds for that purpose not having been supplied by the company or the plaintiffs, he having expended the 1,000*l.* agreed to be advanced by him; that the mortgages were not taken by him only in consequence of the agreement on the part of the company to furnish the list of the calls and of the shareholders not having been fulfilled by them; and that under the agreement with the company he was entitled to carry cargo, although consisting of the above-mentioned munitions of war; and by the answer he wholly denies having made any such false or fraudulent representations as are alleged by the bill, and he alleges that the sale of the steamships proceeded throughout upon the footing of the plaintiffs being personally responsible for the purchase-money.

There is an enormous mass of evidence in the cause, consisting in part of letters and other documents, and in part of affidavits and depositions. Amongst the letters in evidence there is a long correspondence between the defendant Rogerson and Mr. Lankasky, the managing agent of the company at Constantinople, from which it clearly appears that, very soon after the steamships had been purchased by the company, the defendant Rogerson contemplated selling the ships when they arrived at Constantinople, and that he was continually intending to do so, and gave express directions that this intention on his part should not be made known to the Anglo-Danubian Company. The parol evidence, consisting of the affidavits and depositions, is painfully conflicting and contradictory, and if it were necessary to decide the case upon that evidence, I should feel great difficulty in arriving at a conclusion upon it, although, upon the whole, I think that the evidence on the part of the plaintiffs is more trustworthy than that on the part of the defendants. In the progress of the cause the plaintiffs paid into court to the credit of the cause the sum of 3,333*l.* 13*s.* 4*d.* as the price of an interim injunction to restrain the proceedings in the actions brought against them, and at the time of the hearing of the cause there was in court the sum of 3,823*l.* 14*s.* 2*d.* Bank Three per Cent. Annuities, which had arisen from the money so paid in. The steamships were also sold in the progress of the cause, and at the time of the hearing there was also in court the sum of 1,706*l.* 9*s.* 5*d.* Bank Three per Cent. Annuities, which had arisen from the proceeds of the sale of the steamships. There was likewise in court at the time of the hearing of the cause the sum of 550*l.* 15*s.* Bank Three per Cent Annuities, which stood in trust in the cause, and in another cause of the *Anglo-Danubian Steam Navigation and Colliery Company (Limited) v. Rogerson*, and had arisen from moneys paid in by the company. Upon the hearing of the cause the Master of the Rolls made the following decree:—It was declared that the plaintiffs were not liable upon the bills of exchange indorsed by them as in the pleadings mentioned, or any of such bills; and generally an injunction was granted to restrain the defendants from suing

upon those bills, and the plaintiffs having, pursuant to the order we made and the Master of the Rolls before us, paid the sum of 3,333*l.* 13*s.* 4*d.* into court, and that being invested, and there being in court in the whole this sum of 5,530*l.*, it was ordered that 3,823*l.* Bank Three per Cent. Annuities, part of the 5,530*l.* Bank Annuities, and any interest accrued due upon them, be transferred and paid to the plaintiffs, but such transfer and payments were not to take place until after a certain time; that is, giving back to the plaintiffs the sum which they had paid in as the price of the injunction, the court being of opinion that the injunction was proper, and the injunction was made perpetual. Then it was declared that Rogerson and Scott were bound to recoup to the plaintiffs the sum of 1,003*l.* 14*s.* paid by them on the 4th January, 1864, to Messrs. Lambton and Co.; that is, Burke and Kearns having been made liable upon one of the bills which they had indorsed, which had been handed over to Lambton and Co., and having been compelled to pay that amount, they were entitled to recover that amount from Rogerson and Co. Then there is a direction to tax the costs. And it was ordered that the plaintiffs Burke and Kearns do pay to the Anglo-Danubian Steam Navigation and Colliery Company and John William Couchman, their costs and add those costs to their own, and then it was ordered that Rogerson and Scott should pay to the plaintiffs the balance of the sum of 1,003*l.* 14*s.* and interest, and of the taxed costs of the plaintiffs in this suit, and Rogerson having paid into court to the credit of *Burke v. Rogerson* the sum of 1,537*l.* 19*s.* 2*d.* appearing to have been the proceeds of the sale of the steamers, it was ordered that 1,706*l.* 9*s.* 5*d.* Bank Three per Cent. Annuities, being the residue of the 5,530*l.* 3*s.* 7*d.* like annuities which had arisen from the sale of the ships, be sold; the residue of the Bank Annuities which were in court was ordered to be sold, and it was ordered that out of the money to arise by such sale, and any interest to accrue on the sum of 1,706*l.* 9*s.* 5*d.*, the 1,000*l.* and interest should be paid, and out of the residue of those moneys the costs were to be paid; it provided for the payment of the costs, that is, applying the proceeds of the sale of the ships to the payment of the amount which had been paid upon the bills, and also payment of the costs, and it was ordered that the ultimate residue should be paid to the defendant John Rogerson, and there is a special direction given as to what is to be done if that money is not sufficient to pay the 1,003*l.* 14*s.* and interest and the costs in full. That is the substance of the Master of the Rolls' decree.

The appeal before us is by the defendant Rogerson from this decree. In disposing of it we must first consider upon what evidence we are to proceed. It was objected on the part of the appellant that the correspondence between him and Lankasky, the manager of the company at Constantinople, with reference to the sale of the ships after they arrived at Constantinople, ought not to be received in evidence against him. Neither the correspondence itself, nor the fact of such a sale having been intended, is put in issue by the pleadings in the case, and it is wonderful that the plaintiff should not have put that upon the record. But this correspondence cannot, I think, be wholly disregarded. It must, as it seems to me, be receivable in evidence at least to this extent, to show that the ships were detained at Constantinople for the appellant's own purposes, and not for the reasons alleged by him, and whether it would be sufficient for that purpose I need not say. I am satisfied, however, that this correspondence is not so put in issue as that the court can properly act upon it without some further inquiry, and I proceed therefore to consider the points of the case without reference to this correspondence, and first, as to the point relied upon by the plaintiffs that the appellant had no title to the ships. I think that the plaintiffs cannot maintain their right to the relief given by the decree upon that ground. The agreement between the company and the appellant fixes no time for the completion of the purchase, and there is nothing so far as I can find upon the face of the agreement which can make the immediate completion of the purchase of the essence of the contract. What was really of importance to the company was not the transfer to them of the ships, but the dispatch of the

ships to the Danube, and they were in fact dispatched upon the voyage and by the order of the company, as appears by the letter of the 11th June, 1863; that letter may well be considered to have constituted Rogerson the agent of the company to dispatch the ships, and to amount in effect to the delivery of possession of the ships to the company. But whether this be so or not the company surely cannot be heard to complain that Rogerson had at this time no title to the ships when they directed him to deal with them before any title was shown; and if they could not then complain of an absence of title on his part, I see no fixed period at which they could become entitled so to complain. This part of the case does not even rest here, for as early as the 13th June both the company and the plaintiffs knew that Rogerson was not the registered owner of the ships, and yet they continued to treat the agreement as subsisting, and took no steps to repudiate it.

Then as to the ships not having been sent to the Danube, I think the plaintiffs' title to the relief given by this decree fails upon this point also, for Rogerson was not bound to advance beyond 1,000*l.* for sending the ships to the Danube and for other purposes, and when the ships reached Constantinople he had advanced beyond that amount, and both the company and the plaintiffs though applied to for the purpose, failed to supply the further funds which were necessary for sending forward the ships.

Again, as to Rogerson not having procured the mortgages which by the agreement were stipulated to be made to him, I do not think that there was any such default on his part in this respect as could entitle the plaintiffs to the relief given by the decree. He was entitled, I think, to have the whole transaction completed at the same time, and was not bound to take the mortgage of the ships without the mortgage of the calls, and the company has never supplied the means of completing the mortgage of the calls, which under the agreement they were bound to do. Besides, the draft mortgage of the calls was sent to them for approval upon the 13th June, and was not returned by them until the 19th August, 1863, when Rogerson was on the point of leaving this country. Then, as to the representations alleged to have been made by the appellant. Although, as I have said, I distrust the evidence on his part more than that on the part of the plaintiffs, I am far from being satisfied with the evidence on their part as to these representations, and I should hesitate long before affirming this decree upon the faith of that evidence. If it was necessary to decide this case upon the question whether the representations alleged to have been made by the appellant were in fact made by him, I am disposed to think that we could not safely come to any decision upon it without some further investigation, either by means of issues, or by examination of witnesses before us.

But I think it is not necessary to take either of these courses. I am satisfied upon the evidence that the *Chesapeake*, when dispatched from this country, was, and was known by the appellant to be, laden with munitions of war for the use of the Circassians in their war with Russia, and that this fact was not communicated by the appellant either to the company or to the plaintiffs, and I think that this fact alone is sufficient to entitle the plaintiffs to be relieved from their liability upon the bills in question. It is, as I have stated, alleged by the answer of the appellant that the negotiations for the purchase of the ships proceeded upon the footing that the plaintiffs were to be responsible for the full amount of the purchase-money, but upon whatever footing the negotiation may have proceeded, I am satisfied that it was concluded upon the footing that the plaintiffs were to be liable as sureties, and not as principals. The indorsements of the bills, and the letters of guarantee, are but parts of one and the same transaction, and must be looked at together; and by the letters of guarantee Rogerson, in consideration of the plaintiffs agreeing to guarantee the payment of the acceptances, enters into certain engagements referred to in the letters, and the plaintiffs, on the other hand, guarantee the payment of the acceptances. It is by the indorsements only the plaintiffs could be liable for the full amount of the bills; they would not be liable for more than two-thirds of the amount upon

the guarantee itself. The plaintiffs therefore were in the position of sureties, and I take it to be clear beyond all doubt, that in all cases of principal and surety, the surety paying the debt is entitled to the benefit of all securities which the creditor has against the principal. Upon that rule, therefore, the plaintiffs paying these bills would be entitled to the benefit of the mortgages agreed to be given to Rogerson; but, beyond this, it is in terms agreed by the letters of guarantee that the plaintiffs, upon payment of two-thirds of the amount of the bills, should become owners of two-thirds of the property mortgaged to Rogerson and Co., so that in any event the plaintiffs to the extent of two-thirds at least of what they should pay upon the bills were to have the benefit of the mortgages.

Now, what was the position of Rogerson as to these mortgages? His right to have them granted to him would be enforced only in equity; but, would a Court of equity have decreed the company to grant these mortgages when it appeared that the fact of one of the ships being laden with a cargo, which, to say the least, would expose her to extraordinary risks, was known to the appellant, and was concealed from the company? I am of opinion that it would not. It was said for the plaintiffs, that by carrying this cargo the ship was rendered liable to seizure and confiscation. I do not enter into that point; I do not think it necessary to do so. It is, in my opinion, sufficient that she was exposed to extraordinary risks, and that this fact was concealed from the plaintiffs. The correspondence with Lankasky proves that Rogerson was well aware of the risk to which the ship was exposed by carrying this cargo. Rogerson, therefore, in my opinion, could not have compelled the company to grant these mortgages, and of course could not give the plaintiffs the benefit of them, and in this state of circumstances I think he has been properly held to have released the plaintiffs from their liability upon the bills. To this extent, therefore, I agree in the decree appealed from; but the decree has gone further and has fixed the payment of the 1,000*l.* and of the costs upon the proceeds of the sale of the ships, and I cannot follow the decree to this extent. If the ships had not been sold, I do not see how a sale of them could have been ordered to meet these payments, and I think that the proceeds of the sale of them must stand in the same position as the ships themselves would have stood in if they had remained unsold. In my opinion, therefore, this part of the decree ought to be discharged, and these sums ordered to be paid by Rogerson and Scott. This, however, is more a matter of form than of substance, and ought not, I think, to absolve the appellant from the payment of the costs of the appeal, which, in my opinion, must be ordered to be paid by him.

LORD JUSTICE KNIGHT BRUCE said:—My conclusion is the same, and substantially on the same grounds.

LORD ROMILLY, M.R., July 17, 18, 1866.

CROSLY v. PERKES.

14 L. T. 786.

Abortive company—Promoters—New company—Claim by plaintiffs for promotion money—Claim disallowed.

COMPANY.—In 1857 the plaintiffs projected a company for lighting Bombay with gas, and, as the defendant insisted, agreed to employ him as their engineer. The concession for that company was obtained, but the company never was formed. In 1862 a new company was established, which obtained the benefit of the concession. A sum of 5,500*l.* was, by the articles of the new company,

authorized to be paid to five of the directors, to indemnify them for guaranteeing the new company against any claim on behalf of the old intended one. The defendant never was employed as engineer, nor did he receive certain other payments which it was agreed he should receive. In 1864 he brought an action for damages against two persons whom he considered to be liable to him under the agreement of 1857, for a breach of it, in not having employed him as the engineer, and in not having made to him the payments agreed upon. He then treated the two companies as identical. That action was afterwards compromised; and under the compromise the defendant was to receive the sum of 2,500l. The plaintiffs believing that that sum was to be paid out of the 5,500l. "as one of the original liabilities of the projected company," filed a bill against the defendant, relying upon an alleged agreement said to have been entered into between them and E. of the one part and the defendant of the other part, praying a declaration that they were entitled to one-third of the 2,500l. "as promotion money," and for other relief in respect of their claim:—Held, on motion for a decree, that there was no evidence of the alleged agreement, and that the plaintiffs were not entitled to the declaration which they sought.

Motion for decree.

The facts of the case, so far as they are material to this report, were shortly these:—

In 1857 the plaintiffs entered into a correspondence with a Mr. Evans and the defendant, an engineer, with reference to the promotion of a company for lighting Bombay with gas. The effect of that correspondence was alleged to be to constitute an agreement between the plaintiffs and Evans of the one part, and the defendant of the other, for the sale to the company which the plaintiffs were promoting of a concession for lighting Bombay with gas. The concession was to be obtained by the defendant in consideration of a sum to be paid partly in cash, and partly in paid-up shares of the company. Two-thirds of those shares were to be retained by the defendant, and one-third by the plaintiffs and Evans, and were to be divided between them as they might think proper. The concession was obtained by the defendant, but made out "to a responsible company, with a capital of not less than 50,000l., and to be approved of by the Government."

The projected company never was formed. The provisional directors of it, however—and among them was a Mr. Price—had passed a resolution to pay 6 per cent. on the capital of 50,000l. to the defendant, and to employ him as their engineer.

In 1862 the Bombay Gas Company (Limited) was formed with a larger capital than that of the originally intended company. The directors of the Bombay Gas Company were, with the exception of Evans, composed of entirely different persons from those who had been the provisional directors of the company projected in 1857. The directors of the Bombay Gas Company ultimately obtained the benefit of the original concession. By the articles of association of the Bombay Gas Company, a sum of 5,500l. was authorised to be and was afterwards paid to Evans and four other directors, in consideration of their guaranteeing the Bombay Gas Company against all prior liabilities incurred in connection with or arising out of the promotion of the original intended company in 1857. The defendant was not employed as an engineer. In fact, as the company who were to have employed him as such never really existed, he could not be so employed. Notwithstanding that, he brought an action against Evans and Price for a breach of the agreement to employ him as engineer, and for nonpayment of the 6 per cent. on the 50,000l. That action was compromised, and under the compromise the defendant was to receive a sum of 2,500l. In that action the defendant had treated the Bombay Gas Company of 1862 as identical with that of 1857, although Evans, who was his witness in the action, swore that the two

companies were different companies, and that the first intended company never was, in fact, formed.

It appeared that the 2,500*l.* to be received by the defendant was about to be paid out of the aforesaid 5,500*l.* "as one of the original liabilities of the projected company." That being so, the plaintiffs filed their bill in this suit, to obtain a declaration that they were entitled to their share of one-third of it, and Evans to the remainder of the one-third; or, if he did not claim any portion of such one-third, then that they were entitled to the whole of such one-third as "promotion money," under the agreement of 1857; and that the defendant might (if necessary) be restrained from receiving from Evans and the other directors the one-third belonging to the plaintiffs.

Baggallay, Q.C., and *E. K. Karslake* appeared for the plaintiffs, and contended that, as the defendant had treated the two companies in the action as identical, he could not now say otherwise; but, if so, the agreement entered into in 1857 was still valid, and the plaintiffs were entitled under it to the declaration they asked.

Selwyn, Q.C., and *Dickinson* contra, for the defendant, denied that either the companies were identical, or the agreement a valid one.

Baggallay, Q.C., in reply.

LORD ROMILLY.—I have carefully considered this case, Mr. Baggallay, and I must say that I think the plaintiffs in it have no equity. They come here to get this court to give them what is virtually the benefit of a concluded contract. But I cannot find any such contract in the materials supplied by the evidence in the suit. From a portion of that evidence I think that in 1858 the parties themselves considered there was then no concluded agreement, and I see nothing since to alter that state of things. Moreover, the plaintiffs' case contradicts itself. They pray, in effect, by their bill, first, that the whole of the one-third of the 2,500*l.* may be paid to them "as promotion money" under the alleged agreement; and secondly, that the defendant may (if necessary) be restrained from receiving from Evans and the other directors of the company the one-third which belonged to the plaintiffs. But as to the first part of that prayer, there is, as I have said, no evidence of, and indeed there is not, any such agreement; and as to the second part of the prayer, the 2,500*l.* is to be paid by Evans and Price, two persons who are not either jointly or severally either the past company or the existing one. I must hold, therefore, that the plaintiffs have failed in their contention in this suit, and the usual consequences will follow.

LORD ROMILLY, M.R., July 19, 1866.

ASHFORD v. THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

14 L. T. 787.

Railway company—Lands Clauses Act, 1845, s. 85—Company in possession—Inadequate payment—Difference ordered into court.

COMPULSORY PURCHASE.—Where a railway company took possession of the plaintiff's lands, under the Lands Clauses Consolidation Act, 1845, s. 85, paid into court 868*l.* as the value of the land, and the land was afterwards duly valued at 1,227*l.*, and the plaintiff moved for an order directing the

company to pay the difference in the value into court: it was Held, that the difference must be paid in forthwith.

By the Lands Clauses Consolidation Act, 1845, s. 85, it was enacted as follows:

That if the promoters of the undertaking shall be desirous of entering upon and using any lands before an agreement shall have been come to or an award made or verdict given for the purchase-money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the bank by way of security as hereinafter mentioned, either the amount of the purchase-money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall by a surveyor appointed by two justices in the manner hereinbefore provided in the case of parties who can not be found be determined to be the value of such land or of the interest therein which such party is entitled to or enabled to sell and convey, and also to give to such party a bond under the common seal of the promoters if they are a corporation, or if they are not a corporation under the hands and seal of the promoters or any two of them with two sufficient securities to be approved of by two justices in case the parties differ, in a penal sum equal to the sum so to be deposited conditioned for payment to such party, or for deposit in the bank for the benefit of the parties interested in such lands as the case may require under the provision herein contained, of all such purchase-money or compensation as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon at the rate of 5l. per centum per annum from the time of entering on such lands until such purchase-money or compensation shall be paid to such party or deposited in the bank for the benefit of the parties interested in such lands under the provisions herein contained; and upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands without having first paid or deposited the purchase-money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them under the provisions of this or their special Act.

The facts of the case were very shortly these:—

The London, Chatham, and Dover Railway Company took possession of certain land belonging to the plaintiff in this suit, under the above-stated section, and paid into court in respect of the land so taken the sum of 868l. The land was afterwards duly valued by an arbitrator, and its actual value was then ascertained to be 1,227l.

Schwyn, Q.C., and G. N. Colt, for the plaintiff, moved for an order directing the company to pay into court the difference between the 868l. and 1,227l.

Baggallay, Q.C., and Kekewich, for the company, contended that no order for payment of purchase-money into court could be made, unless the purchaser had been let into possession under an agreement with the vendor. Here, however, the railway company had taken possession of the plaintiff's land *quasi in invitum*, under the compulsory powers of the Lands Clauses Act.

LORD ROMILLY.—Two things are clear in this case; first, that the company have taken possession of the land under the statute; and secondly, that they have not paid the full value for the land. It would, in my opinion, be most inequitable to allow them to remain in the possession of the land without paying into court the proper value. I shall therefore make an order for them to pay in the difference between the 868l. and the 1,227l. forthwith.

LORD ROMILLY, M.R., July 23, 1866.

SAUNDERS v. MILSOME.

14 L. T. 788; L. R. 2 Eq. 573.

Referred to, *Jackson v. North Eastern Railway*, [1878] E. R. A.; 47 L. J. Ch. 303; 7 Ch. D. 573; 37 L. T. 664; 26 W. R. 518 (V.C.).

Simple contract debt—Agreement by deed to execute mortgage to secure it—Specialty.

DEED AND BOND.—Where a testator, who was indebted on a simple contract debt to B, gave him a promissory note to secure the debt, and at the same time by deed covenanted to execute a mortgage as a further security for the same, but never did execute the mortgage, it was—Held, that B. was entitled in equity to rank as a specialty creditor against the testator's estate.

This was an administration suit. It now came on to be heard upon further consideration, and on an adjourned summons to vary the chief clerk's certificate.

The facts of the case were very shortly these:—

On the 15th February, 1853, Thomas Milsome, the testator in the suit, was indebted to the Messrs. Bulpett in a sum of 1,187*l.* 2*s.* 6*d.* The testator then gave them a promissory note for that amount, and at the same time executed a deed whereby, after reciting the debt and the promissory note, he covenanted, by way of further security, to charge all his estate and interest under the will of his late uncle W. Milsome with the payment of the debt and interest; and to execute such a mortgage of such estate and interest, with a power of sale, and all other the usual powers, covenants, and clauses necessary and incidental thereto, as the Messrs. Bulpett might at any time require him to do. No mortgage was ever executed by the testator.

The chief clerk had certified that the Messrs. Bulpett were not entitled to take rank against the testator's estate as specialty creditors in respect of the aforesaid covenant. The question now came on for argument.

Hemming, for the Messrs. Bulpett, contended, that the deed of covenant executed by the testator converted the debt, which no doubt originally was a simple contract one, into a specialty debt. It was the ordinary rule of equity that what was agreed to be done must be considered as if done; and if here the mortgage had been duly executed, the debt would have unquestionably been a specialty one. But that principle applied, and the debt must be so regarded now.

Schomberg, for the plaintiff (a specialty creditor, whose claim to rank as such was not disputed), argued that the deed of covenant did not alter the character of the debt due to Messrs. Bulpett. The mortgage was only to be executed if they required it; and until they did so, the debt remained a simple contract debt. All that the deed of covenant effected was, to give to the Messrs. Bulpett an equitable charge on the testator's estate by way of further security for their debt, and nothing more.

Begg appeared for the executrix of the testator.

LORD ROMILLY.—I am of opinion, in this case, that the Messrs. Bulpett are entitled to rank as specialty creditors of the testator; and that the certificate of the chief clerk must be varied accordingly. The acknowledgment of a simple contract debt by a deed executed for the mere purpose of such acknowledgment, and not with the view of creating a security for the debt, will not alter the character of the debt. But where it is intended by the deed to create a further security for the debt, the result is different. Here

the deed in question contained an agreement to execute a mortgage by way of further security, with the usual covenants and clauses incidental thereto. Such a mortgage should properly contain a covenant for the payment of the debt. But that would have made the debt a specialty one. As the deed was an agreement to give the Messrs. Bulpett a security for their debt, which would, if given, have made their debt a specialty one, the deed must in equity be held to have converted the debt into a specialty debt; and the Messrs. Bulpett must be held entitled to take their rank as specialty creditors accordingly.

IN THE COURT OF QUEEN'S BENCH.

April 28, 1866.

REG v. THE TRUSTEES FOR PAVING, &c., GREAT TOWER HILL.

14 L. T. 792.

Metropolis Local Management Act—Extra-parochial place—Trustees for paving &c.—Transfer of powers to district board—18 & 19 Vict. c. 120, s. 90.

LONDON.—At the time of the passing of the *Metropolis Local Management Act* (18 & 19 Vict. c. 120), there was an ancient parish called the "Precinct of the Old Tower Without," adjacent to the Tower of London, and between that parish and certain parishes in the city of London, an extra-parochial place called Great Tower Hill, partly in the county of Middlesex, and partly in the city of London. Great Tower Hill, for paving and lighting purposes, was vested in trustees under a local Act (37 Geo. 3), who had power to make rates. By section 90 of the *Metropolis Local Management Act* all the powers, &c., of trustees under local Acts in relation to paving, lighting, &c., any parish in schedule B. are to cease to be so vested, and to become vested in the board of works for the district. In schedule B., part 1, the Whitechapel District of Works is to include, among other places, "Tower, district of." There was no known district of that name:—Held, that it was intended to include within the description "Tower, district of," as well the area of Great Tower Hill as the parish of the Precinct of the Old Tower Without; and that since the passing of the 18 & 19 Vict. c. 120, the power of the trustees under the Local Act, 37 Geo. 3, had ceased.

This was an appeal against a rate made on the 16th November, 1864, by the trustees for putting into execution a local Act, the 37 Geo. 3, c. lxxxvii., intituled "An Act for paving, lighting, watching, cleansing, watering, improving, and keeping in repair Great Tower Hill, and for removing and preventing nuisances and annoyances with the same," by the appellant Mr. Humphreys, the occupier of a house, 19, Trinity Square, Tower Hill, London, who is liable to be rated under the said Act (if the power of the trustees to make a rate has not been taken away by the *Metropolis Local Management Act*), and was assessed at the sum of 5l. 12s. in the said rate.

The following were the grounds of appeal:

That the said rate is illegal and contrary to law.

That the trustees have no power since the passing of the *Metropolis Local Management Acts* (18 & 19 Vict. c. 120; 19 & 20 Vict. c. 112; and 25 & 26 Vict. c. 102), to make any such rate.

That the Act passed in the 37th year of Geo. 3, has been put an end to, and all the powers of the said trustees have ceased and been transferred to other bodies by the said *Metropolis Local Management Acts*.

The required preliminaries having been complied with, an order was

made by Lush, J., with the consent of the parties for the statement of a special case for the opinion of this Court, pursuant to the 12 & 13 Vict. c. 45, s. 11.

CASE.

The above local Act, 37 Geo. 3, was passed in the year 1797. The preamble states the necessity for it thus :

Whereas Great Tower Hill lying partly within the county of Middlesex and partly within the city of London is, and for some time past has been, in a neglected state, and the roads and ways over the same are very inconvenient and in bad condition, and it would be to the benefit and advantage of the owners, lessees, and occupiers of the houses and buildings on or near the said Tower Hill, and to all persons having occasion to resort to His Majesty's Tower of Ordnance, and all persons resident in the Tower, and to the public in general, if the said hill were properly paved, lighted, watched, cleansed, watered, improved, and kept in repair, and all nuisances and annoyances within the same removed and prevented, &c.

The preamble then recites that a plan for the improvement had been prepared, and many of the owners, lessees, and occupiers of houses and buildings in and near the said hill had voluntarily agreed to contribute towards carrying the said intended improvements into effect; but the same could not be properly done without further provisions were made for defraying the expense for making such improvements and keeping and continuing and preserving the same when made, and the walls, railing, gates, lamp-irons, grass plot, walks, and other ornaments belonging thereto, in good repair and condition.

The statute then proceeds to provide for the appointment of trustees for the purpose of putting the Act in execution : (sections 2, 3, 4, and 5.)

Section 7 enacts :

That the sole power of forming, improving, and laying out Great Tower Hill within the limits hereinafter described, that is to say, from the west end of Postern Row by the outside of the foot pavement northward to the south end of Cooper's Row, and from thence by the outside of the foot pavement to be made before the intended inclosure in front of the Trinity House to the entrance into Muscovy Court, and from thence by the outside of the foot pavement running southward by the end of Barking Alley to the north-east of Tower Street, and from thence by the side of the said ditch to the west end of Postern Row aforesaid; and also of maintaining and keeping the said hill within the limits aforesaid, with the railing and fencing, and other things thereto belonging, in good and proper repair, &c., shall be and the same is hereby vested in the said trustees, &c.

Under the above enactments the said trustees were possessed of the management of the carriage way of Great Tower Hill. They were required to cause the said hill to be laid out and improved according to the plan, and to cause it to be paved, and to be raised, lowered, levelled, or altered as they should think fit; they were vested with the sole power of lighting and watching the said hill (s. 7), and the trustees also became possessed of the management of an inclosure or ornamental square or garden, now called Trinity Square, part of the intended improvements, having a grass plot, walks, iron railings, &c. This last circumstance is important with reference to the special provisions in the Metropolis Local Management Act (18 & 19 Vict. c. 120, s. 239, *et seq.*) relating to inclosed gardens and ornamental grounds in squares, crescents, &c.

Section 8 of the local Act gives the trustees power to cause the said hill to be cleansed, and also to be watered, and also gives them power to cause wells to be sunk (so as the same do not interfere with or affect the public sewers, or drains, or watercourses, &c.), and pumps to be erected for the purpose of cleansing or watering the said hill.

Section 9 reserves to the Crown and the City of London any rights they may have in or to Great Tower Hill within the limits aforesaid.

Section 18 enacts that, in order to defray the expenses of the Act, and to enable the trustees to raise and pay such annual or other sum or sums of money as shall be necessary for these purposes, one or more rates shall be made by the trustees once in every year, or oftener, upon all occupiers of houses and premises encompassing or abutting on Great Tower Hill, and all rates of assessments shall be subject to and chargeable with all such sums of money which shall, or may, be borrowed for the purposes of the Act.

Section 19 enacts that the statute is not to extend to the foot pavements in front of the houses in Great Tower Street, &c., or affect or prejudice any parliamentary, parochial, or other taxes on the houses and premises encompassing or abutting on Great Tower Hill.

Section 22 enacts that the occupiers of such houses and premises encompassing and abutting upon Tower Hill aforesaid who shall be assessed to and pay the rates raised by virtue of this Act shall have the use of the pleasure-grounds or inclosure intended to be made in the centre of the hill aforesaid.

Section 29 gives the power of appeal against the rate.

Sections 30 and 31 give the trustees power to borrow money for the purpose of the Act, and the same is thereby charged upon the said rates.

In accordance with sections 30 and 31, the trustees have from time to time borrowed moneys, and there is still owing on that account a considerable sum of money for principal and interest.

Since the passing of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, considerable doubt and discussion has taken place with respect to the position of the trustees under the local Act, as to whether or not their powers had been superseded. The trustees in the first instance were of opinion that their powers had been determined by the Metropolis Local Management Act, and had become vested in the board of works of the Whitechapel district, and, acting upon that opinion, the trustees for some years suspended the exercise of their powers under their local statute. The Whitechapel Board of Works took the opinion of counsel, and, in accordance with his opinion, repudiated any jurisdiction, and intimated that they were advised that the local Act was not superseded by the Metropolis Local Management Act, and that the powers of the trustees still continued.

The authorities of the Metropolitan Board of Works were also consulted, and the inclination of their opinion being the same as that of the counsel advising the Whitechapel Board of Works, it was sought to clear up the difficulty by legislative enactment, and a clause was prepared for insertion in one of the Metropolis Local Management Act Amendment Bills, but, owing to the press of business before Parliament at the time, it was not inserted.

In the meantime the carriage-way of Great Tower Hill has become much out of repair and dangerous to the traffic; the trustees are being pressed for payment of principal and interest due for money borrowed by them; and, in order to raise money for the repair of the roadway, and also for paying creditors, the debts due to whom have been charged on the rates, the rate now appealed against has been made.

By the Metropolis Local Management Act (18 & 19 Vict. c. 120), s. 90, all duties and powers relating to the paving, lighting, watering, cleansing, or improving of any parish or part of a parish mentioned in schedules A. and B. to the Act now vested in commissioners or in any body other than the parish vestry under any local Act shall cease to be so vested, and shall become vested in the vestries and district boards constituted by the Acts.

By section 247 of 18 & 19 Vict. c. 120 all local Acts relating to any parish or place remain unrepealed except so far as the same are inconsistent with the Metropolis Local Management Act.

In schedule B. to the Act it will be seen that the district denominated the

Whitechapel District is composed of nine parishes, the ninth parish being denominated "Tower, district of." To this portion of the district the present case relates.

There is no locality known by the name of the Tower district, but there is a parish called the "Precinct of the Old Tower Without," but that does not include the area of the limits of the trustees' jurisdiction under the local Act 37 Geo. 3.

That area known as Great Tower Hill is on the borders of the parish of "Old Tower Without," adjoining thereto, but in no part situated within it, and lies between the parish of "Old Tower Without" and certain parishes in the city of London. This space is altogether extra-parochial. The parish of Old Tower Without is complete in itself as a parish, and the Whitechapel Board of Works contend that it answers the description of the ninth on the list in schedule B. sufficiently to satisfy the Act, more especially as by the existing union for poor-law purposes it had been associated with the remaining eight parishes in the Whitechapel Union.

Section 242 of the Metropolis Local Management Act (the City saving clause) enacts that no part of any parish in the city of London shall be rated or assessed by any district board. The larger portion of the property which abuts upon Great Tower Hill is within the city of London.

Section 175 points out the mode of assessing certain extra-parochial places mentioned in schedule C. of the Act, of which Great Tower Hill is not one.

The view of the board of works for the Whitechapel district is, that the locality known as Great Tower Hill remains under the jurisdiction of the trustees under the local Act, and that the operation of the Metropolis Local Management Act does not affect the provisions of the local Act or the appointment of the trustees, in whom the management of the locality is vested. They contend that the local Act is not repealed, and that the only question is by whom should its provisions be put in force?

With respect to the use of the term "district of the Tower," there is no evidence of any such term being in use to denote any certain or defined district previous to or at the time of the passing of the Metropolis Local Management Act.

As to the soil of the carriage-way of Great Tower Hill, the preamble of the local Act describes it as partly within the county of Middlesex and partly within the city of London, and that description is correct.

As to the sewerage and drainage of Great Tower Hill, that was superintended and performed by the city of London.

The question for the opinion of the court is (the court to have power to draw inferences of fact should such be necessary),

Whether, under the above circumstances, the trustees under the 37 Geo. 3. had power to make the rate in question.

Maude (Gray, Q.C.) in support of the rate; and

D. D. Keane, Q.C. (J. Thompson with him), contra.

BLACKBURN, J.—In this case there is no doubt considerable difficulty in understanding and applying the Act of Parliament, and there may have been some oversights on the part of the Legislature, but the question we now have to determine is whether this rate, made by the trustees under an Act of 37 Geo. 3, is a good rate, and I think it is not. The facts, so far as they are material, are these:—There is an ancient parish called "The Precinct of the Old Tower Without," and there lies in the city of London, and hemmed in by that parish, a smaller area called and known by the name of the "Great Tower Hill," which was extra-parochial, and which was managed under the provisions of a local Act. The Legislature by the 18 & 19 Vict. (the Metropolis Local Management Act, which does not extend to the city), in the

interpretation clause, defined that the word "parish" should include any place or combination of places mentioned in schedule B. of that Act. Now in schedule B. to that Act we find under the head of "parishes" (that is "places or combination of places"), "Tower, district of." What did the Legislature mean by "District of the Tower?" The contention is that they must have meant by that the ancient parish or place called by the name of "Precinct of the Old Tower Without." But, then, if they did mean to say that, it seems impossible to see why the Legislature should not have used that name. Then the area which was adjacent, which was included and hemmed in by that, which is called Great Tower Hill, is not the Tower district either. It seems to me that, putting a reasonable interpretation on the words of the Legislature, the only interpretation we can put upon them is, that the words "Tower, district of," were meant to include those two places lying adjacent to each other, and were not intended to be confined to either of these places. The argument against that notion is this: inasmuch as the area called Great Tower Hill was extra-parochial, there would be difficulties under the machinery of the Act if jurisdiction is given over that spot, and that there would be difficulty in working it because it is extra-parochial, and there are consequently neither persons rated to the poor or churchwardens. No doubt there are difficulties, and it is not very easy at present to say how the thing ought to be worked out. I quite concede to Mr. Maude that it must be taken that the Legislature intended that the debts secured on the old precincts should not be annihilated, and that it must have been intended that there should be some mode by which the thing could be worked out. The present question is, could it be done by taking it out of the district altogether, the power of the trustees being left as before? I think that would be straining the words of the Act of Parliament, and that the Legislature did not intend that there should be this place out of the scope of the Metropolis Local Management Act working for itself. I think that would be quite contrary to the general object and intention of that Act. The general intention of the Act was to put the whole metropolis under one general management, and they must have intended to include that. Then, under section 90, it is provided that all duties, powers, and authorities, given to any commissioners or other bodies having powers under an Act of Parliament over any place in schedule B. shall cease to be vested in them, and that all the powers now vested under any local Act in any such commissioners shall cease to be so vested, and shall, save as herein otherwise provided, become vested in and be performed and exercised by the board of works for such district. Now then comes the question, can the trustees under this local Act exercise any of the powers which by the Act of Legislature are to be no longer vested in them, but are to be vested in the district board? That is all we have really to decide, and it seems to me to be clear that they cannot, and that consequently this rate is bad. There remains another question behind which may be raised hereafter in some shape or other, that it being pretty clear that it could not have been the intention of the Legislature to do away with these debts in the smaller area there must be some way of enforcing them, and two ways occur to me if the powers vested in the trustees are transferred to the district board, and the Act does not otherwise provide for them. The district board would seem to be able to make a rate under the old Act: if there is another provision made for it, then it may be that they would have to follow that other provision. At present it would be premature to say what the right way of doing it is: all we say is that it seems to us clear that the Tower district was intended to include this extra-parochial place, and consequently that the powers of the trustees are no longer vested in them, and that this rate is bad.

SHEE, J.—I am of the same opinion. It was admitted at the beginning by Mr. Maude that the whole question to be determined in this case was the meaning of the words "Tower, district of" in schedule B. of the Metropolis

Local Management Act. Now those words, "Tower, district of," have been used in preference to the words "Precinct of the Old Tower Without," which is undoubtedly, according to the view of Mr. Maude, included in "the Tower, district of" for some purpose. There must have been some meaning in changing the designation "Precinct of the Old Tower Without" to "Tower, district of" for the purposes of this Act. Then, it being admitted that the Precinct of the Old Tower Without is included in "Tower, district of" in schedule B., we must endeavour to find some intelligible and probable reason for the insertion of the words in the schedule "Tower, district of" instead of the words Precinct of the Old Tower Without. Now, we find that this precinct of the Old Tower Without is a parish separated from certain parishes in the city of London which are not within the purview of the Metropolis Local Management Act, and that there is also another district, or place, called Great Tower Hill. It does not belong to the parishes of the City of London which it adjoins, and it is not within the parish (for the purposes of the poor-law so called) which bears the name of "Precinct of the Old Tower Without." What possible object could the Legislature have under those circumstances in using the words "Tower, district of" in the schedule B. to the Metropolis Local Management Act if it were not understood to include in that description as well the Precinct of the Old Tower Without, which was a parish properly so called within the meaning of the poor-laws, and that outlying place called the Great Tower Hill, which lies between that and certain parishes which are not within the purview of the Metropolis Local Management Act at all? It seems to me that in that state of things we can come to no other conclusion than that the words "Tower, district of" do include as well the Precinct of the Old Tower Without, which they are admitted to include, and to which in Mr. Maude's view they are limited, as well that parish as the place between it and the parishes of the city of London. Then we find that the outlying place called "Great Tower Hill" was managed for the purposes of paving, lighting, watching, cleansing, watering, improving, and keeping in repair, by the trustees under a local Act of 37 Geo. 3, passed in the year 1797, and that these trustees have the power of making rates in a particular way. Mr. Maude certainly does impress us in some parts of his argument very strongly by pointing out that the provisions of the Metropolis Local Management Act as to the constitution of vestries and the election of vestrymen, and of boards of works, are not provisions which are clearly or distinctly applicable, or can easily be made to fit such a case as this; for a place which is extra-parochial in the first place, special officers called vestrymen are to be elected under the provisions of the Metropolis Local Management Act, and the person who is to initiate the election of these vestrymen is to be a churchwarden of the parish. There is no churchwarden of this place. Then again, the vestryman to be elected, as Mr. Maude has pointed out, must be a person who is assessed to the relief of the poor on a rental of not less than 40*l.* per annum. Mr. Maude very clearly puts it that that prevents any person residing in or having property in this extra-parochial place from being a vestryman under the provisions of this Act because he is not rated to the relief of the poor, and the result of that, no doubt, would be, that the board of works which is to be elected by these vestrymen and which is for the future to have the government of this extra-parochial place, is to be a board composed of persons being duly elected in strict conformity with the provisions of the Act, and a number of other parishes properly so called within the meaning of the poor-law, and therefore that the board of works which is to govern this extra-parochial place for the future is to be a body in which the inhabitants and overseers of property in this extra-parochial place are to have no voice whatever in the selection of their members. That, no doubt, is a difficulty which Mr. Maude has pressed very strongly, and it would not be easy to escape from it if we were called upon to determine conclusively how in all

particulars and respects in this extra-parochial place the Act of Parliament is to be made to work. It may be, as has been suggested in the course of the argument, that under section 90 all the powers, duties, and authorities vested in the trustees under the 37 Geo. 3, with all the rights and liabilities of the former trustees, are now vested in the board of works, and that the board of works have, under the local Act of Parliament, all the powers and authorities which the trustees had before the passing of the Metropolis Local Management Act. It is suggested that that construction of the Metropolis Local Management Act in section 90 is hard to be received, because under the Metropolis Local Management Act the duties, powers, and authorities of the new board of works are to be exercised through the medium of the overseers of the parish. It may be that in this particular case of an extra-parochial place governed by trustees under those local Acts of Parliament, those sections providing for the execution of the Act through overseers, churchwardens, and parochial officers properly so called do not apply to such a case at all. We, however, as it seems to me, are not in this case called upon to come to any decision upon that point at all. For my own part, I am very sensible of the difficulties that Mr. Maude has very ably pointed out; but this one thing, as has already been stated by my Brother Blackburn, seems to me perfectly clear, that under the 90th section of the Act of Parliament all the powers and authorities now vested under any local Act of Parliament, in any commissioners or in any other body than the vestry of such parish, or in any wise relating to the regulation, government, or concerns of any such parish (which perhaps means "place" in this Act), shall cease to be so vested, and shall become vested in other persons appointed under this Act. It is enough for us to say, that when this rate was made the trustees under the old Act of Parliament had under this 90th section ceased to have any powers conferred upon them by this local Act vested in them. They have ceased to have it vested in them, therefore the rate made by them is bad.

MELLOR, J.—I did not hear the whole of Mr. Maude's argument, and therefore I think it is more satisfactory that I should not take any part in the judgment.

Judgment for the applicants.

IN THE COURT OF EXCHEQUER.

May 26, June 12, 1866.

WALKER (Administrator, etc.) v. THE MIDLAND RAILWAY COMPANY.

14 L.T. 796.

Referred to, *Clarke v. Midland Railway*, 1880; 43 L. T. 381 (Ex. D.).

Railway company—Level crossing—Accident to passenger crossing—Liability of company for—Negligence.

CARRIERS.—A passenger having arrived by a train at a station on defendants' line of railway, got out in safety and walked along the way which she was well acquainted with, and proceeded to cross the single line by the appointed level crossing, in order to leave the station. At the very moment that she stepped on the line a train which she could have seen if she had looked arrived at the same spot, and she was knocked down by it and killed:—Held, making absolute a rule to enter a nonsuit, that there was no evidence for the jury of any negligence on the part of the defendants, it not being

negligence in them not to have a person stationed on the spot to warn passengers about to cross the line of the approach of a train, of which, if passengers used due care, they might inform themselves.

This was an action brought by the plaintiff, as husband and administrator of the estate of his deceased wife Charlotte Walker, against the defendants the Midland Railway Company, for alleged negligence on their part in causing her death on the 3rd December, 1865.

The declaration alleged that defendants were carriers of passengers for hire upon a certain railway, and used a certain station at Holbeck upon the said railway for the use and accommodation of their passengers arriving at the said station, and requiring on their arrival there to depart from and out of the same, and had the management of the said station for the purpose aforesaid, and also of a certain train of carriages then travelling upon the said railway, yet defendants negligently managed the said station and train of carriages, and omitted to light the said station in a proper and sufficient manner for the use and accommodation of their said passengers there, and to provide proper and sufficient accommodation for the safety of their passengers arriving at the said station, and requiring on their arrival there to depart from and out of the same, whereby the said Charlotte Walker having been received and carried by defendants as a passenger on the said railway from Apperley Bridge to the said station at Holbeck, and requiring on her arrival at the said station to depart, and being in the act of departing from and out of the said station, was struck and thrown down by the said train of carriages and thereby injured, and by reason of the said injuries so occasioned to her as aforesaid, she afterwards and within twelve calendar months next before this suit died, and plaintiff as administrator as aforesaid for the benefit of himself the husband, and of J. W. Walker and L. Walker, the children of the said C. Walker, according to the form, etc., claimed 2,000*l.* Plea, not guilty, and issue thereon.

At the trial before Keating, J., at the last spring assizes at Leeds, it appeared that the plaintiff was a journeyman joiner at Leeds, and that his wife, the deceased woman, having gone to a place some few miles distant from her home by an excursion train on the defendants' line of railway, on the 3rd of December, was returning home on the evening of that day, and had arrived at the Holbeck station, which is a station used for the interchange of traffic between the Midland and other railways, and where it appears to be customary for a number of persons to alight, and which station was the terminus of the deceased's journey. She arrived at the centre platform of the Holbeck station by an up train at about 5.30 p.m., and in order to leave the station she had to cross the down line of rails on a level crossing. As she was crossing the down line a down train coming in from Leeds at the instant knocked her down and killed her on the spot. It appeared from the evidence that the deceased, who was familiar with the station, having often been there as a passenger, stepped on to the line without looking to the right or left, and was walking quickly across the line, and that the driver of the train, which was in fact pulling up and going not faster than from eight or ten miles an hour, saw her for the first time only when she was about six yards off, and immediately blew his whistle, and he had whistled before in approaching the station. There was a conflict of evidence as to the state of the atmosphere, whether it was or was not a foggy night. It appeared that from the slanting direction taken by the deceased in crossing the line, her opportunity of seeing the approaching train until it was within a very few yards of her was prevented by the position of a urinal which obstructed the line of vision, although from the crossing itself the advancing train could be seen for a distance of nearly 200 yards by any one looking along the line.

The charge of negligence in not sufficiently lighting the station was not persisted in at the trial, but it was contended that defendants ought to have

provided a high-level footbridge to enable passengers to cross the line. It was also urged that they should have a porter or policeman stationed at the spot to inform persons of the approach of trains. It was proved that there were level crossings at almost every station, and that there were only four high-level footbridges on the whole line, and that many millions of passengers had used these level crossings without a single accident. It was also proved that a person walking at the rate of three and a half miles an hour (the rate at which deceased was said to have walked across) would cross the line in two seconds, during which time a train going from eight to ten miles an hour would pass over from ten to twelve yards. It appeared also that a train is visible as it approaches about 191 yards from the spot where the accident happened.

The engine carried the usual signal lamp. Sixty-three trains pass along the line daily, of which thirty-three stop at the Holbeck station.

At the close of plaintiff's case, defendants' counsel contended, on the authority of *Stubley v. The London and North Western Railway Company*, that there was no case for the jury against the defendants; the plaintiff's counsel on the other hand relying on *Bilbee v. The London, Brighton, and South Coast Railway Company* as showing the defendants to be liable. The learned Judge thought he ought not to keep the case back from the jury, and he accordingly summed up the case, and left it to them to say whether the accident was occasioned by the negligence of the defendants without any contributory negligence on the part of the unfortunate deceased. The jury found a verdict for the plaintiff with 150*l.* damages, and leave was reserved to defendants to move to enter a nonsuit.

Field, Q.C. accordingly, in Easter Term last, moved for and obtained a rule *nisi* to set aside the plaintiff's verdict, and to enter a nonsuit pursuant to leave, on the ground that there was no evidence of negligence on the part of the defendants, or for a new trial on the ground that the verdict was against the evidence, and that the deceased contributed to the accident; and against that rule,

May 26.—Overend, Q.C., and *Kemplay*, for the plaintiff, now shewed cause, and contended that this was a case in which negligence was clearly substantiated against the defendants. It was a dangerous and negligent thing that passengers should be obliged to cross a line of rails on which so many trains were daily passing and repassing; and if no high-level bridge was put there, which ought to have been the case, the company were at all events bound to place one or more porters there to warn and caution passengers crossing of the advance of coming trains. The cases of *Bilbee v. The London, Brighton, and South Coast Railway* in the Court of Common Pleas (13 L. T. (N.S.) 146; 34 L. J. 182 C.P.; 18 C. B. N.S. 584), and *Stopley v. The London, Brighton, and South Coast Railway Company*, in the Exchequer (13 L. T. (N.S.) 406; 4 H. & C. 93; 1 L. R. 21 Ex.; 35 L. J. 7 Ex.), were authorities in plaintiff's favour. The danger here, as in those cases, was created by the act of the company; the deceased not having the choice of a convenient way was warranted in crossing. Again, there was no contributory negligence in the deceased. [BRAMWELL, B.—In *Stopley's case* the open gate might be said to amount to an invitation. Here you say "silence gave consent." Of course there is always a presumption that a train is coming on a railway.] Not, it was submitted, at the particular moment when passengers are in the act of crossing, and that, too, in the absence of any caution from the defendants' servants. [BRAMWELL, B.—If, instead of being killed, the unfortunate deceased had had her dress torn by contact with the engine, could it not have been said to her, "Why did you not look out?"] There were here no means of getting from the station without danger, and no one to warn her of the danger.

A. Wills (with him *Field, Q.C.*, contra), for defendants, distinguished

Bilbee's case and *Stapley's case*, relied on contra. In those cases the accidents happened at public level crossings where the company were bound by the statute to erect gates and keep them closed across the line when a train was approaching. Here there was no statutory obligation on defendants to put a bridge or to place a porter there. The remarks of Bramwell B. in *Stubley v. the London and North Western Railway Company*, in the Court of Exchequer (13 L. T. (N.S.) 376; 35 L. J. 3 Ex.; 1 L. R. 13 Ex.; 4 H. & C. 83), were appropriate and applicable here, and that case was precisely in point and conclusive of the present one. There was, at any rate, undeniable negligence on the deceased's part, who should have looked right and left before stepping on the line. He cited, also,

Cotton v. Wood, 29 L. J. 333 C. P.; *Cornman v. The Eastern Counties Railway Company*, 29 L. J. 94 Ex.; 4 H. & N. 781.

Cur. adv. vult.

June 12.—BRAMWELL, B. now delivered the judgment of the court (Pollock, C.B., Martin, Bramwell, and Channell, BB.) as follows:—We are of opinion that the rule to enter a nonsuit in this case should be made absolute. It was an action by a husband against the defendants for damages occasioned by the death of his wife attributable, as he alleged, to the negligence of the defendants. The case was this: the deceased woman having arrived by a train at the Holbeck station on the defendants' line of railway, got out in safety and then proceeded along the way, which she was well acquainted with, and to cross the single line by a level crossing in order to leave the station. At the very moment she stepped on the line, a train, which she could have seen if she had looked, arrived at the same spot, and she was knocked down by it and killed. Under these circumstances, on the point reserved, we are of opinion that there was no evidence to go to the jury to shew any negligence on the part of the defendants; the supposed negligence being that they ought to have had somebody stationed there to inform her of what she might have informed herself, if she had used due care. I am unwilling to say that of a deceased person, but it is the truth. We think therefore that there was no evidence to go to the jury for negligence on the part of the defendants. For my own part I think, in addition to that, that there was sufficient evidence that it was her own doing and her own act. As to that matter I speak for myself only.

Rule absolute to enter a nonsuit.

IN THE COURT OF EXCHEQUER.

June 2, 1866.

GRIFFITHS (*Administratrix, &c.*) v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

14 L. T. 797.

Railway company—Liability of for accident from defective hoisting machinery—Right of to carry on business in their own way.

NEGLIGENCE.—*A railway company have a right to carry on their business on their own premises in such a way as they think fit; and, so far as the conduct of such business is concerned, to use defective machinery, e.g., for hoisting goods on their own premises, merely compensating the owners for any injury done thereby to such goods, and they are not guilty of negligence, or liable*

in an action for damages, under Lord Campbell's Act, quoad a third party lawfully on their premises who, without invitation by words or conduct on their part so to do, chose to pass under a heavy package of goods which was in the act of being hoisted by a crane, and which slipped from the sling by which it was defectively suspended, and fell upon and killed him whilst so passing under it, there being another way by which he might have gone without passing under the package in question, and the company having no reason to expect that people would pass underneath it.

Declaration :

That before and at the time, &c., defendants were possessed of a certain railway and a certain railway station and platform in Liverpool, and one Thomas Griffiths was lawfully in the said station and upon the said platform and defendants by their servants were then receiving from a certain lorry or waggon in the said station certain bags of ground madder by means of certain machinery and tackle of defendants to wit a certain hoist or crane there, and a certain sling or rope attached or belonging thereto, and defendants so negligently and unskilfully managed the said machinery, tackle, hoist, crane, and sling for the purpose aforesaid, and used so little care and skill in and about the fastening and security therewith and thereto one of the said bags whilst being so removed as aforesaid, and the said machinery, &c., were so defective and improper, and imperfect for the purpose aforesaid, that by means of the premises the said bag of ground madder slipped from the said machinery, &c., and fell upon and struck the said T. Griffiths, then lawfully being in the said station and upon the said platform, whereby the said Thomas Griffiths was wounded and injured, and in consequence of the wounds and injuries received thereby the said T. Griffiths shortly afterwards, and within twelve calendar months, &c., died, and plaintiff as such administratrix, &c., for benefit of herself the wife, and of Thomas and William, the children of the said T. Griffiths, according to the statute, &c., claims 1,000l.

Pleas:—1. Not guilty. 2. That at the said time when the said bag, &c. fell upon the said deceased he was not lawfully in that part of the station and platform where he was at the said time when, &c.; and upon those pleas issue was joined.

At the trial, before Lush, J. and a special jury, at the last Lancashire Spring Assizes at Liverpool, it appeared that the deceased husband of the plaintiff was a porter of the name of Griffiths, in the employ of a firm of chemists and druggists at Liverpool, and in the course of his duty on behalf of his employers he took some goods to the Waterloo goods station of the defendants' company at Liverpool for the purpose of their being sent off by the railway into the country. Upon arriving at the usual forwarding department he unloaded his goods from his lorry, as is customary for all carters to do at the station, and then applied to a servant of the company of the name of Newsome for a receipt for the goods which it was Newsome's duty to give him. At the moment that deceased spoke to Newsome the latter was engaged in unloading some sacks of ground madder from another cart by means of a steam power hoist or crane, each bag being suspended from the crane by a sling or noose placed round its centre. Newsome was in charge of the jigger and break that worked the crane, and on being asked by the deceased to sign the receipt, he made fast the check of the jigger, and left the bag of madder which he was in the act of hoisting swinging suspended in the air some five feet above the ground. Newsome having no ink with him, the deceased offered to get him a dip, whereupon Newsome handed him his pen, and the deceased proceeded to go with it to Newsome's hut, a short distance off where the ink was. In doing so he passed over several packages of goods that were lying heaped about the station yard, and under the bag of madder which was hanging suspended in the sling from the hook of the crane, and at the moment that he was so passing under it, the bag of madder,

weighing between three and four hundredweight, slipped from the sling, and fell upon and crushed him so seriously that he died within a few minutes after being carried to the hospital.

It was contended at the trial, on the part of the plaintiff, and witnesses were called who stated, that the sling used, being a single loop round the centre of the package, which might be safe enough for a soft or limp package like a bag of flour, the ends of which would hang down on each side, and so prevent the bags slipping through the loop, was not a safe or proper one for a hard and stiff package like the bag in question, and that it should either have been a "thimble sling," which tightly grips and ties the package in the middle, or there should have been two loops or slings, one at each end of the package, so that it would have rested steadily, and not have slipped through the sling. But, on the other hand, other witnesses, called by the plaintiff, who were servants of the company, stated that the sling in question was the usual and proper one, and had been used for more than twenty years for similar packages without an accident.

It was also contended by the defendants that the plaintiff contributed to the accident by his own negligence in going under the package, there being, as it was proved, another way to the hut or office in question free from obstruction of packages and clear of the crane and sling, by which he might and ought to have gone.

The learned judge left the jury to say first, whether the sling was a proper sling, and whether the company used it in the way in which they ought to have used it; and secondly, whether the deceased was himself contributory to the accident by going under the sling in the way in which he did.

The jury found a verdict for the plaintiff with 300*l.* damages—200*l.* for the widow, and 50*l.* each for the deceased's two children, and the learned judge reserved leave to the defendant to move to enter a nonsuit.

E. James, Q.C. accordingly, in Easter Term last, obtained a rule on the part of the defendants to set aside the plaintiff's verdict and enter a nonsuit on the ground that there was no evidence for the jury, or for a new trial on the ground that the verdict was against evidence; against which

June 2.—*Brett, Q.C.*, and *Quain*, for plaintiff, now shewed cause.—The negligence here was twofold. The company knew persons must apply to Newsome, their signing clerk, for receipts, and yet they set him to superintend working the crane, and then he, instead of lowering the bag to the ground, left it swinging in the air. [*MARTIN, B.*—Can it be said to be negligence that he stopped to attend to the deceased who spoke to him? The accident was the natural result of his speaking to Newsome.] It was not the stopping, but leaving the bag suspended instead of lowering it to the ground, that was negligent. It was negligence also in defendants to use this sling, which was proved to be an unsafe one for a hard package, which required either a thimble sling, which would have gripped and locked it tightly in the middle, or a sling with double loops at each end of the package. If there be any evidence of negligence in defendants' servants this rule must be discharged, for the question of contributory negligence was for the jury. [*MARTIN, B.* refers to *Bolch v. Smith* in the Court of Exchequer (6 L. T. (N.S.) 158; 31 L. J. 201 Ex.; 7 H. & N. 736). *BRAMWELL, B.*—Negligence is a relative term, and the difficulty I feel in cases of this class is whether a sling like this can be called a negligent sling with regard to a man who walks under it having no right to walk there. Was he invited to go that way? Would the defendants, if they did again wilfully, and with knowledge of what might happen, that which they did as you say carelessly, not knowing it, be liable for an accident?] It was contended that they would be. The rule was that persons must so use their property as not to endanger others who were not themselves negligent, and this was clearly an unsafe sling. As to contributory negligence, the

deceased had a right to assume defendants would use a safe sling and use it in the usual way, which it was proved was not the case here. Moreover, their servants permitted him to go under the sling without a word of caution or prohibition, which amounted to an invitation. [MARTIN, B.—Can crawling over heaps of packages and under cranes be a proper way? Using common sense he must have known that round behind the hut was the proper way.] There was evidence of negligence in using a dangerous sling, and the jury were justified in finding no contributory negligence in plaintiff in his passing under the crane. A nonsuit at all events could not be entered here. They cited also *Cotton v. Wood* (29 L. J. 333, C.P.). [MARTIN, B. referred to *Crafter v. The Metropolitan Railway Company* in the Court of Common Pleas (1 L. R. 300, C.P., 1 H. & R. 164).]

E. James, Q.C. and *T. J. Barstow*, contra, for defendants, were not called on to support their rule.

MARTIN, B.—We are all of opinion that there was no evidence in this case to go to the jury, and therefore that we must adopt the course pursued in the case in the Court of Common Pleas. There was, in my judgment, no evidence of negligence here. Surely a railway company must be allowed to carry on its business on its own premises in such a way as it thinks fit. When the company used this crane it was never thought that any one would go under it; it was merely used in carrying out their own mode of doing their own business. How can it be said that there was any negligence? Let us see what it was that occurred and how. The deceased man went to the goods station; he interrupted the servant of the company in the discharge of his business, and thereupon he naturally stopped the working of the crane, and the package remained suspended in the air; he wanted a pen and ink for his own purpose and he went to get it, but instead of going the clear road, he went under this suspended package and misfortune happened. If ever there was an accident, that was one; and unless railway companies can be made insurers in every case where a man goes upon their premises, the defendants are not responsible here. We take the same course in this case that was adopted by the Court of Common Pleas, and make the rule absolute to enter a nonsuit, but we reserve our decision upon the other point in the event of the case going to error.

BRAMWELL, B.—I have merely a word to add. If the defendants had had reason to expect that people would pass under this crane, or had invited them by words or conduct in any way so to do, there would have been evidence of negligence of which the suffering party might complain; but I see no evidence that they had any reason to expect that people would pass underneath it, or that they in any way invited or led them into the temptation of so doing. If that is so, I do not see how there can be said to have been any negligence in this case, because the defendants had a right to use the most defective slings they liked as far as the conduct of their own business was concerned, merely compensating the owners of goods for any injury done thereby to such goods. These questions are really relative questions; there is no such thing as absolute negligence: the question is, whether there is negligence with reference to the party complaining, and I am of opinion that there was not any such here.

CHANNELL, B.—I do not entertain any doubt in this case. In the course of the argument I entertained perhaps some little doubt whether there should be a nonsuit; but I do not think it necessary to recapitulate the facts, considering the course we propose to adopt in making the rule absolute, and the possible event of the case being taken to a court of error.

POLLOCK, C.B. was absent.

Rule absolute for a nonsuit.

NISI PRIUS.

Newcastle, MARTIN, B., July 16, 1866.

HARLE v. CATHERALL AND OTHERS.

14 L. T. 801.

Libel—Public Officer—Newspaper.

No criticism on a person holding a public office like that of waywarden can be a libel unless malice is proved.

LIBEL AND SLANDER.—*Whether the neglect of the editor of a newspaper to inquire into the truth of allegations sent to him for publication is evidence of malice, quære?*

This was an action for a libel in the *Hexham Courant* newspaper.

Manisty, Q.C., and *Kemplay*, for the plaintiff.

Campbell Foster and *Herschell* for the defendants.

The plaintiff was a waywarden and member of the highways board of the Corbridge District. The defendants were proprietors of the *Hexham Courant* newspaper. The alleged libel was contained in the following letter, published in that journal:

“ If our unworthy waywarden, who is supposed to do nothing but what is right and just, thinks fit, after being placed in that responsible position, to pave and drain his own premises with the public money, it is time that we raise a cry, and say, ‘ Well done, thou bad and unfaithful servant, thou hast not been careful over few things, so we will not make thee lord over many things.’ I do sincerely hope that a sufficient number of ratepayers will attend the vestry meeting, and not allow this individual to bring in his party for the purpose of carrying their scheme by a large majority.—A RATEPAYER.”

Foster contended that it was a privileged communication, being a criticism on a public officer.

MARTIN, B., in summing up, said :—The first question was whether the correspondence which appeared in the paper was a libel at all, and according to the construction which had been put upon the Act of Parliament as regarded libels, the jury must judge for themselves. They were perhaps aware that at one time it was a matter of great doubt whether it was for the judge or the jury to decide upon what was a libel; but recently that question had been set at rest by Act of Parliament, which said that the jury were to decide, and not the judge. It had always been the practice, since the passing of that Act, in these cases to leave the decision to the jury. He believed also that, according to the opinions of many eminent persons, the judge ought to state to the jury what his opinion of the case submitted to a court was; so that it was only an opinion of a judge as a thirteenth jurymen, as it were, and not a matter of law, which aided the jury in arriving at their decision upon the question of libel. A libel had been defined to be a publication without justification or lawful excuse, which was calculated to injure the reputation of another by exposing him to contempt or ridicule. That was the definition put upon libel by Lord Wensleydale when that learned Lord was Baron Parke, and it was a definition which he (the learned judge) had always acted upon in his judicial career. He would read the document complained of to the jury, and they might observe it carefully to see if they saw anything libellous in it. They must use their own judgment in the matter, and lay aside altogether the eloquent statements of the learned counsel on each side.

[His Lordship then read the letter dated March 21, 1866, and signed "A Ratepayer."] Now they must ask themselves whether such statements as were contained in that letter were injurious to a public man. His impression was that the document was a libellous one; but the defence was that the paper containing the letter was a privileged publication; and that if a person put himself forward as a public man for a public office, every one had a right to comment on the man's fitness for the office which he held; and that so long as the critic confined himself to comments on the man's fitness or unfitness for the office, the comments were not actionable, and the publication containing them was excusable from action. The real case was whether the *Hexham Courant* was a publication of that character or not. He knew no limit himself to comments on a man who claimed a public office, except it were malice. If a person thought fit to publish what he knew to be false in regard to a man, then the privilege of comment in a journal ceased to protect him, and he became responsible for what he published. There was, however, in this case some difficulty, but he was not aware that the difficult point had been directly raised. If this action had been brought against the writer of the letter of March 21, and it had been proved that the paving and draining of the plaintiff's premises had not been done at the public expense, then he (the learned judge) should have had no doubt from the evidence of that being a malicious statement, and it would take away the character of privilege from the publication in which the statement appeared. But the action had been brought against three gentlemen whom they did not know were cognisant of the question. Mr. Catherall did not know Mr. Harle nor his concerns, although he admitted that he might know that there was such a man as Mr. Harle in existence living in the neighbourhood. It struck him (the learned judge) that, if a newspaper editor or proprietor published a document which contained a false statement of a particular fact in regard to a person mentioned in the document, and if it turned out that the statement was false, and that it was published without taking any pains to establish its truth, that would be a malicious publication. Therefore, he told them that it seemed to him that if a fact was published in a newspaper, and the editor took no pains to ascertain its truth, the jury must decide on its nature when submitted to them. If a man thought fit to bring an action for libel against the proprietor of a newspaper, no blame attached to him; and again, when a man went to an editor to ask for the name of an anonymous correspondent, no blame attached to the editor for refusing to give the name. Indeed, an editor would almost be mad to do so. He should blame no editor for so refusing. In this case the editor refused to give the name of his correspondent, but he had offered to open his columns to the plaintiff, and the plaintiff had taken advantage of the offer, and replied to several communications against him, in which he had pointed out how the statements of the latter erred against him. It did seem *prima facie* hard after that, that he should turn round against an editor and sue him for damages. He should, however, leave all that to the jury, but the fact last mentioned should not be left out of the consideration of the jury.

Verdict for the plaintiff, damages 20l.

CHELMSFORD, L.C., July 18, 1866.

**Re THE SUITORS' FEE FUND, *ex parte* THE ADDITIONAL CLERKS
IN THE TAXING MASTERS' OFFICE.**

14 L. T. 819.

5 & 6 Vict. c. 103, and 15 & 16 Vict. c. 87—Salary—Construction of Act.

Six additional clerks had been appointed in 1853, at a salary of 100l., on the application of the taxing masters to the Lord Chancellor. Their salary was subsequently increased to 120l., but they received no formal appointment until 1865, when the Lord Chancellor made a formal order appointing them. They now applied for the full salary of 350l. under the terms of the above Acts:—Held, that as a statutory power must be strictly construed, the petitioners were entitled to the full salary from the date of the formal appointment in 1865.

This was a petition presented by six additional clerks in the taxing masters' office for the full salary of 350l. By the Chancery Amendment Act (5 & 6 Vict. c. 103) s. 9, each taxing master was authorised to appoint a clerk to assist him, at a salary of 250l. a-year; and by the subsequent Act (15 & 16 Vict. c. 87) the salary was increased to 350l. In 1853, in consequence of the increased duties of their office, the taxing masters applied to the Lord Chancellor for additional clerks, and the Lord Chancellor, by a memorandum, approved of an additional clerk to each taxing master. By an order of the court such clerks were to be paid 100l. each, which salary was afterwards increased to 120l. Several unsuccessful applications had since been made to various Lord Chancellors for an increase. Up to July, 1865, no regular appointment of these additional clerks had been made, but the then Lord Chancellor (Lord Cranworth) made a formal order appointing them. Under these circumstances they now petitioned for the full salary of 350l., to which they alleged they were entitled under the above-mentioned Acts.

Rolt, Q.C., and W. Pearson, for the petitioners, submitted that, under the strict legal construction of the Acts, additional clerks were to have the same authority as other clerks, and had a statutory right to the salary of 350l.

J. H. Taylor for the Suitors' Fee Fund.

THE LORD CHANCELLOR.—The case depends entirely upon the construction of the Act, and the terms used in the Act are so plain that I wonder any doubt could have been entertained about them. By the 9th section of the 5 & 6 Vict. c. 103, a taxing master may appoint an additional clerk if necessary, and as many more as the Lord Chancellor shall order, and every such clerk shall be entitled to a salary of 250l. per annum under that Act. It is not possible to put such a construction on the Act as to exclude the assistant clerks. The 40th section of the 15 & 16 Vict. c. 87, raised the salary of every such clerk to 350l. per annum, and the question is whether a clerk appointed by the taxing master and the Lord Chancellor comes within the meaning of the words "every such." The case has nothing to do with the nature of the duties performed. A statutory power must be strictly construed, and looking at the Act and the order of July, 1865, I have no doubt that the petitioners are entitled to the full salary of 350l. per annum after that date. The costs will come out of the suitors' fund.

LORD ROMILLY, M.R., July 30, 1866.

BRETT v. CARMICHAEL.

14 L. T. 820.

Administration—Decree—Distribution of estate—Foreign suit—Executors in England—Indemnity.

EXECUTOR AND ADMINISTRATOR.—A suit was instituted here for the administration of a testator's estate, and the usual administration decree was pronounced. The chief clerk then made his certificate, finding that certain debts were due from the testator's estate, which debts he specified. A petition was then presented praying for an order to compromise the suit, and to distribute the estate among the parties entitled to it, when it was for the first time discovered that there were some foreign creditors in France who had large claims against the estate. Thereupon the order to distribute it was stayed, and proper advertisements and notices directed to be inserted in the French and other papers for creditors to come in by a certain day, or otherwise that the estate would be distributed. It further appeared that two of the French creditors had commenced actions in France against the executors and others interested in the estate in respect of their claims. The plaintiff in one of those actions was unsuccessful, and lodged an appeal against the decision, which was adverse to him. That appeal was afterwards compromised. The other French action was still pending. The executors in this country now applied to the court for its advice and direction how they should act in the matter, and for an order to distribute the estate, having regard to the pending French action and the proper indemnity to be afforded to them with respect to it, and other such like demands:—Held, that the proper course was for the court to retain a sum (5,000*l.*) of Consols to meet the possible claim, if established, in the pending French action; that, subject thereto, the residue of the estate ought to be distributed among the parties entitled to it; and that liberty must be reserved to apply to the court, and specially for the executors to do so with reference to their indemnity.

This suit was instituted for the administration of the estate of a Mr. John Watkins Brett. The testator, by his will, dated the 18th July, 1856, desired that all his real and personal estate should be disposed of, and that one-tenth of the value should be appropriated to charitable purposes, with the earnest prayer that God might so guide the disposition of the same as might best tend to the present and eternal welfare of the testator's fellow-creatures. He then appointed his brother and sister, Francis Henry Brett and Caroline Jane Wileman, to an equal right to the disposal of such tenth part, it being the testator's wish that the Church and Moravian missions should receive two-thirds of such one-tenth part, equally divided, and the town missions and Scripture readers' societies the remaining third of such tenth part equally divided. The testator then left his collection of pictures, with certain exceptions, works of art, curiosities, and plate, to be disposed of by sale at auction, as in his will was mentioned, one-tenth of the proceeds being reserved for disposal as aforesaid; and so in like manner with each portion of the property as realised. The furniture was to be disposed of as might be best approved; and he also desired that the shares in telegraph companies, and in railways or mines, should be disposed of by or under the advice of Mr. Isaac Braithwaite, to realise as might be best advised, one-tenth being set apart for disposal as aforesaid, and the remaining nine-tenths to be divided as follows:

To Jacob Brett one remaining tenth of all such proceeds, and further all right and title to two pictures by Dalreffe, then in the possession of Mr. Cyrus Field at New York, U.S., and also an acquittance of all debts due to the

testator from him, the said debts and pictures to be clear of all appropriation of the one-tenth set apart for charitable purposes. The testator then directed that the remaining eight-tenths of his property should be divided into five parts, and he gave one-fifth of such parts to Francis Henry Brett, another fifth to Caroline Jane Wileman, another fifth to Isaac Brett, another fifth to Thomas Watkins Benjamin Brett, and the remaining fifth to Hester Brett and Elizabeth Brett, equally to be divided between them. The testator then expressed his desire that, if any of the British Submarine or other telegraphic shares could not be disposed of to advantage, after setting apart one-tenth as aforesaid, the same should be deposited in the London and Westminster Bank in the joint names (of his executors), and that the interest and annual income thereof should be divided in the proportion named. He then appointed Francis Henry Brett and Henry Wileman to act conjointly under the trustees of his will in all such arrangements for securing the appropriation of the annual interest to the said Jacob Brett, Thomas Watkins, Benjamin Brett, Caroline Jane Wileman, Hester Brett, and Elizabeth Brett; and he also appointed Sir James Robert Carmichael and Edward Cheshire to be the executors of the will, with the usual powers, and bequeathed to them the sum of 100*l.* each, or the value thereof, to be selected from the pictures or curiosities at the sale.

The testator died on the 3rd December, 1863, and the executors duly proved the will on the 29th January, 1864.

The testator had no real estate; but at the time of his death he had an interest in a leasehold house, No. 2, Hanover Square, which was afterwards sold for 500*l.* and was possessed of some original and preference shares, debentures, bonds, stocks, or other securities, in the Atlantic Telegraph Company, the Mediterranean Extension Telegraph Company, the New York and London Telegraph Company, the British and Irish Magnetic Telegraph Company, and other companies of a similar nature, and in particular in the Mediterranean Submarine Electric Telegraph Company. In March, 1865, the estimated value of all that species of property belonging to the testator was about 32,536*l.* 10*s.* He was also possessed of other personal estate of considerable value. Various deeds of arrangement and other transactions took place between the parties interested in the testator's estate; and ultimately this suit was instituted to administer it. The usual administration decree was made in the suit; after which the chief clerk certified that there existed certain claims against the estate, which he specified. A petition was afterwards presented praying an order to compromise the suit, and on the 21st July, 1865, an order to that effect was duly made; and that the distribution of the estate by the executors should then be carried out, in accordance with the arrangement agreed upon between the parties.

Before any distribution of the estate had been effected, it appeared that there were some claimants in France, the existence of whose demands was not known when the chief clerk made his certificate, and that two of those claimants had commenced suits in France against the executors and the other parties interested in the testator's estate in respect of their claims. They sought to recover a sum, in the whole of upwards of 80,000*l.*, for alleged mismanagement and malversation by the testator, as gerant of the Mediterranean Submarine Electric Telegraph Company. It was stated, however, that the company had, at a general meeting, passed a resolution by which they approved of the testator's conduct as gerant, and honourably acquitted him of any approach to impropriety.

When the executors here ascertained the fact of the French claims being persisted in, they presented a petition praying that, notwithstanding the order of the 21st July, 1865, the estate of the testator remaining undistributed might be retained, and the distribution thereof postponed until the final determination of the French suits, or until the further order of this court; and that all proper inquiries might be ordered and directions given with

reference to the defence of the said French suits or otherwise in relation to the said claims, and for the indemnity of the executors; that if and so far as necessary the petition upon which the order of the 21st July, 1865, was made might be reheard, and all proper directions given with respect to this suit, and the conduct or compromise thereof, to the administrator of the testator's estate, or that such other order might be made as the court should think proper.

Accordingly, on the 10th March, 1866, an order was made on that petition staying that of the 21st July, 1865, for the distribution of the estate. At the same time the court directed that, besides the usual advertisements, others should be inserted in the *Paris Moniteur*, stating that persons claiming against the testator's estate in France must come in with their claims by the first day of the then next ensuing term, otherwise the estate would be distributed.

It subsequently appeared that M. Charpentier, the plaintiff in one of the two French suits, was unsuccessful in the first instance, and that an appeal of his from the adverse decision was compromised, and his costs paid. The other suit was still pending. The petition presented by the executors for the order to stay the distribution of the estate again came on to be considered, and an application was now made to the court by the petitioners for its advice and direction how they should act in the matter, having regard to the still pending French action, and to the indemnity against the result of it, and of any other similar claims to which they conceived that (as executors) they were clearly entitled. They also asked for an order directing that (subject as last aforesaid) the residue of the testator's estate might now be distributed among the legatees and other claimants entitled to it.

Hemming appeared for the executors.

Selwyn, Q.C., Baggallay, Q.C., Jessel, Q.C., Kay, and Holmes for the other parties to the suit.

Daly, Pearson, and O. Morgan for creditors and other incumbrancers who had come in and proved their debts.

LORD ROMILLY.—The proper order to be made now is I think this: Assuming the validity of the compromise with M. Charpentier, upon the payment of his costs in the action in France, let such a sum of consols, forming part of the testator's estate, as will produce by the sale thereof a sum of (say 5,000*l.*) be retained in court to meet the claim, if established, in the French action which is now pending (called the second action), and let the residue of the estate be distributed under the order of the 21st July, 1865. Liberty to apply must be also reserved. The executors must also have liberty to apply specially to this court, if necessary, on account of any claims which may be established against them in France, with respect to their indemnity, as against any persons, whether original legatees or other incumbrancers, who are now to be paid under the order for distribution of the 21st July, 1865.

ADMIRALTY.

DR. LUSHINGTON, March 28, 1866.

THE UNITED KINGDOM, THE HERCULES, THE RESOLUTE, AND
THE RELIEF, v. THE SYRIAN.

14 L. T. 833.

Salvage claim—Duration of service and extent of property rescued.

SHIPPING.—In awarding the amount for salvage services well performed,

the Court holds the shortness of the duration of such services as an element of meritoriousness; and where the amount of property salvaged is very large, the Court will not take advantage of the extent of such amount further than to give a liberal reward, according to the meritoriousness of the services actually performed.

Aspinall, Q.C., and Cohen appeared for the United Kingdom.

The Queen's Advocate and E. C. Clarkson appeared for the Hercules.

Deane, Q.C., and Butt appeared for the Resolute and the Relief.

Milward, Q.C., and V. Lushington appeared for the Syrian.

DR. LUSHINGTON gave judgment in this case, which was an action for compensation against the screw steamship *Syrian*, of 1,500 tons, from Alexandria to Liverpool, with cotton, by the steamships *United Kingdom*, *Hercules*, *Resolute*, and *Relief*, for services rendered to the steamer at the entrance of the Mersey, on the 24th November, 1865. From the evidence in the case it appeared that the *Syrian*, on coming into the Mersey, grounded on the Zebra Flats, the sea being at the time very heavy, and the wind W.N.W. After remaining for some time in this position, and failing to get off, she made signals for assistance. These eventually were answered by the *United Kingdom*, which, coming up, made fast to the *Syrian*, and assisted in partly removing her from her position on the bank. The steam-tug *Hercules* then came up, and the *United Kingdom* and the *Hercules* succeeded in getting the *Syrian* off, but she afterwards touched on the Little Burbo Bank. The steam-tug *Resolute* then came up, and the three tugs, by their united efforts, got the steamer into the channel; the steam-tug *Relief* then came up, and it was alleged that by the assistance she gave, she in reality rescued, or prevented the steamer from getting on the Taylor Bank until the other tugs helped to tow her up the Mersey to the Birkenhead Docks. The *Syrian*, however, being a long ship, could not be taken into the lock leading from the low-water basin into the Birkenhead Docks, and she was therefore taken by the *Resolute* and the *Relief* to the Morpeth Dock, where she was moored in safety. It was alleged in the evidence on the part of the salvors that some of the crew of the *Syrian* were so alarmed for their safety at the time the steamer was on the Zebra Flats, that they made preparation for effecting their escape by lowering a boat, and that this boat, just when the *United Kingdom* arrived, was capsized, those in her having previously got back to their ship. It was also alleged that the *Syrian's* steering apparatus was out of order, and that her engines were defective in action. Great labour and exertion were attendant on the performance of the services of the tugs, and damage arose to the tugs in rendering such services, from the destruction of their hawsers and other gear. The pilot of the *Syrian* was examined on behalf of the *United Kingdom* to show the extent of the services rendered by that vessel; and the damage alleged to have been sustained by the tug in giving assistance was admitted on the part of the steamer, and the representations of the tug's crew were in this respect taken as true. The value of the property salvaged was 120,000*l.* On the part of the owners of the *Syrian*, it was admitted that a salvage service of great merit had been rendered, and for which the salvors should be liberally remunerated; but it was contended that many of the facts alleged by the tugs as to the extent of the services rendered by them were greatly exaggerated. All that had to be considered was the fair result of the evidence of the pilot, the extent of the danger actually incurred, and the extent of the services actually rendered by each of the tugs employed; and these considerations would enable the court to arrive at something like an equitable conclusion as to the quantum of salvage to be given for the whole service, and the proportion in which the amount awarded should be divided amongst the different claimants. The Court had to consider also the state of the weather at the time when the service was rendered, the condition

of the steamer in respect to her steerage powers, and whether the locality where the transaction took place was peculiarly dangerous or not. The danger of the steamer beating to pieces on the Zebra Flats, the probability of the statement that she was in still greater danger when on the Burbo Bank, the quarter from which the wind blew, and the services then undoubtedly rendered by all the tugs, must also be well weighed. It was urged that the service of the *Relief* tug, when the steamer was in danger of getting on the Taylor Bank, were very prominent, and they certainly seemed to have been very prompt and energetic. As to the period of time which the salvage services occupied, the court had often had occasion to observe that the shorter the period occupied in rescuing a ship from distress the more meritorious was the service. In dealing with the present case, the Court also bears in mind that there is a large amount of property saved; but for the single purpose of remembering that it is enabled out of an ample fund fitly to remunerate meritorious services well performed; and the court does not hold the large value of the property saved as a ground for attempting to extort from the owners of that property or from the underwriters, as the case may be, more than full recompense for such services. In this case there are sufficient ingredients to show that a considerable amount of salvage ought to be given. And, looking at the danger with which the property was threatened, and the risk to life that might have occurred to those on board the steamer, the Court, under the advice and concurring with the opinion of the learned assessors, awards to the *United Kingdom*, 3,000*l.*; to the *Resolute*, 2,800*l.*; to the *Hercules*, 2,500*l.*; and to the *Relief*, 2,000*l.*, besides damages and costs.

ADMIRALTY.

DR. LUSHINGTON, July 4, 1866.

THE UNA v. THE THOMAS LEA.

14 L. T. 884; 2 Mar. L. Cas. (o.s.) 889.

The Abraham, 28 L. J. 775; 2 Asp. M.C. 84.

Steamers and sailing ships—Collision—Admiralty regulations—Construction of the 15th, 18th, and 19th articles.

SHIPPING.—*Regulation 15:—If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship should keep out of the way of the sailing ship.*

Regulation 18: Where, by the above rule, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualification contained in the following article, viz.:

Regulation 19: In obeying and construing the above rules due regard must be had to all the dangers of navigation, and due regard must also be had to any special circumstances that may exist in any particular case rendering a departure from such rules necessary in order to avoid immediate danger.

Case of the " sailing ship " in default.

Deane, Q.C., and Vernon Lushington appeared for the *Una*.

The Queen's Advocate and E. C. Clarkson for the *Thomas Lea*.

DR. LUSHINGTON gave judgment in this case, which came before the Court on an action brought by the owners of the late brig *Una*, 246 tons, from London,

(1) For a case of a " steamship " being in default under these regulations, see " Maritime Law Cases," vol. 2, part 6, p. 289.

in ballast for the Tyne, against the screw steamship *Thomas Lea*, 486 tons, from Newcastle, coal laden, for London, to recover for a total loss resulting from a collision between them in S.W. reach of the Swin; about a mile from the Middle Light, at a quarter past five p.m. on the 21st of last December. The wind was stated by both parties as being N.W. by N. For the brig, the weather was represented as fine and clear but dark, with a moderate breeze; and for the steamer, as dark and rather hazy, blowing a strong breeze. The case for the *Una* was, that the ebb tide was just commencing, and she was proceeding at the rate of about five knots, heading N.E. by N., close-hauled on the port tack, and carried her coloured lights fixed and screened as required by law, burning bright and clear, when the red and white lights of the steamer were observed by those on board her below the Middle Light vessel and about a point on her starboard bow, and distant about two miles; that she kept her course without any alteration, and the steamer, with her red and white lights alone visible, got clear on to the weather bow of the brig, which still kept her course until the hull of the steamer became visible, and she appeared to be passing so close as to be dangerous, whereupon the helm of the *Una* was ported a little, but that the steamship suddenly starboarded her helm, and ran at full speed across the hawse of the brig, the stem and starboard bow of which came violently in contact with the starboard side of the steamship abaft her midships, whereby everything forward on the brig was carried away. The *Thomas Lea*, on whose part a cross-action was brought, pleaded that the tide was about high water, and she was steering S.S.W., making seven to eight knots under steam alone, exhibiting the Admiralty regulation light, when the green lights of two vessels, one of which was rather astern of the other, were seen on her starboard bow, and at the distance of about one mile, and directly afterwards the bright light of a vessel riding with her head to the northward was seen ahead, and thereupon her helm was starboarded to pass clear of the vessel riding; that the foremost of the two vessels carrying the green lights kept on her course to pass the steamship on her starboard side, but the sternmost of them (which proved to be the *Una*), instead of keeping also on her course, altered her course under a port helm, and notwithstanding that the helm of the *Thomas Lea* was put hard-a-starboard, the *Una* ran into and struck the *Thomas Lea* on the starboard side, about twelve feet before the poop, and stove in her side, and did her so much damage that her cargo ran out of her hold, and she had to be run aground on the Maplin Sand to prevent her from foundering. By the rules established by the authority of Parliament in that case, the duty imposed upon the steamer was to give way, and to keep out of the way of the sailing vessel, and the sailing vessel was directed to keep her course. That being so, the first inquiry was, whether the *Thomas Lea* did all in her power to keep out of the way of the sailing vessel, whether the measures she took for that purpose were the right measures or not, and whether the collision was brought about by the violation by the sailing vessel of the 18th of the rules, whereby she was directed to keep her course, unless she was compelled, with a view to avoid immediate danger, to adopt a different mode of proceeding. The burden of proof first lies upon the *Thomas Lea*. She was bound to show she took all the proper measures in order to avoid the collision; but if it should appear that she did not take the proper measures to avoid the collision, and that also the sailing vessel was to blame for altering her course, it signified not whether she ported or starboarded, but that she altered her course, and thereby contributed to the collision. The result would be simply that both the parties would be to blame. With regard to the steamer the statement from the evidence of the second mate was very justly relied on by the Queen's Advocate, and from this it would appear that the steamer came round the Middle Light under a starboard helm, and that as soon almost as she came round the Middle Light, notice was given by the look-out man that there were two green lights two or three points on the starboard bow, and it was admitted on all hands, and had not been questioned in any way whatever, that the sternmost of those green lights was

the *Una*'s. The questions to be determined are: first, what, if anything, ought to have been done on board the steamer; and it is not an unimportant question to understand at what distance they were at the time. The evidence was not very clear as to that distance, but it was probably a cable or cable and a half. Before anything was done with regard to the *Una*, a report was made that there was a bright light right ahead, upon which an order was given by the master to starboard the helm, and the helm was subsequently starboarded, and the consequence was she passed by the bright light, leaving it upon her starboard hand. It appeared, therefore—for there did not appear to have been any alteration made in the course of the steamer at the time—that she would be from originally two to three points, having the *Una* upon her starboard bow, and she would then be from four and a half to five points. Under these circumstances, so far as can be gathered from the evidence, the steamer proceeded straight on, keeping her course until she approached the *Una*. Then arose the question as to whether the steamer did everything in her power to avoid the collision, and whether the statement she gave of her conduct of the *Una* was consistent with truth or not. There was also another consideration, viz., whether, according to the *Una*'s own statement of the case, she was or was not to blame. If the *Una* unnecessarily ported, and thus contributed to the collision, then for that she was to blame. If she did port under pressure of expectation of necessity, but that did not contribute to the collision, then that slightly porting would not affect the result of the case. After giving the most careful consideration to the evidence adduced on both sides, the Court was of opinion that the *Una* was solely to blame for the collision that had occurred, and there would be a decree to that effect in both actions.

The Court was assisted by Captain Drew and Captain Close, of the Trinity House.

HOUSE OF LORDS.

July 13, 1866.

BICKET v. MORRIS.

14 L. T. 835; L. R. 1 H.L. (Sc.) 47; 12 Jur. N.S. 803.

See, *Crossley v. Lightowler*, 1866, L. R. 3 Eq. 279 (V.C.); [1867] E. R. A. 656; 36 L. J. Ch. 584; L. R. 2 Ch. 478; 16 L. T. 438; 15 W. R. 801 (L.C.); *Norbury v. Kitchin*, 1866, 15 L. T. 501 (V.C.). Distinguished, *Edleston v. Crossley*, 1868, 18 L. T. 15 (V.C.). Applied, *Att.-Gen. v. Loinsdale*, [1869] E. R. A.; 38 L. J. Ch. 335; L. R. 7 Eq. 377; 20 L. T. 64; 17 W. R. 219 (V.C.). Referred to, *Pisani v. Att.-Gen. for Gibraltar*, 1874, L. R. 5 P.C. 516 (P.C.). See, *Rhodes v. Airedale Drainage Commissioners*, [1876] E. R. A.; 45 L. J. C.P. 337; 1 C.P. D. 380 (C.P. D.): reversed, [1876] E. R. A.; 45 L. J. C.P. 861; 1 C.P. D. 402; 35 L. T. 46; 24 W. R. 1053 (C. A.); *Orr Ewing v. Colquhoun*, 1877, 2 App. Cas. 839 (H.L. (Sc.)). Applied, *Palmer v. Persse*, 1877, Ir. R. 11 Eq. 616 (V.C.). Distinguished, *Sutherland v. Ross*, 1878, 3 App. Cas. 736 (H.L. (Sc.)). Considered, *Kali Kishen Tagore v. Jodoo Lal Mullick*, 1879, L. R. 6 Ind. App. 190 (P.C.). Explained, *Kensit v. Great Eastern Railway*, [1885] E. R. A.; 54 L. J. Ch. 19; 27 Ch. D. 122; 51 L. T. 862; 32 W. R. 885 (C. A.). Discussed, *Belfast Ropeworks Co. v. Boyd*, 1887, 21 L. R. Ir. 560 (C. A.). Applied, *M'Glone v. Smith*, 1888, 22 L. R. Ir. 559 (Ex. D.). See, *Withers v. Purchase*, 1889, 60 L. T. 819 (Ch. D.). Distinguished, *Burgess v. Morton*, [1896] E. R. A.; 65 L. J. Q.B. 321; [1896] A.C. 136; 73 L. T. 713 (H.L.).

Water—Riparian owner—Right to build on bed of river—Damage to neighbouring owner.

WATER.—*Though a riparian owner in the case of a stream not navigable is the owner in severalty of his half of the alveus, still he has no right to build upon such alveus, even though no damage is occasioned or is likely to be occasioned thereby. An action or injunction therefore lies at the instance of an adjacent or ex adverso riparian owner, against one who so builds, and it is no defence that no damage has been sustained or is likely to be sustained.*

The interest of a riparian proprietor in a running stream goes not only to the extent of preventing its being diverted or diminished, but of preventing the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to such proprietor: (per Lord Westbury.)

This was an appeal from a judgment of the Court of Session in Scotland.

The appellant Bicket was the owner in fee of certain tenements abutting on the water of Kilmarnock in the town of Kilmarnock. At that place the river was about fifty-eight feet wide and very shallow. Bicket resolved in 1860 to rebuild his premises, and he was desirous of building the wall on the river side farther into the river. He applied to his neighbour, Mr. Morris, the owner of premises directly opposite, on the other bank of the river, for permission to build the new wall according to a red line drawn on the Ordnance Map, and it was finally agreed that, in consideration of receiving 10*l.* from Bicket, he (Mr. Morris) would make no objection to the wall being built farther into the river. The parties signed a copy of the map as relative to their agreement and the money was paid.

After the building had proceeded, the respondent discovered that Bicket, instead of adhering to the red line agreed upon, advanced his wall still farther into the river by a distance of three feet at one place. The respondent complained and requested the appellant to desist, but he refused, as he contended that he had kept to the line agreed on. The respondent thereupon commenced an action. He did not allege any actual damage from the appellant's operations, but alleged that such operations were injurious, inasmuch as they had the effect of narrowing the channel, altering the flow of the river, and diverting the course of the stream. The respondent also prayed an injunction to stop the appellant's proceedings, and a decree ordering him to take down his building so far as it transgressed the red line agreed on between the parties.

The appellant denied that he had transgressed the red line; but even if he had done so, yet that no injury was caused to the respondent.

The evidence produced was conflicting. The Court of Session held, (1) that the appellant had in point of fact encroached; (2) that he was liable to an action for such encroachment, though no injury was alleged by the respondent. The leading part of the judgment was as follows:

INGLIS, L.J.C.—The main contention of the defender, upon the assumption that the line of his wall does extend into the *alveus* of the stream farther than was permitted by the agreement, is, that the pursuer is not entitled to object, unless he can show that he is actually prejudiced thereby—that the extension of the line of the wall is productive of damage to his property upon the other side. The pursuer, on the other hand, contends that any advance into the *alveus* of the stream, however slight—be it to the extent of one inch or one hair's breadth—constitutes a legal wrong, and therefore that he is entitled to obtain redress against it, even although it could be shown that the operation is not only not injurious, but beneficial to both parties. Now, I do not think it necessary to adopt the extreme view contended for by either party. But I think the law may be stated in such a way as to be perfectly reconcilable with what are the true interests of parties in the relation in which the pursuer and defender stand to one another here, and, at the same time, consistently with legal principle, and with the cases upon our books. The property of these two neighbours on the opposite sides of the stream is said to be, and is by their

titles described as being bounded by the stream. The effect in law is, that each is proprietor up to the *medium filum fluminis*, and that *medium filum* constitutes the boundary or line of march between the two estates. It is a mistake to say that the *alveus* of the stream is the common property of the two proprietors of the banks. That is not the law of Scotland. The sole property of each proprietor comes up to the *medium filum fluminis*, and this appears to me to be a matter of some consequence, because we are told that the maxim *in re communi melior est conditio prohibentis* was applicable to this case. I do not think it is. I think that rule is applicable to common property, and not properly applicable to any other kind of property. But although the *alveus* of the stream is thus divided between the two proprietors of the opposite banks, and is held by each up to the *medium filum* in sole property on either side, it does by no means follow that they have not common interests. They have a common interest in the water. In water alone, as such, there can be no property either sole or conjunct; but there is a common interest in the water, and out of that common interest in the water there also necessarily arises a common interest to each in the whole *alveus* over which the water runs, and a common interest even in the banks of the stream, although they are unquestionably the sole property of the parties whose estates they adjoin. Now, it is out of that kind of common interest that the legal principles arise which are applicable to the present case. I think the general rule of law unquestionably is, that a proprietor upon the banks of a stream of this kind is not entitled to make any erection whatever *in alveo*. He is undoubtedly entitled to defend his land against inundation by fortifying the bank of the stream, but even that right he must exercise under certain restrictions. He must have some regard to the interests of his opposite neighbour, even in the exercise of that right. But the general rule unquestionably is, that even for the purpose of defence, and where it may be shown to be absolutely essential for the defence of his property, he has no legal right to make any erection *in alveo*. I entertain no doubt that a party in the position of the defender here is not entitled to make any erection *in alveo*. But, then, at the same time, if it could be shown that the party complaining of a very slight encroachment upon the *alveus* was doing so for the mere purpose of annoyance—in *emulationem vicini*—not under any apprehension of danger to himself, or of damage to his property, but merely for the purpose of asserting his legal right up to a definite line, if it could be shown that the work had been accidentally extended into the *alveus*; that it was *innocue utilitatis*, or that it was beneficial to the complainer as well as to the respondent, I am not prepared to say that I could hold such a work to be illegal, or that it could be prohibited in the course of erection, and for the reason that I have stated, that this is not a subject of common property, and therefore the maxim *melior est conditio prohibentis* is not applicable. But then the question comes to be whether the pursuer in this case, though he cannot (and that is the fair result of the proof) show that any damage has actually been occasioned by the erection of this wall, is not in a position to say that an injury has been done to his property because the operation involves a certain risk of damage. There is nothing the operation and action of which are more uncertain than running water. The smallest interference with the course of running water may be productive of effects which nobody can foresee or could have contemplated; and although engineers are very skilful, no doubt, in generally foreseeing what the action of water will be, I doubt whether an engineer can absolutely insure one as to what shall be the precise effect of an alteration, however slight, in the course of a running stream. I think, therefore, looking to the nature of the subject, and to the fact that this is not an encroachment of an inch or two, or any such impalpable encroachment as that, but that it is an encroachment clearly established to be of considerable size, and certainly calculated to effect some deviation in the course of the water, that the opposite proprietor, the pursuer, is well entitled to say, "I apprehend risk to my interest; I apprehend that my property may be affected by the consequences of

this diversion of the stream, and therefore, seeing that you have no legal right to interfere with the *alveus* at all, I am quite entitled to have your *opus manufactum* removed." I think that is the pursuer's undoubted right.

The defender now appealed against that judgment.

Rolt, Q.C., Anderson, Q.C., and Blair, for the appellant, contended that even though a riparian owner built on the bed of a river, if such building caused no damage to the other riparian owners, no action was competent, for it was *damnum absque injuriâ*. One may build a boathouse or drive a stake into the soil, and if no damage was caused to other riparian owners, none had any cause of action. There was no difference between the law of Scotland and of England on this point.

The Attorney General (Palmer) and W. Paterson for the respondents, contended that the mere act of encroachment by building was in itself an injury, and was actionable without actual damage being alleged or proved; that though the soil was the property of the riparian owner the water was not, and whatever altered the flow of water was of itself a wrong. If it were otherwise a riparian owner might encroach inch by inch till he got to the middle of the stream, and yet at no point of the encroachment could he be stopped.

Cur. adv. vult.

The LORD CHANCELLOR.—The important question in the case is, whether the respondents were entitled to a declaration that the defender had no right or title to erect any building, or otherwise to encroach upon or to interfere with that part of the *solum* of the river called the water of Kilmarnock which is immediately opposite the pursuer's property, beyond a certain line, and to a decree ordering the defender to take down and remove the buildings or other erections, in so far as these extend into or encroach upon the *solum* of the river beyond the said line, and interdicting him from erecting "any building or otherwise encroaching upon the *solum* of the river beyond the line in question." There is a general statement in the pleas in law of the encroachments complained of being "injurious to the pursuer's property," but no proof was given by him of any actual injury from the building being advanced farther into the river than the line agreed upon. The result of the opinions of the judges of the Second Division appears to be, that a riparian proprietor has no right to erect any building in *alveo fluminis*, and that if he does so, although the opposite proprietor may be unable to prove that any damage has actually happened to him by the erection, yet, if the encroachment is not of a slight and trivial but of a substantial description, it must always involve some risk of injury. Lord Benholme said, "Without my consent" (*i. e.*, the consent of the proprietor of the other side of the river) "you are not to put up your building in the channel of the river, for that in some degree must affect the natural flow of the water. What may be the result no human being with certainty knows, but it is my right to prevent your doing it, and when you do it, you do me an injury whether I can prove damage or not." And Lord Neaves said: "Neither can any of the proprietors occupy the *alveus* with solid erections without the consent of the other, because he thereby affects the course of the whole stream. The idea of compelling a party to define how it will operate upon him, or what damage or injury it will produce, is out of the question." These views appear to me to be perfectly sound in principle, and to be supported by authority. The proprietors upon the opposite banks of a river have a common interest in the stream, and although each has a property in the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water. My noble and learned friend the late Lord Chancellor during the argument put this question, "If a riparian proprietor has a right to build upon the stream, how far can this right be supposed to extend? Certainly (he added) not *ad medium filum*, for, if so, the opposite proprietor must have a legal right to

build to the same extent from his side." It seems to be clear that neither proprietor can have any right to abridge the width of the stream, or to interfere with its regular course, but anything done *in alveo* which produces no sensible effect upon the stream is allowable. It was asked by the counsel in argument, whether a proprietor on the banks of a river might not build a boathouse upon it? Undoubtedly this would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course; but if the erection produced this effect, the answer would be, that, essential as it might be to his full enjoyment of the use of the river, it could not be permitted; *à fortiori* when the act done is the advancing solid buildings into the stream, not in any way for the use of it, but merely for the enlargement of the riparian proprietor's premises, it must be an infringement upon the right and interest of the proprietor on the opposite bank. Upon principle, then, the pursuer had a cause of action in respect of the defender's building, and was entitled to a declaration against the encroachment and a decree to have the obstruction removed. The authorities cited in the argument at the bar support the principle and establish a satisfactory distinction. The proprietors on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark, *ripari muniendi causâ*; but even in this necessary defence of themselves, they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite side of the river. In this case mere apprehension of danger will not be sufficient to found a complaint of the acts done by the opposite proprietor, because, being on the party's own ground, they were lawful in themselves, and only became unlawful in their consequences upon the principle of *sic utere tuo ut alienum non ledas*. But any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor, and therefore the act being *primâ facie* an encroachment, the onus seems properly to be cast upon the party doing it to show that it is not an injurious obstruction. There only remains the question of acquiescence to be considered. There is no doubt as to the principle of the cases of persons standing by and permitting acts to be done which they are entitled to prevent. It is only just that a person who has been encouraged to continue expensive operations by the seeming consent of him who might have stopped them, should be able to defend himself against any subsequent attempt to treat them as an encroachment upon the rights of the party who has so misled the other into the confidence that his acts were sanctioned. But in all such cases knowledge of the acts done is essential to stop the party who has suffered the encroachment upon his rights from afterwards objecting to it. In this case there was an agreement between the parties, and it does not appear that the pursuer knew at first that the defender was exceeding the limits prescribed by the agreement. As soon as he was aware of the fact he objected to it. The defender, however, chose to go on in the face of the pursuer's objection. His proper course would have been to have suspended his works until it could be ascertained whether he had kept to the permitted line or not. If he determined to proceed, in spite of the objection, it is difficult to understand how he can now claim the benefit of the principle of acquiescence, or how he can reasonably complain that he is compelled to reduce his building within the limits agreed upon. My Lords, for these reasons I think that the decree of the Second Division ought to be affirmed.

LORD CRANWORTH.—My Lords, there is no doubt that the respondent agreed with the appellant that to a certain extent he would not object to his advancing his building into the bed of the river, so that if the limit to which that agreement extended has not been transgressed, there can be no ground of complaint on the part of the respondent. If the limit has been transgressed, then there arises a second question, namely, whether independently of any agreement the appellant had not by the law of Scotland a right to erect the buildings which he has erected in the *alveus* of the river. In the hearing of this case at your Lordships' bar the two questions were argued in the order in

which I have just stated them; that is, first, whether the appellant's buildings had been carried further into the river than the line agreed to by the respondent; and secondly, whether by the law of Scotland there was anything to prevent the appellant, independently of consent, from erecting the buildings in question. I will take a different course, and consider first what rights the appellant had independently of contract or consent. By the law of Scotland, as by the law of England, when the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *primâ facie* owner of the soil of the *alveus* or bed of the river *ad medium filum aquæ*. The soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that, if from any cause the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the *alveus* each of them up to what was the *medium filum aquæ*, in the same way as they were entitled to the adjoining land. The appellant contended that, as a consequence of this right, every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the *alveus*, so long as other proprietors cannot show that damage is thereby occasioned or likely to be occasioned. I do not think that this is a true exposition of the law. Rivers are liable at times to swell enormously from sudden floods and rain, and in these cases there is danger to those who have buildings near the edge of the bank, and indeed to the owners of the banks generally, that serious damage may be occasioned to them. It is impossible to calculate or ascertain beforehand what may be the effect of erecting any building in the stream so as to divert or obstruct its natural course. If a building should be carried out to the middle of the stream, that is, to the whole extent of the proprietor's right in the *alveus*, no one can fail to see there might be great danger in case of floods. If the proprietor on one side can make an erection far into the stream, what is there to prevent his opposite neighbour from doing the same? The most that can be said in favour of the appellant's argument is, that the question of the probabilities of damage is a question of degree, and so, if the building occupies only a very small portion of the *alveus*, the chance of damage is so little that it may be disregarded. But this is an argument to which your Lordships cannot listen. Lord Benholme says truly that what may be the result of any building in the *alveus* no human being knows with certainty. The owners of the land on the banks are not bound to obtain or to be guided by the opinions of engineers or other scientific persons as to what is likely to be the consequence of any obstruction set up in waters in which they all have a common interest. There is in this case, and in all such cases there ever must be, a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say, "We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it." This is a plain, intelligible rule, easily understood and easily followed, and from which I think your Lordships ought not to allow any departure. It was said in argument, "Then, if I put a stake in the river, am I interfering with the rights of the riparian proprietors?" To this I should answer, *De minimis non curat prætor*. But, further, it might be demonstrated in such a case, not that there was an extreme improbability, but that there was an impossibility of any damage resulting to any one from the act. It is, however, unnecessary for us to speculate on any such infinitesimal obstruction. No one can say that in this case the extent to which the appellant has built into the river is so small as to be, like the case of a stake driven into the soil, inappreciable. I will only add that I find nothing in the cases or text-books to which we were referred at variance with the view I have taken of the law. And the cases of the *Town of Aberdeen v. Menzies*, and *Farquharson v. Farquharson*, cited by the Lord Justice Clerk, are in exact conformity with it. I therefore come without hesitation to the conclusion that

the appellant had no right, independently of contract or consent, to build as he has built into the bed of the river.

LORD WESTBURY.—My Lords, this is a case of very considerable importance because, as far as I know, it will be the first decision establishing the important principle that a material encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor without the necessity of proving either that damage has been sustained, or that it is likely to be sustained, from that cause. The examination that has been given at the bar to the cases cited upon that point of law certainly had led me to the conclusion that it has not yet been clearly established by decisions. I have felt much difficulty upon it, because undoubtedly a proposition of that nature is somewhat at variance with the principles and rules established on the subject by the civil law. I am, however, convinced that the proposition as it has been laid down in the court below, and it has received the sanction of your Lordships in your judgments, is one that is founded in good sense, and ought to be established as matter of law. When it is said that proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not by any means follow that the property is capable of being used in the ordinary way in which so much land uncovered by water might be used, but it must be used in such a manner as not to affect the interests of riparian proprietors in the stream. Now the interest of a riparian proprietor in the stream is not only to the extent of preventing its being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor. If we attend to the subject for a moment, it will occur to every one that in the bed of a river there may possibly be a difference in the level of the ground, which, as we know, has the effect of directing the tide or current of the river in a particular direction. Suppose the ordinary current flows in a manner which has created for itself, by attrition, a bay in a particular part of the bank; if that were obstructed by a building, the effect might be to alter the course of the current so as to direct the flow with a greater degree of violence upon the opposite bank, or upon some other portion of the same bank; and then it will immediately occur to your Lordships that if, at that part of the bank to which the accelerated flow of the water in greater force is thus directed, there happens to be a building erected, the flow of the water thus produced by the artificial obstruction would have the effect possibly of wearing away the foundation of that building at some remote period, and would thereby be productive of very considerable damage. It is wise, therefore, in a matter of that description, to lay down the general rule that, even though immediate damage cannot be alleged, even though the actual loss cannot be predicted, yet, if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury in the sense that it is a matter the court will take notice of as an encroachment which adjacent proprietors have a right to have removed. In this sense the maxim has been applied to the law of Scotland that *melior est conditio prohibentis*, namely, that where you have an interest in preserving a certain state of things in common with others, and one of the persons who have that interest in common with you desires to alter it, *melior est conditio prohibentis*, that is to say, you have a right to preserve the state of things unimpaired and unprejudiced in which you have that existing interest. Upon these grounds I entirely concur with your Lordships.

Judgment affirmed with costs.

CHELMSFORD, L.C., July 25, 1866.

Re HESEE AND SMITH.

14 L. T. 842; L. R. 1 Ch. 518.

*Application for letters patent—Accidental delay—Expiration of the Provisional protection.*PATENT.—*Extension of time allowed under special circumstances.*

T. Aston moved to have the time extended for the application for the warrant of the law officer, and for the letters patent, under the following circumstances: According to the regulations as to patents, the application must be made twelve clear days before the expiration of the provisional protection, but the Lord Chancellor, under special circumstances, might allow an extension of the time. In the present case one of the patentees met with a severe accident, and the clerk of his solicitor was not aware of the limit of twelve days. The consequence was that the application had been made three days after the twelve days.

The LORD CHANCELLOR could see no reason why the other patentee should not have looked after the business. The ignorance of the clerk was certainly no plea; however, as it would be hard to deprive the applicants of the benefit of the patent, he would give leave to affix the great seal, although he did not wish to encourage carelessness.

CHELMSFORD, L.C., July 28, 1866.

Re THE INTERNATIONAL CONTRACT COMPANY.

14 L. T. 843; L. R. 1 Ch. 523; 12 Jur. N.S. 591.

25 & 26 Vict. c. 89, ss. 147, 149—Winding-up—Appointment of official liquidators—Discretion of judge.

COMPANY.—*Official liquidators were appointed by an order of Stuart, V.C.:—Held, that the discretion of a lower court is not to be controlled by a higher in the absence of extraordinary circumstances. Where subsequent matter arises, application should be made to the court which issued the original order.*

This was an application to discharge an order made by Stuart, V.C., on July 24, 1866, appointing official liquidators.

The company was registered in May, 1864, with a nominal capital of 4,000,000*l.*, its object being to take contracts for railways and other public and private works. The company having incurred liabilities which it had no means to meet, upon the petition of a shareholder and an execution-creditor, the Court, on July 6, made an order for the winding-up, and those two persons were appointed official liquidators.

Daniel, Q.C. and *L. Webb*, in support of the application, contended that a creditor and a shareholder were not fit persons to be official liquidators. They cited

Northumberland and Durham Banking Company, 2 De G. & J. 508.

The Attorney-General, *Bacon, Q.C.*, *J. N. Higgins*, *Roxburgh*, and *Swanston*, were not heard.

The LORD CHANCELLOR.—A Court of Appeal ought not to be called upon to control the discretion of a lower court, save under most extraordinary circum-

stances. No such circumstances exist in the present case, and I must peremptorily refuse all such applications. Where new matter arises in a case, application should be made to the judge who gave the original order. The court below, in the exercise of its discretion, has made an appointment. If it has been deceived and has made an improper appointment, an application must be made to the same court to reconsider the point. The motion is refused with costs against all parties served.

CHELMSFORD, L.C., July 28, 1866.

Re LONDON, BOMBAY, AND MEDITERRANEAN BANK.

14 L. T. 843; L. R. 1 Ch. 525; 12 Jur. N.S. 591.

Winding-up—Official liquidators—Appointment.

This was also an application to discharge an order made by Stuart, V.C., under which two directors of the company had been appointed official liquidators.

Craig, Q.C. and *Roxburgh* supported the motion.

The *Attorney-General*, *Daniel, Q.C.*, *Bacon, Q.C.*, *De L. Giffard, J. N. Higgins* and *Whitehorne* were not called upon.

The LORD CHANCELLOR said he must refuse the application with costs against all parties served.

STUART, V.C., July 14, 1866.

DENNY v. DENNY.

14 L. T. 854.

Power—Appointment—Charge on lands—Time of vesting—Interest—Irish currency.

POWERS.—By a deed of settlement B. was empowered to charge certain lands in Ireland with any sum, not to exceed 400l. a-year, as a jointure for his wife, and with any sum not to exceed 2,000l. sterling for his younger children.

In exercise of the power B. charged the lands with 2,000l. late Irish currency, to be vested in and paid to his younger children in equal shares on their attaining twenty-one or marriage; and he directed, in the event of his dying before the shares became vested, that his said children should be entitled to interest on their presumptive portions at 5 per cent. by way of maintenance from the time of his death until such portions should be payable:—Held, that the 2,000l. carried interest at 5 per cent. Irish currency, from the death of B. until the shares of the younger children became payable.

This suit was instituted for the purpose of determining certain questions which had arisen as to the exercise of a power under a settlement.

The deed containing the power in question, dated 18th February, 1816, after conditionally settling certain lands in Ireland on Robert Day Denny for life, with remainder to his eldest son, provided that it should be lawful for the said R. D. Denny and any of the issue of his body, when in actual possession of the said lands, to charge the same with any sum not to exceed 400l. a-year,

as a jointure for his wife, and with any sum not to exceed 2,000*l.* sterling for his younger children.

By a deed of appointment dated 20th July, 1843, R. D. Denny charged the lands in Ireland with 2,000*l.* late Irish currency to be raised by sale or mortgage, and to be vested in and payable to his younger children in equal shares on their attaining twenty-one or marriage. And he directed that the sum should bear interest at 5 per cent. from the time the same was directed to be paid until the same should be raised and paid; and he further directed that, in case he should die before any of his younger children should be entitled to vested interests in their portions, he or she should be entitled to interest on their presumptive portions at 5 per cent. by way of maintenance from the time of his death until their portion should be payable.

R. D. Denny died on the 12th July, 1864, after having made a will and without having further exercised his power of appointment.

The plaintiffs were infants, and the younger children interested under the appointment, and it was maintained on their behalf that they were entitled to interest at 5 per cent. on their presumptive shares by way of maintenance from the death of R. D. Denny until majority or marriage, or day of payment after such majority or marriage. The defendant, the eldest son, contended that R. D. Denny had no power to charge the property with 5 per cent. or any sum by way of interest on the 2,000*l.* until after the times for payment of such sum, and that the appointment of the 2,000*l.*, inasmuch as it purported to give interest on presumptive shares, was in excess of the power.

For the plaintiffs it was further submitted that the 2,000*l.* was sterling money of England. The defendant, on the other hand, contended that the sum appointed was late Irish currency.

The bill prayed for a declaration as to how the 2,000*l.* and interest thereon was to be raised and made payable, and that the cost of the suit might be either paid by the defendant or declared a charge on the inheritance.

Bacon, Q.C. and W. W. Mackeson, for the plaintiffs.

Malins, Q.C. and Bedwell, for the defendant.

The VICE-CHANCELLOR.—I consider that the 2,000*l.* carries interest at 5 per cent. from the death of R. D. Denny. At the proper time the 2,000*l.* will have to be paid to the plaintiffs in Irish currency, and the interest, in the meantime, must therefore be paid in the same currency. The costs, as between solicitor and client, will be a charge on the inheritance.

Wood, V.C., April 17, 1866.

LEWERS v. THE EARL OF SHAFTESBURY.

14 L. T. 855; L. R. 2 Eq. 270; 12 Jur. N.S. 389.

Referred to, *Larios v. Bonany y Gurety*, 1873, L. R. 5 P.C. 346 (P.C.).

Practice—Contract—Damages—21 & 22 Vict. c. 27, s. 2.

SPECIFIC PERFORMANCE.—Under the 2nd section of the 21 & 22 Vict. c. 27, the Court has not jurisdiction to deal with the question of damages where a plaintiff has failed to establish, by proper evidence, a bill for the specific performance of a contract.

Motion for decree.

This was a bill by the plaintiff, who alleged that the defendant's agent had entered into a contract with him to grant him a lease for twenty-one years of

a farm in Dorsetshire belonging to the defendant, for a specific performance of such contract. The plaintiff alleged that he had spent considerable sums of money on the buildings on the farm and the improvement of the farm generally. He had been let into possession, and had held it for about five years, paying the stipulated rent. The prayer of the bill was also for compensation for all damage or loss occasioned to the plaintiff in relation to the premises, in addition to or in substitution for all or any part of the other relief prayed.

Rolt, Q.C. and *E. E. Kay*, for the plaintiff, attempted to make out from the evidence a case for the specific performance of the contract, but in this they wholly failed (the Vice-Chancellor holding that no contract had been proved). They then contended that, although the plaintiff was not entitled to a decree for specific performance of the contract, he was entitled to compensation in the nature of damages for the sums of money which it was proved he had disbursed in the improvement of the farm, &c. The 2nd section of the 21 & 22 Vict. c. 27, is as follows:—

“That in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, *either in addition to or in substitution for such injunction or specific performance*, and such damages may be assessed in such manner as the court shall direct.”

The outlay had been made by the plaintiff on the faith of the contract having the effect of a binding agreement.

The *Attorney-General* (Sir R. Ralmer), *Sir Hugh Cairns, Q.C.*, and *Speed*, for the defendant, were not called upon.

The VICE-CHANCELLOR said that it appeared to him that he had no jurisdiction to deal with the question of damages where the plaintiff had failed to make out a case for the specific performance of the contract. By the Act the court had a discretion to give relief in damages, where the contract was established, and the discretionary power might be exercised where the court thought relief in damages was better for the plaintiff than specific performance, the words of the Act being “in addition to or in substitution for” the relief prayed. This assumed the fact that a contract had been established, and there being none in this case, the court had no jurisdiction over the matter.

No order made.

WOOD, V.C., May 5, 1866.

EARL BEAUCHAMP v. WINN.

14 L. T. 856; L. R. 2 Eq. 802.

Practice—Revivor.

PRACTICE.—Where a sole plaintiff dies before answer put in the Court will, on the application of the executor, make an order to revive, and that the defendants do answer the interrogatories in support of the bill within twenty-eight days from notice of the order.

The Earl of Beauchamp, as the executor of a sole plaintiff who had died after bill and interrogatories in support of it had been filed, but before answer put in, applied for an order to revive the suit as against the defendants.

F. J. Walford, in making the application, stated that the clerk of the record and writs had expressed doubts as to the form of the order to revive the suit, and had requested that the point should be mentioned to the court, referring to the 52nd section of the Chancery Amendment Act, 15 & 16 Vict. c. 86, which states that an order to the effect of a bill to revive shall be sufficient.

The VICE-CHANCELLOR made the order to revive, but, as the abatement had taken place before any answer put in, directed also that the defendants should answer the interrogatories within twenty-eight days.

ADMIRALTY.

DR. LUSHINGTON, Jan. 31, 1866.

THE ALLAN v. THE FLORA.

14 L. T. 860.

Rules of the Road—Admiralty regulations—General construction of.

SHIPPING.—*The 19th article of the Admiralty Regulations of the rules of the road, which directs that "in obeying and construing all the other and previous regulations, due regard is to be had to all dangers of navigation, and to any special circumstances existing in any particular case, rendering a departure from such rules necessary, in order to avoid immediate danger," does not prescribe any specific course to be adopted or pursued, since such prescription would necessarily involve on many occasions the destruction of the very ships it was framed to preserve.*

Brett, Q.C., and E. C. Clarkson appeared for the Allan.

Millward, Q.C., and Vernon Lushington for the Flora.

DR. LUSHINGTON gave judgment in this case, which was a suit instituted by the British ship *Allan*, 924 tons register, from the Gulf of St. Lawrence to London, with a cargo of deals, against the Spanish barque *Flora*, 320 tons register, from Havannah to Hamburg, with a cargo of tobacco, for a loss resulting from a collision between them about fourteen miles south of the Eddystone Lighthouse, on the morning of the 16th November last. The *Allan* represented that the weather was clear, with light clouds and stars visible, and a strong westerly swell. The *Flora* stated the night was dark. The case for the *Allan* was, that the tide being flood running half-knot, she was under all plain sail, close-hauled on the starboard tack, steering E. by S. $\frac{1}{4}$ S., making four knots, carrying her proper lights, when the green light of the *Flora* was seen, distant about a mile, and about three points on her lee bow; that she (the *Allan*) was kept as clear to the wind as possible, and as the *Flora*, which was on the port tack, continued to approach the *Allan* without any apparent change in her course, those on board the *Allan* hailed the *Flora* loudly and repeatedly, notwithstanding which the *Flora* ran aftermost hawse of the *Allan*, and with the fore shroud of her starboard main rigging carried away the *Allan's* jibboom and bowsprit, and being entangled with the wreck thereof swung round with her starboard bow into the starboard main chains of the *Allan*, and there lay beating for nearly two hours, doing a great deal of damage; after which the *Allan* was drawn clear astern by setting her main and mizen topsails, the top-gallantsails braced all aback, all the canvas having been taken in on her foremast directly after the collision to save such mast from being carried away; that as soon as the two vessels were clear of each

other the crew of the *Allan*, as she still lay aback, proceeded to secure her foremast, the headstays of which were all adrift, and while engaged in doing so the *Flora* ran down towards the *Allan*, and owing to the negligence and mismanagement of those on board her caught the port bow and anchor of the *Allan* with her port main-rigging, and did further serious damage to the *Allan*, and was finally got clear by cutting away some of her said port main rigging; that the collision and the damages arising therefrom, were occasioned by the neglect and improper navigation of the *Flora*, and no blame in respect thereto is attributable to any of those on board the *Allan*. The defence of the *Flora*, on whose behalf a cross-action was brought, set forth that she was close-hauled on the starboard tack, heading E.S.E., carrying her regulation lights brightly burning; that she was taken aback, and having come round on the port tack she proceeded on that tack, heading W.S.W., for some time, to get sufficient way on the barque to tack her; that the barque being ready to tack, and the sea appearing clear for that purpose, the *Flora* was put in stays, all hands being on deck; whilst in stays a light was suddenly seen by Antonio de Gonlisolo, the look-out man, on the barque's starboard side, and immediately afterwards the barque was struck on her starboard quarter with great violence by the stem of the *Allan* coming up channel, and on board of which no regulation lights could be seen; that the two vessels fell alongside, head and stern, and remained in contact for nearly three hours; that the vessels at last got clear, and the *Allan* dropped clear astern for some distance. The *Flora* having lost nearly all her sails, lay quite powerless. It was then alleged that the *Allan* then gathered way, and by bad management advanced and came with great violence into the port side of the *Flora*, and did much further damage; that after the vessels finally cleared, the *Flora* put into Plymouth; that the collisions were both caused by the improper navigation of the *Allan*, and by the negligence of those on board her, and were in no degree the result of any neglect on the part of the *Flora*. The questions for our consideration are, which of these two vessels was to blame for the collisions which have occurred, or whether they were both to blame on the same account. It appears that the *Flora* intended to go into stays, and was, according to her own account, in stays. The question will be, whether she took those measures which were proper to be taken preliminary to going into stays, and whether she did that after having taken a proper survey of the state of the sea immediately surrounding her, so as not to run the risk of a collision in case of a vessel being near her. According to the *Flora's* own statement, she had one person on the watch at the time in question, and, according to her own statement, from the admitted facts, and according to her own plea, the *Allan* was not seen coming, although she was a large vessel. Why did she not see the *Allan*? Assuming for the moment the *Allan* carried lights, why did she not see those lights? There was nothing in the state of the weather to prevent her seeing them, because, taking the whole of the evidence together, it is clear that it was an ordinary night, and you might see a vessel carrying lights at the distance of a mile, and she does not see them. Provided she could have seen them at that distance, I apprehend she would have avoided, or might have avoided, by adopting proper measures, the collision altogether; that is to say, she probably need not have gone into stays in the immediate neighbourhood of a vessel that was coming down upon her. What must be the reasons, and the only reasons, why the lights were not seen in due time? Either there was an insufficient look-out on board the *Flora*, or there were no lights burning brightly on board the *Allan*. There are three witnesses to whom it would be unfair to impute perjury from the *Allan*, who state that the lights were burning at the time, and there is nothing to negative that on the other side. It was said by them that the lights were not seen, and under the circumstances the balance of evidence is in favour of the *Allan*, that she had her lights burning at the time. If the *Flora* ought to have seen the *Allan* in due time,

and if she had so seen her, she might and ought to have taken measures to avoid the collision; there can be no other conclusion than that the *Flora* was to blame. Then it may be asked, was or was not the *Allan* to blame for the course she pursued? It is abundantly clear that, in the first instance, she did that which was right, because she was on the starboard tack close-hauled, and according to the 12th Admiralty regulation she was bound to have kept her course. She did keep her course; and was she to blame in not taking any other measure to avoid a collision? It may be that the circumstances are such in a case like this that a departure from the strict rule of road as laid down in the Admiralty regulations is justified, and the question before the court as far as the *Allan* is concerned is, whether there was such a justification for departure from the rule in the present case. I have no doubt, looking at the 19th Admiralty regulation, that if the circumstances of the case were such that there was immediate danger, perfectly clear to the apprehension of those present, the *Allan* would have been justified in departing from the strict letter of the 12th rule. The 19th rule does not prescribe any particular measures that should be adopted in departing from the strict terms of any of the previous regulations that it governs, but it merely states that in construing and obeying these regulations, as far as possible, you may take into consideration urgent attendant circumstances. I believe that is common sense, for if any rule were laid down by Parliament or any other authority that could never be departed from in certain states of circumstances, such a rule would necessarily involve, on many occasions, the destruction of those ships, which it was intended to preserve. Upon a careful consideration of the evidence on both sides, the Court is of opinion that the *Flora* was solely to blame, and there must be a decree to that effect.

NISI PRIUS.

WILLES, J., Aug. 10, 1866.

HARTLAND v. THE GENERAL EXCHANGE BANK (LIMITED).

14 L. T. 863.

Master and servant—Wrongful dismissal—Damages.

MASTER AND SERVANT.—*In estimating damages for the wrongful dismissal of a servant, the jury should take into account the salary and not any commission obtained by the plaintiff. The plaintiff is not entitled to his full salary for the unexpired period of the contract for service, but that is to be reduced by the probabilities of the plaintiff having other employment during such period. The employer being a company afterwards ordered to be wound-up, that fact also should be taken into consideration in estimating the loss sustained by the plaintiff through his dismissal.*

This was an action for wrongful dismissal of the plaintiff from the defendant's service.

The defendants pleaded the misconduct of the plaintiff.

Ballantine, Serjeant, Garth, Q.C., and Inderwick for the plaintiff.

M. Chambers, Q.C., and Kemp for the defendants.

The facts were as follows:—

On the 1st October, 1865, the banking company, of which Mr. Roebuck, M.P., was chairman, engaged the plaintiff as their manager for three years, at a

salary of 1,000*l.* a year, with 5 per cent. on the net profits, but with a condition that the agency should be at an end in the event of the bank ceasing to carry on their business, provided his services were dispensed with. After this an amalgamation took place with an estates company, and there were certain dealings with a building society, of which, as the plaintiff represented, he disapproved. In the result the bank got involved in difficulties (the cause of which was in dispute), and the plaintiff was dismissed, as he said, on the ground that he could not keep the bank open. The company, however, stated their grounds of dismissal thus:—1. Non-communication to the directors of the state of the assets of the company; 2, misleading the directors as to the state of the assets; 3, the reduction of the assets of the bank to an unsafe amount; 4, the plaintiff's recommendation to the directors to assign the assets of the bank to him; 5, the plaintiff's refusal to make an affidavit of facts in answer to Messrs. Clench's petition for an order to wind-up the company; 6, the plaintiff overstated to the directors the amount paid by him for the premises 79, Lombard Street. There were proceedings pending for the winding-up; and this action, it was stated, had been directed by the Court to determine the liability of the company (if any) to the plaintiff.

The plaintiff was called and examined as a witness at great length in support of this statement of his case, and in disproof of the charges of misconduct. He stated that he carried on the business of the bank until the 2nd June last, when a resolution was come to by the directors "that, as the manager had expressed his inability to carry on the bank in the present crisis, the directors deem it expedient that, in order to carry out plans for the relief of themselves and the shareholders, he retire from office." Mr. Roebuck, as chairman, communicated this resolution to him, and when asked on what grounds it was come to said, "We fear you would not be able to pull the bank through; there is no charge against you, and you may understand that it is to make no difference in regard to our arrangement with you." It was then proposed to refer the matter to arbitration. He claimed, however, the balance of his salary for the residue of the three years, which being refused, and proceedings being taken for the company to be wound-up, the present action was directed to determine their liability.

Upon these facts being opened and the winding-up appearing to have been after the dismissal—

WILLES, J., observed that it could not affect the right of action supposing the dismissal wrongful.

Chambers, Q.C., admitted it to be so, but urged that it would be very material as to damages.

The plaintiff was cross-examined as to the alleged grounds of dismissal, which he denied.

The action was brought on the 13th June, and the petition for winding-up the company was on the 4th July.

M. Chambers, Q.C., in addressing the jury for the company, said he really appeared for the liquidator who represented the interests of the shareholders of this unsuccessful concern, which had small assets remaining, and he insisted that the plaintiff was not entitled to recover more than trivial damages.

WILLES, J., in summing up the case to the jury, said he had some difficulty in seeing what the precise defence was. The plaintiff had been dismissed in a kind and civil manner, no doubt; but still he had been in effect dismissed and sent "about his business." The engagement was for a fixed period of three years, as its terms plainly implied. The justification set up imputed misconduct to the plaintiff, and involved serious reflections upon his conduct, which were calculated to prevent him from obtaining similar employment in future. It was for the jury to say whether there was any foundation for it.

He could not himself see any foundation for it, and the transaction as to the house, for instance, appeared to him to have been on the part of the plaintiff entirely straightforward. It was said that at the time of the panic he had attempted to get the assets assigned to himself. He agreed with Mr. Roebuck that this was not good advice, but could it be deemed gross misconduct? Mere erroneous advice given at a time of panic, without fraud, and without misrepresentation, could that be called "misconduct?" The pleas were of the vaguest description, and "particulars" had therefore been ordered. It was for the jury to say whether there was any foundation for the charges they set forth. As to the charge about not making an affidavit, one could scarcely read it without a smile; and indeed it was not pressed. Such was the defence raised, and if the jury thought it was not sustained, then came the question of damages, which was one of some difficulty. The jury ought only to take the salary into account, not the commission. Next they were not to give the whole salary for the two years and eight months, 2,800*l.*, nor anything like that sum. They must reduce the amount by the probabilities of the plaintiff having other employment to fill up his time during that time. No doubt the position of manager of a bank was not to be got every day, and that they would consider. Still, they would also consider what might reasonably be deemed the value of his time. Then came the question of the winding-up, and certainly the stoppage of the concern might fairly be taken into consideration in assessing damages.

*Verdict for the plaintiff, damages 880*l.**

NISI PRIUS.

Guildford, Aug. 10, 1866.

WHITEHEAD AND OTHERS v. IZOD.

14 L. T. 863. For subsequent proceedings see [1867] E. R. A.;
36 L. J. C. P. 113; L. R. 2 C. P. 228.

Joint-Stock company—Purchase of shares.

STOCK EXCHANGE.—*The bank of O. and Co. stopped payment on May 10. On the same day the defendant went to plaintiffs' agent and asked him to telegraph to the plaintiffs to buy twenty-five Overends at 4 discount for the day. They were bought by the plaintiffs before three o'clock, and at half-past three o'clock the bank stopped. The purchase was notified to the agent, who notified it to the defendant, who, on receipt of the notice at six o'clock, repudiated the purchase, and the next day returned the contract note which had been sent to him, refusing to execute it. On the same day (May 11) there was a petition to wind-up, and an interim order made, and the final order was made on June 22 for a voluntary winding-up under the supervision of the court. By the 153rd section of the Companies Act 1862 all transfers of shares between the commencement of winding-up and the order are avoided.*

Whether the winding-up commenced on the presentation of the petition and interim order, quære?

What is a sufficient authority given to brokers for the purchase of shares?

This was an action to recover money for shares purchased for the defendant, which he had refused to accept.

Sir George Honyman, Q.C. and *Archibald* appeared for the plaintiffs.

C. Pollock, Q.C. and *Beresford* appeared for the defendant.

The facts were as follows:—

At ten o'clock on the 10th May (the day on which Overend's stopped), the defendant, an iron merchant at Birmingham, went to the plaintiffs' agent there and asked him to telegraph to them about twenty-five shares in Overend's. There was a contradiction between them as to the instructions he gave, but the telegram actually sent was, "Buy twenty-five Overends at 4 discount for the day." That telegram having been received by the plaintiffs, they sent one back in answer that they thought it could not be done, as the shares had risen a little in the market. The agent then saw the defendant and told him, and there was again a contradiction as to what then passed between them. According to his account his instruction was to send this telegram, "Can you buy twenty-five Overends at 4 discount?" and that when he heard it could not be done he said at once, "Then, I shall not buy at all;" but this was denied by the agent; and before three o'clock the plaintiffs bought twenty-five shares at 4 discount, which they at once notified to the agent, who notified it to the defendant the same evening. At half-past three Overend's stopped. At six o'clock in the evening the defendant repudiated the contract and sent a written message to the agent in these terms,—“When I left you to-day, I determined not to buy at all, and I will not take the shares now at any price.” Whether or not at that time he had heard of the stoppage was disputed. Next day, the 11th, the contract note, dated that day was sent to him, and he at once returned it, he being then, he admitted, aware of the stoppage, having seen it in the *Times*, and refused to acknowledge the transaction. The plaintiffs (members of the Stock Exchange) had purchased the shares from Messrs. Whittons, who were also members; and in consequence of the defendant refusing to take the shares paid Whittons for them, which was the money (278*l.*) they now sought to recover from their customer, the defendant. There is a rule at the Stock Exchange that they do not recognise any other parties than their own members; every party, therefore, whether agent or principal, must protect the principal according to the rules and usages of the Stock Exchange. And there would, according to the view of the Stock Exchange, have been no doubt that the defendant was bound to indemnify his brokers (supposing the transaction were a binding one), but for the occurrence of the stoppage and the effect of the winding-up order. As to this, the dates were as follows:—The stoppage had already occurred on the 10th, and the defendant knew it next day, and admitted that he knew of it when he repudiated and returned the contract note, which he had received on that day. On the same day, the 11th May, there was a petition for a winding-up, and an interim order was at once made, but on the 22nd June there was a final order:—“This court doth order that the voluntary winding-up of Overend, Gurney, and Co. be continued subject to the supervision of the Court.” The enactments in the Winding-up Act, which were cited as bearing upon the question, are the 130th clause, which says that a voluntary winding-up shall be deemed to commence from the time of the passing of the resolution, and the 153rd,—“That where any company is being wound-up by the court, or subject to its supervision, all depositions or transfers of shares made between the commencement of the winding-up and the order for winding-up shall—unless the court otherwise order—be void.” The contract note having been dated the 11th May, the day after the stoppage, there was on that same day a petition for a winding-up, and then there was a resolution for a voluntary winding-up, finally confirmed by the court on the 22nd June. There would be fourteen days for delivery of shares, which would not expire until several days after this final order; but, on the other hand, the contract (if valid at all) was before the first resolution for voluntary winding-up. On the 15th there was a letter to the agent to the effect that

the defendant, Mr. Izod, would resist any attempt to force the shares upon him, referring to an opinion, which had been published, of the eminent Chancery counsel Mr. Glasse and Mr. Locock Webb, that the effect of the winding-up proceedings would be to defeat the contract. There were, it will be seen, two questions made in the case: first, whether, there was a binding contract; next, whether, if so, the defendant was bound to indemnify the brokers. As to the first point the telegram actually sent up by the agent to the brokers, the plaintiffs, was "Buy twenty-five Overends at 4 discount for to-day," and the question was whether this was in accordance with the defendant's instructions. As to the other point it was admitted that it resolved itself into a question of law.

WILLES, J. said that, assuming a valid contract, there could be no doubt that (apart from the effect of the Winding-up Act) the customer would be bound to indemnify the broker. For by the rules of the Stock Exchange the brokers were deemed to be liable to each other to complete their transactions, and the broker must fulfil a contract if the principal did not. It followed that the employer, the customer, must indemnify the broker. There could be no doubt of this according to the rules and usages of the Stock Exchange, by which customers were deemed to be bound. Then arose the question as to the effect of the Winding-up Act, as to which the result of the recent decisions, so far as they went, appeared to be that the winding-up did defeat the contract, even supposing it to exist. That would be a question of law upon which he must follow authority although the point might be reserved for further consideration, as in the case which occurred yesterday. The decisions seemed to be that the contract was defeated; and, if so, it would seem to follow that the effect was to relieve the buyer from liability to indemnity.

Pollock, Q.C., for the defendant, insisted that there was no contract at all; in point of fact, independent of the point of law; if there was a contract, it was defeated, and so the liability of the defendant was destroyed. The brokers had bought without authority, and wanted to fix their customers with the loss.

Sir George Honyman, Q.C., for the plaintiff, in reply, urged that there was a clear contract, and that the customer could not turn round and throw the loss upon the brokers. The order was to buy "for the day," and they had done so, and the fact that it was on the day of the stoppage did not matter. The customer was willing enough to take the shares until he had heard of the stoppage, and then he wanted to repudiate.

WILLES, J., in summing up the case to the jury, said the first and fundamental question was whether there was authority to the brokers to purchase the shares. If so, then the rest followed as a matter of law. For assuming the authority, then the brokers, no doubt, purchased according to the rules of the Stock Exchange, and *primâ facie* customers would be bound to indemnify them. The great question, then was as to the authority to the brokers to buy, for, if there was such authority, it was not retracted or revoked before the purchase. Was such an authority given? As to this the evidence was contradictory. The version given by the plaintiff was that there was a distinct authority, whereas what the customer said was that it was only an inquiry. Now, the best test as to what had really been said was to see what had really been done, and to look to the documents written at the time. Beyond all doubt the agent had at once acted upon a supposed authority to buy; for so ran the telegram which he sent off at once, "Buy twenty-five Overends at 4 discount for the day." And then came a telegram that the shares had been so bought, and it was notified to the defendant, whose answer was, "When I left you I determined not to buy at all. I will not

take them at any price." Did that mean that he had distinctly said so at the time? Was it not quite consistent with his having given the order to buy? Did it necessarily imply that he had withdrawn the authority? No prejudice should arise against a man because he chose to set up an Act of Parliament as a defence. The jury would decide the question as one of fact. Was the order really given? If so, then—subject to the point of law reserved—they would find for the plaintiff; if not, for the defendant.

Verdict for the plaintiff; damages 278l. 7s. 6d.

ADMIRALTY.

DR. LUSHINGTON, July 29, 1865.

THE DAPPER v. THE LADY NORMANBY.

14 L. T. 895.

Admiralty regulations—Costs—Rules of the road—Construction of—Sailing ships meeting end on—Collision.

SHIPPING.—11th regulation: *If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helm of both shall be put to port, so that each may pass on the port side of the other.*

12th regulation: *Where two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side; except in the case in which the ship with the wind on the port side is close-hauled, and the other ship free, in which case the latter ship shall keep out of the way: but if they have the wind on the same side, or if one of them has the wind aft, the ship which is windward shall keep out of the way of the ship which is to leeward.*

Brett, Q.C. and E. C. Clarkson, for the *Dapper*.

Deane, Q.C. and Vernon Lushington, for the *Lady Normanby*.

DR. LUSHINGTON gave judgment in this case, which was an action brought by the owner of the brig *Dapper*, 177 tons register, from Sunderland, coal-laden for Ipswich, against the brig *Lady Normanby*, 237 tons register, from Havre de Grace, in ballast, for Newcastle, to recover for a total loss resulting from a collision between them off Kettleness, near Whitby, about seven p.m. on the 23rd February last. For the *Dapper* the wind was stated as W.S.W., and the weather as dark but fine; for the *Lady Normanby* the former was represented as W. by S., and the latter as clear. The case for the *Dapper* was that, the tide being the last quarter ebb, and of the force of about one knot, she was under double-reefed topsails, on the starboard tack, going at between four and five knots, steering S.E., carrying her proper lights, when those on board her observed three green lights on her starboard bow, at some distance apart, and apparently belonging to three vessels, proceeding so as to pass clear of her on her starboard side, and she kept her course; that the first two of such vessels did pass clear of her on her starboard side, but that the last—the *Lady Normanby*—which, when her green light was first seen from the *Dapper*, was distant about a mile, about three points on her starboard bow, after continuing for some time with her green light only in view, opened her red light and shut in her green light to the *Dapper*, and caused danger of a collision with the *Dapper*; and thereupon the helm of

the *Dapper* was ported, and afterwards put hard a-port, notwithstanding which the *Lady Normanby* ran against and with her port bow struck the *Dapper* a violent blow on the port bow and stove it in, and did her so much damage that she soon began to sink. It was then alleged that the *Lady Normanby* at once sailed away without rendering or attempting to render any assistance to the *Dapper* or those on board her, although those in charge of the *Lady Normanby* could, without danger to the *Lady Normanby* or her crew, have rendered such assistance, and although the *Lady Normanby* was loudly hailed from the *Dapper* and requested to stand by her; that endeavours were made by the master and crew of the *Dapper* to save her, but such endeavours were ineffectual, and they were compelled to take to the long boat and leave her, and she was totally lost, with everything on board her, the long boat being taken in tow by a brig, and towed until she was off Whitby, when she was cast off, and pulled into that place by the master and crew of the *Dapper*; that just before the collision the *Lady Normanby* appeared to have luffed, and her green light was again seen from the *Dapper*; that those on board the *Lady Normanby* did not keep a proper and efficient look-out; that the helm of the *Lady Normanby* was improperly ported; that the helm of the *Lady Normanby* was improperly starboarded; that the collision was occasioned by the negligent and improper navigation of the *Lady Normanby*, and that no blame with regard to the collision is attributable to the *Dapper*, nor to any one on board her. The answer of the *Lady Normanby* pleaded, that it was about low water, and she was proceeding under two double-reefed topsails, jib, foretopmast staysail, foresail, mainsail, and trysail, close-hauled on the port tack, heading N.W. by N., going five knots, carrying the Admiralty regulation lights, when the red and green lights of the *Dapper* were perceived a mile to a mile and a half off, bearing about one point on her port bow; that shortly afterwards the *Dapper* shut in her red light, and advanced, with her green light visible, in a direction to pass the *Lady Normanby* on her starboard side; that the *Lady Normanby* kept her course close-hauled to the wind, exhibiting her green light only to those on board the *Dapper*; and that when the vessels were a short distance only from each other, the *Dapper* ported her helm and exhibited her red light to the *Lady Normanby*, and rendered a collision between the two vessels imminent, whereupon the helm of the *Lady Normanby* was put hard a-port, notwithstanding which the *Dapper* with her port bow struck the *Lady Normanby* on her port bow with great violence, stove in the same, broke her foreyard, and rendered her unmanageable, so that she was unable to heave to. It was then pleaded that the collision was occasioned by the negligence or improper navigation of the *Dapper*, and that it was not in any way occasioned by the *Lady Normanby*. There was extreme difficulty in ascertaining what was the truth amidst this conflicting evidence, because it appears to the Court that the evidence on both sides was encumbered with much improbability. Looking to the Act of Parliament, how does the case stand with respect to the obligations imposed on the one party or the other? Does the case fall within the statutory regulations or not? Now, one of these vessels was pursuing a N.N.W. course, and the other was originally pursuing a S.S.E. course, but just about the time of collision a S.E. course. That being so, what says the 11th article? "If two sailing ships are met end on, or nearly end on, so as to involve risk of a collision, the helms of both shall be put to port, so that each may pass on the port side of the other." If these two vessels were approaching each other in the manner which is stated in this article, then, of course, the duty was imposed upon both of porting at a reasonable opportunity and time; and if that they did not do, both would be to blame. If the case does not fall within the 11th article, does it fall within the 12th? "When two sailing ships are crossing so as to involve risk of collision, then if they have the wind on different sides the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled and the other ship free, in which case the latter ship shall keep out of the way." Now, if these

vessels were not meeting, were they crossing so as fairly to bring the case within the provisions of this article? If they were crossing so as to come under the regulations prescribed by this article, then it is clear that, as the *Lady Normanby* was close-hauled on the port tack, and the *Dapper* was free upon the starboard tack, it was the duty of the *Dapper* to keep out of the way; but attached to that there is another consideration, which is, if the case falls within this 12th article, not only was the *Dapper* bound to keep out of the way, but the *Lady Normanby* was bound by the 18th article to have kept her course. I will assume that neither of these articles applies, and that the vessels were sailing, meeting in parallel courses, so that there was no real risk of collision if both kept their courses. Then I apprehend neither of these articles would directly apply, but that in that case the vessel would be to blame which deviated from her proper course, and so produced the collision. These are the three sets of circumstances I request your consideration upon. You will also judge from the circumstances in evidence whether the *Lady Normanby*, as charged, heartlessly abandoned her duty of giving assistance. It appears that the *Lady Normanby* was on the port tack close-hauled bound for Newcastle, and the *Dapper* was sailing free, bound for Ipswich; and, according to the case made against the *Lady Normanby*, it is this, that the two other vessels that were in company with her passed straight on without any difficulty, and went past this vessel and proceeded on their voyage, but that she unnecessarily ported her helm in order to pass a vessel which was ahead about seventy fathoms off the *Dapper*. I cannot understand upon what possible view of this case it is consistent with probability that a vessel close-hauled on the port tack should, in order to pass another vessel which, according to the case made, there was no reason to suppose she would come in contact with, port her helm, and endeavour to cross the bows of that vessel, except it is that she would lose her way, and have to make it up afterwards. The case made by the *Lady Normanby* against the *Dapper* is, that she was sailing on a south-east course, and when there was no probability of conflict she without rhyme or reason ported her helm, and so brought about the collision.

The Court was assisted by Captain Farrer and Captain Close, of the Trinity House.

ADMIRALTY.

DR. LUSHINGTON, April 17, 1866.

THE ESTHER v. THE CONCORDIA.

14 L. T. 896; L. R. 1 A. & E. 93; 12 Jur. N.S. 771.

Admiralty regulations as to rules of the road—Construction of—"Steamships meeting end on"—Collision.

SHIPPING.—13th regulation: *If two ships meeting under steam are crossing so as to involve risk of collision, the helm of both shall be put to port, so that each may pass on the port side of the other.*

14th regulation: *If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of the way of the other.*

19th regulation: *In obeying and construing the above rules due regard is to be had to all the dangers of navigation, and to any special circumstances which*

may exist in each particular case rendering a departure from such rules necessary in order to avoid immediate danger.

Deane, Q.C. and E. C. Clarkson appeared for the *Esther*.

Milward, Q.C. and V. Lushington, for the *Concordia*.

DR. LUSHINGTON gave judgment in this case, which was an action brought by the owners of the French screw steamship *Esther*, 261 tons register, with a general cargo from London to Rouen and Paris, in charge of a duly licensed pilot, against the General Steam Navigation Company's paddle steamship *Concordia*, 326 tons register, from Boulogne to London with passengers and cargo, to recover for the loss resulting from a collision between them off St. Katherine's wharf, in the river Thames, between twelve and one p.m. on the 16th November last. The *Esther* represented the wind as easterly, and the weather as fine and clear; the *Concordia* stated the former as westerly, very light, and the latter as fine, but hazy. The case for the *Esther* was, that the tide being nearly high water, and of the force of about one knot per hour, she was under steam proceeding down the river nearly in mid-channel, and at the rate of about three knots an hour, when the paddle-wheel steamer *Concordia* was seen coming up the river under steam, nearly ahead of, and at a distance of about one-third of a mile from the *Esther*; that the helm of the *Esther* was ported, and afterwards put hard a-port, but that those on board the *Concordia* did not port the helm of the *Concordia* as they ought to have done, but on the contrary, improperly starboarded the same, and although the engines of the *Esther* were stopped and reversed, the *Concordia*, without having duly stopped and reversed her engines, came into collision with the *Esther*, the starboard fore sponson of the *Concordia* taking the stern of the *Esther*, and thereby great damage was occasioned to the *Esther*. It was then alleged that the collision was occasioned by the improper conduct of those on board the *Concordia*, in neglecting to keep a good look-out and port their helm, and improperly starboarding it, and in neglecting to duly stop and reverse their engines, and by improper navigation. The defence on the part of the *Concordia* was, that she was being navigated very carefully and slowly up the river to the south of mid-channel, making two knots, and frequently stopping on account of the craft in the river. Just shortly before the screw steamer *Esther* was observed, the helm of the *Concordia* was put hard a-starboard to avoid a barge; that the *Esther* was then noticed coming down the river, about a quarter of a mile distant, on the *Concordia*'s starboard bow; that if the *Esther* had kept her course there would have been no risk of a collision, but the *Esther* would have passed well clear on the starboard hand of the *Concordia*; that the *Concordia*'s helm was accordingly kept hard a-starboard, but as she had very little way through the water her head did not pay off considerably; that the *Esther*, however, improperly, and without any reason, put her helm hard a-port, and came towards the *Concordia*, whereupon the *Concordia* stopped, and reversed her engines, but that the *Esther*, notwithstanding she was hailed, drove stern on with great violence into the starboard fore sponson of the *Concordia*; that the collision was wholly occasioned by the improper navigation of the *Esther*, and by the negligence of those on board her, and was not occasioned by those on board the *Concordia*. The evidence is more unsatisfactory and more difficult, if not impossible to be reconciled. I see no reason to impute to any of the witnesses on either side an intention to deceive the court. I believe they are all entitled to the benefit of intentional veracity, though they differ so much among themselves, and are contradicted by others. You will not forget, in considering this case, the usual state of the river, and the circumstances occurring at the time requiring great care, and no doubt being matter of difficulty as proved by the evidence; and you will regard all the occurrences that happened at the moment in question. The true question raised is, whether or not the *Concordia* was not bound to have ported her helm, and whether the *Esther* was not to blame for having improperly ported her helm so as to produce this collision. The

first point upon the law that arises is, whether these two steamships were meeting end on, or merely end on so as to involve risk of collision, in the words of the 13th article of the Steering Rules and Regulations; because, if they were so meeting, then the directions are, that the helms of both ought to be put to port, so that each may pass on the port side of the other, and it is clear that the helm of one was not put to port. There are exceptions to this rule, which are contained in the 19th article, which states that "due regard must be had to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary"—mark the next words—"in order to avoid immediate danger." The next point is whether there existed any special circumstances to justify a departure from the 13th article. What immediate danger there was on the present occasion was confined to the fact alleged, that there was a barge in the way, and, if the *Concordia* had starboarded, she would have run over it, and probably have caused destruction of life as well as property. I feel some difficulty upon this point, for I am unable to trace through the evidence what became of that barge. If the case was that the *Concordia* had passed the barge and got ahead of it, then of course there would be no immediate danger. If it were put to me whether there was any immediate danger of coming into contact with that particular barge, I should say there is not evidence to satisfy my mind of the fact. The evidence of Mr. James, the harbour-master of London, was, that there was quite a cordon of barges round, so that neither could the *Esther* continue her course straight down the river in the direction she was going, nor could the *Concordia* move because of the vessels round her. Respecting the vessels round the *Concordia* there is not much evidence, except that there was ample evidence of there being vessels to the south. As to the road from where the *Esther* was down to where the *Concordia* was when she starboarded, the other evidence is directly opposed to that of Mr. James. There is abundant evidence to the effect that that part of the way was clear, and that not only might the *Esther* have pursued her course, but that the *Concordia* might also have gone on. It appears to be pretty well agreed that the distance between the *Esther* and the *Concordia* when the *Esther* was first perceived from the *Concordia* was about a quarter of a mile, and the question is whether she had then starboarded her helm. Though it is a matter I submit to you which is exceedingly in doubt, yet, as I apprehend, it was after she had starboarded that she saw the *Esther*. If the *Esther* was aware at the time that the *Concordia* was merely dead in the water, and utterly unable to help herself, and if she was capable, and had the power of seeing and observing what the *Concordia* was doing, and the position she was in, then, notwithstanding the rule to port, and though the vessels might be end on, yet she would not be justified in porting and running in upon the *Concordia*. The *Concordia* represents that she was not moving at all, or not perceptibly moving, and ought to have been treated almost as a vessel at anchor. Supposing these two ships were crossing so as to involve risk of collision within the meaning of the words of the 14th article, and the ship which had the other on her own starboard side should keep out of the way, what would then be the state of the case? The real question is, whether or not there was sufficient evidence to establish that there was a chance of immediate danger so as to justify the *Concordia* in departing from the regulation which prescribes that two vessels approaching each other nearly end on shall port when there is a risk of collision. It was stated for the *Concordia* that there were barges in the way which prevented her from complying with the statute. I am of opinion that there is not sufficient evidence to establish immediate danger so as to justify a violation of the rule; and after deliberation by the elder brethren of the Trinity House, they have confirmed my opinion, and I must therefore pronounce against the *Concordia*.

The Court was assisted by Capt. Pigott and Capt. Webb, of the Trinity House.

NISI PRIUS.

Guildford, WILLES, J. and a Special Jury.

Aug. 9, 1866.

MORRICE AND ANOTHER v. HUNTER.

14 L. T. 897.

Share broker—Order to purchase shares.

STOCK EXCHANGE.—*B. instructed C., a sharebroker, to purchase for him ten shares in the D. bank. The shares in this bank were 50l. shares, on which 25l. were paid; but the plaintiffs' manager admitted that, after the order was given to purchase, he had said that they were 25l. shares, and the defendant stated that it was upon the understanding that the shares were 25l. that he had been induced to purchase ten shares instead of five. After the order was given the bank failed, and defendant repudiated the contract.*

The jury found a verdict for the plaintiffs, the judge directing them that the question was whether the authority to buy the shares was coupled with a condition to buy 25l. shares if they could be got, or to buy so many shares if they were 25l. shares.

They who direct brokers to buy shares are bound by the rules of the Stock Exchange, under which brokers are liable to each other and their employers to themselves.

This was an action by sharebrokers against the defendant, an officer in the Indian army, to recover the sum of 210l. which the plaintiffs had paid to Messrs. Clarke on the 14th June last, for ten shares purchased by the plaintiffs as brokers for the defendant, in the Agra and Masterman's Bank, upon a contract the defendant had failed to perform.

Sir George Honyman, Q.C. and Holl, for the plaintiffs.

M. Chambers, Q.C. and Rigby, for the defendant.

The plaintiffs' case rested mainly on the evidence of their manager, which was in substance this :

The defendant was introduced to them as an officer of the Indian army, who wanted to invest some money and requiring the services of a stockbroker. He had thought of investing it in preference shares or stock in some railway company, but he had been advised to invest in Agra and Masterman's, as they had an excellent position in India and unbounded resources. Thereupon he directed the plaintiffs, as they said, to purchase ten shares in Agra and Masterman's. The contract note was produced, and was dated 1st June, for delivery on the 14th. The shares were 50l. shares, on which 25l. were paid. The manager of the plaintiffs' firm denied that at any time of his employment he said anything about the amount of the shares, but he admitted that afterwards in haste and by mistake he said they were 25l. shares. At that time he said he did not know that they were 50l. shares, as they were in fact, with 25l. paid. Agra and Masterman's stopped on the 6th June, six days after the contract, and six days before the day for delivery; and after the stoppage there was a winding-up order. The plaintiffs alleged that upon this contract to purchase they had entered into a contract with Messrs. Clarke, another firm of brokers, to buy the ten shares at 21l. each, which came to 210l., and that, as the defendant would not complete the purchase, they had to take up the shares themselves and pay Clarke the price which they sought to recover. Upon hearing of the stoppage the defendant refused to complete, and now repudiated the transaction, asserting that the plaintiffs had represented to him that the shares were 25l. each. On the 16th June the plaintiffs got the "ticket of

transfer," and on the 20th (within the ten days allowed by usage for delivery) there was a tender of transfer. On the 7th June there was a petition for a winding-up, and on the 23rd June there was a resolution for a voluntary winding-up. The plaintiffs' case was that they had acted according to the usage of the Stock Exchange.

WILLES, J.—It is settled law that the mere stoppage of the bank would not defeat the transaction. It was likewise well settled that brokers—as between themselves—were principals, and had to complete the transactions they negotiated, and upon default of their employers could come upon them to recoup themselves. Whether the Winding-up Act and the order made under it would affect the transaction was a new and different question, and might be one of some difficulty. It had not been settled by the recent decisions of the Master of the Rolls and the Lords Justices.

The defence, as to the facts, was in substance that the defendant was told the shares were 25*l.* shares, and as to the law, that in such cases and under such circumstances, the brokers were not bound to complete, and therefore their principals were not bound to pay. It was proved that on the 25th May the following resolution was come to by the Stock Exchange:

"At a meeting specially summoned this day to consider a memorial from several brokers, in reference to the settlement of transactions in shares of Overend, Gurney, and Co. (Limited) and other companies in course of winding-up, it was resolved that members having bought shares in such companies were bound to settle and pay for the same, in accordance with the rules and regulations and the present practice of the Stock Exchange."

At the close of the plaintiffs' case,

M. Chambers objected that there was no proof that the shares of which a transfer was tendered were the shares contracted to be sold to the defendant.

WILLES, J.—The shares tendered were shares in the Agra and Masterman's Bank. No particular shares were contracted for, and the seller was not bound to tender any shares until the day for delivery, nor need he have been the owner of those shares at the time of contracting. It was enough that he tendered shares such as he had contracted to tender, and that he had tendered them at the time he was bound to deliver them.

M. Chambers, Q.C., for the defendant, contended that it was a case in which an agent had been told to buy one article and had bought another. It was as though a man had been told to buy fat pigs, and had bought lean ones. He admitted that his client had read in the papers that the shares were 50*l.* shares; but he had been told by the plaintiffs' manager that they were 25*l.* shares, and he consequently had given the order for ten shares; whereas, otherwise, as he had but 250*l.* to invest, he meant only to buy five shares. He did not put it as a fraud, but as a mistake. The plaintiffs were instructed to buy 25*l.* shares, and had bought 50*l.* shares.

WILLES, J.—You put it, in fact, as an authority with a condition; an authority to buy 25*l.* shares, if they were to be got, or to buy so many shares, if they were 25*l.* shares.

M. Chambers, Q.C.—Just so. My client could not afford to buy 50*l.* shares. He had only 250*l.* to invest. He therefore desired to buy 25*l.* shares, and the brokers had no right to fix him with shares which doubled his liability.

WILLES, J.—If the contract was conditional, as suggested, then, of course, the plaintiffs were not entitled to recover; but assuming the contract to have been for 50*l.* shares, then the case was too clear to admit of doubt. Those who directed brokers to buy shares were bound by the regulations of the Stock

Exchange, under which the brokers were liable to each other and their employers to themselves.

For the defence, the defendant swore that the order was to purchase 25l. shares, and the representation was that the shares in the Agra and Masterman's Bank were 25l. shares. The brokers strongly recommended Agra and Masterman's shares, and he told them he wanted to buy so many shares as would come to 250l., that being all he could invest. He believed that the shares were 50l. shares, and therefore desired to buy five shares; but the plaintiffs' manager told him that they were 25l. shares, and so he could buy ten, to which he assented, thinking that the broker would know better than he did the amount of the shares, and he accordingly gave an order to purchase ten shares in Agra and Masterman's. Afterwards he found from the papers that the shares were 50l. shares; he saw them advertised as such. He had previously, he said, desired that the shares should be sold, as he did not like the investment. In cross-examination, however, he said that he was told that the market price of the shares was about 21l., and that then the broker said he could buy ten of them. He heard from several persons a day or two after the contract that the investment was not desirable at that moment, as it was a critical time for banks. He admitted that these friends had told him also that the shares were 50l. shares. But he said that he had objected before the stoppage.

Another witness also admitted that at the first interview the market price was mentioned—21l. a share, as quoted in the day's papers; and that then the broker said that with 250l. the buyer could have ten shares. He also admitted that in the columns of the *Times* the amount of the shares and the price for the day were equally stated, and that it was on the 6th June he raised the objection as to the amount of the shares.

The cross-examination of the witnesses for the defence was mainly directed to show that the suggested mistake as to the amount of the shares was only an excuse; and that the real reason for throwing up the shares was the stoppage, and that the stoppage was known before the objection was made. But the plaintiff and his witness positively swore that they had not heard of the stoppage on the 6th June, and did not hear of it until the next day.

M. Chambers, in summing up to the jury, urged that his client never meant to make himself liable for nearly 500l.—that is, 210l. the price of the shares, and 250l. for calls.

Sir George Honyman, in reply, contended that the defendant had ordered ten shares to be bought, and the plaintiff had bought ten of the only shares there were in the market. The liability to pay calls would probably be the last thing that the defendant or any other purchaser of shares would think of. The effect of the evidence was, that the repudiation of the shares took place after the stoppage of the bank.

WILLES, J., to the jury.—The question for them was, whether the plaintiffs did buy that which they were employed to buy. Was the statement that the shares were of 25l. made at the time of the contract? and, if it was so made, was the order to buy shares conditional on there being such shares? It was important to observe that this question had arisen after the failure of the bank, which was not anticipated when the first interview took place on the previous Friday. The question might be summed up thus: have the plaintiffs bought and transferred to the defendant that which they contracted to buy and transfer, and have they thus earned the money which the action is brought to recover?

Verdict for the plaintiffs, damages 210l.

NISI PRIUS.

Leeds, MELLOR, J., Aug. 15, 1866.

BARRACLOUGH v. GREENHOUGH.

14 L. T. 899: see s. c., [1866] E. R. A.; 36 L. J. Q.B. 26 (Q.B.), and 251 (Ex. Ch.).

Will—Ejectment—Notice—Probate Act.

WILL.—Ejectment was brought against a devisee, on the ground of incapacity of the testator to make a will.

By section 67 of the 20 & 21 Vict. c. 77 notice is to be given to admit the probate of the disputed will at the trial, and it is enacted that, if within four days after such notice the party receiving it does not give notice that he intends to dispute the validity of the will, the production of the probate shall be sufficient evidence of such validity.

Such counter notice not being proved to have been given within four days, the plaintiff was nonsuited.

Ejectment.

D. Seymour, Q.C. and Gibbons, for the plaintiff.

Manisty, Q.C. and Wills, for the defendant.

This ejectment was brought to recover some land which the defendant held under a devise in a will. The plaintiff claimed on the ground of the incompetency of the testator to make a will; thus impeaching its validity.

On the production of probate being called for, it appeared that the defendant had given the plaintiff notice under 20 & 21 Vict. c. 77, s. 64, to admit the probate at the trial. It is enacted by that section that, if after such notice has been given by either party to the other the latter does not within four days give notice that he intends to dispute it, the probate shall be sufficient evidence, *inter alia*, of the validity of the will. It appeared that notice to admit the probate had been served on the plaintiff, who resided at Bradford, in Yorkshire, and that the counter notice that she intended to dispute the validity of the will was not given until some time after the expiration of the four days limited for that purpose by the Act.

Manisty, Q.C., for the defendant, contended that under these circumstances the validity of the will must be taken to have been admitted, and that it was not now competent to the plaintiff to dispute it.

MELLOR, J. (after consulting with MONTAGUE SMITH, J.), said that they were both agreed in opinion that the objection of Mr. Manisty was sound. The terms of the statute were clear.

Plaintiff nonsuited.

LIVERPOOL WINTER ASSIZES.

PIGOTT, B., December, 12, 1865.

REG. v. JOHN SARGENT.

10 Cox. C.C. 161.

Forgery.

CRIMINAL LAW. C.—*The prisoner was a collector of rates for a corporation. While in this service he received cash from the prosecutor on account of a rate, for which he gave a receipt. After he had left the service he called on the prosecutor for the balance, which was paid, and for a receipt the prisoner altered the figures in the former receipt, which then appeared as a receipt for the entire rate due:—Held, not to be a forgery. But (quære) if not an indictable false pretence.*

The prisoner was indicted for forging a receipt for money.

Hosack, for the prosecution.

It was proved that the prisoner had formerly been a collector of rates in the service of the Liverpool Corporation, and had received rates on their account; but had, at the time of the offence charged, left their employ. While in such employ, he received from the prosecutor a sum on account of rates, which he appears to have duly accounted for. On the day in question he went to the prosecutor and demanded the balance, and it being handed to him, a receipt was required from him. He said, however, that the old receipt would do, if altered. Whereupon the prosecutor handed it to him, and he altered the receipt by turning the sum of 1*l.* into 2*l.*, and the sum 7*s.* 3*d.* into 1*l.* 7*s.* 3*d.* On these facts the prisoner was indicted for forging a receipt.

PIGOTT, B., expressed an opinion that the charge on the evidence looked more like a case of false pretences than of forgery, as he did not think that the alteration of a spent receipt was a forgery within the statute. He said, however, that he would not withdraw the case from the jury, who *convicted* the prisoner.

There was, however, a second similar charge against him, and that was postponed until the following morning, when the learned Baron said that he had taken an opportunity of consulting Martin, B., and he was of opinion that it would be safer, under the circumstances, to send another indictment before the grand jury for the second offence, laying it as a false pretence.

[Reported by R. D. M. Littler, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

R. M. KERR, Esq., Commissioner, February 1, 1866.

REG. v. WENHAM.

10 Cox. C.C. 222.

Evidence—23 & 24 Vict. c. 127, s. 22—*Law List*.

SOLICITOR.—*Upon an indictment for obtaining money by a false pretence, made by the prisoner, "that he was an attorney," it is not necessary to prove the negative in any other way than by production of the Law List, in which*

the prisoner's name does not appear as an attorney, as the statute 23 & 24 Vict. c. 127, makes the Law List evidence, and shifts the burden of proving its inaccuracy from the prosecution to the prisoner.

Francis Alexander Wenham was indicted for obtaining 10*l.* from Elisha Little by falsely pretending that he was an attorney, duly qualified to practise as an attorney.

In October or November, 1864, the prisoner was present when the prosecutor was conversing with another person with reference to his claim to some money, paid into the Court of Chancery in a suit of *Freeman v. Parsley*. The prisoner said he was an attorney, and if the claim were in money he could get it. The prosecutor, believing him to be an attorney, from that time employed him, and in the course of three or four months paid him 30*l.* The prisoner was well known as the pew-opener in the parish church at New Cross, and he told Mr. Little, the prosecutor, that he was about to become the parish clerk, and that he could not do the parish business unless he were an attorney. On several occasions he said that he was an attorney, and on one occasion that he had paid 9*l.* that year for his certificate. He pretended to be on intimate terms with an equity barrister, and to have taken his opinion on the case, reading a paper to give a colour to that representation. Finally, at the latter end of May, 1865, or beginning of June, he said that the barrister wanted 10*l.* to carry on the case, and that it would come off in the ensuing term. The prosecutor paid the 10*l.*, believing that the prisoner was a duly qualified attorney, and did not discover the fact that he was not an attorney until October, 1865. Mr. William Joyce, the equity barrister, proved that he had never been consulted in the case of Mr. Little, or written any opinion on the matter for the prisoner.

As the prosecutor swore that he parted with his 10*l.* because he believed that the prisoner was an attorney, it became necessary to show that he was not on the roll.

William Farmer Fisher was called. He said he was a clerk at the Law Institution. He produced the Law List for 1865, and the prisoner's name did not appear in the list of attorneys and solicitors.

Sleigh, for the prisoner.—This evidence does not negative the prisoner being an attorney. The Law List proves merely that a certain number of attorneys have taken out their certificates, and an attorney, uncertificated, is still an attorney.

Lewis, F. H., for the prosecution.—The 22nd section of 23 & 24 Vict. c. 127, makes the Law List evidence, and it declares that if any name does not appear in that list it shall be *primâ facie* evidence, until the contrary be made to appear, that the person is not qualified to practise as an attorney.¹

KERR, Commissioner.—That is so. The prisoner must prove that he is an

(1) The words of the section quoted are as follows: "22. Every certificate issued by the registrar between the fifteenth day of November and the sixteenth day of December in any one year, shall bear date on the sixteenth of November, and shall take effect on that day for all purposes, provided it be stamped before the sixteenth day of December; and in every such case the sixteenth day of November shall, for the purpose of this Act, be deemed to be the date of the payment of the duty; but if such certificate be not so stamped, it shall take effect, as regards the qualification to practise, on the day on which it is stamped; and every certificate issued at any other time shall bear date on the day on which it is issued, and subject to the provision herein contained relating to certificates stamped after the first day of January in any year, and not produced within a month to be entered by the registrar, shall take effect as regards such qualification on the day on which it is stamped, and every certificate shall be and continue in force from the day on which it shall take effect as aforesaid until the fifteenth day of November next following, inclusive, and no longer; and any list of attorneys, solicitors, and conveyancers, purporting to be published by the authority of the Commissioners of Inland Revenue, and to contain the names of attorneys, solicitors, and conveyancers who have obtained stamped certificates for the current year on or before the first day of January in the same year, shall, until the contrary be made to appear, be evidence in all Courts, and before all Justices of the Peace and others, that the persons named therein as attorneys, solicitors, or conveyancers holding such

attorney; otherwise, as his name does not appear in the Law List, it is legally proved that he is not an attorney.

The Judge refused an application by *Sleigh* to have the point reserved, as being too clear to admit of any doubt, and the prisoner was convicted and sentenced to four months' imprisonment with hard labour.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

THOMAS CHAMBERS, Q.C., Common Serjeant, presiding as Deputy Recorder,*

February 27, 1866.

REG. v. WEEKES.

10 Cox. C.C. 224.

Accommodation acceptance—Drawer can be a bailee—24 & 25 Vict. c. 96, s. 3.

CRIMINAL LAW. C.—Where the drawer of an accommodation bill received the same from the accommodation acceptor, upon an arrangement to get it cashed and pay over to the latter all the proceeds except an agreed sum, and did not do so, but handed the bill to a creditor (who was pressing him for a small debt) to be discounted, it was held that he might be a bailee, but that, as the bill was never discounted and was wrongfully detained by the person who received it on an express agreement to pay the drawer the amount of the bill less his debt, there was no conversion analogous to larceny by the drawer.

John Davy Weekes, an attorney, was indicted before Mr. Deputy Recorder Thomas Chambers for stealing a bill of exchange, value 30*l.*, the property of Charles Batty.

Previous to the 17th day of July, 1865, the prosecutor, an engineer, residing at Kennington, had had one transaction with the prisoner, and on that day, at a chance meeting in the street, the prisoner volunteered to obtain discount of his acceptance at two months for 30*l.* in two hours. The bill was drawn by the prisoner, accepted and indorsed by the prosecutor, and then handed to the prisoner. Subsequently the prisoner required to be paid 3*l.* or 3*l.* 10*s.* for his trouble, and no objection was made to that proposal by the prosecutor. Mr. Batty called daily, and sometimes more than twice a day, upon the prisoner during the next three weeks, and the prisoner invariably said he had not yet got the money. On the 5th of August, Mr. Albert William Bailey, a photographer at Walworth, called to obtain payment from Weekes of 10*l.*, which he had repeatedly promised and failed to pay, and on that occasion Weekes

certificates as aforesaid for the current year, are attorneys, solicitors, or conveyancers holding such certificates; and the absence of the name of any person from such list shall, until the contrary be made to appear, be evidence as aforesaid that such person is not qualified to practise as an attorney, solicitor, or conveyancer, under a certificate for the current year; but in the case of any person being an attorney or solicitor whose name does not appear in such list, an extract from the roll of attorneys or solicitors kept by the registrar, certified under the hand of the secretary of the Incorporated Law Society (while such society performs the duties of registrar), or of the registrar for the time being, shall be evidence as aforesaid of the facts appearing in such extract; and in the case of any person being a conveyancer whose name does not appear on such list, the fact of his being so shall be proved in the way in which it is now by law required to be proved."

* Mr. Recorder Gurney was absent upon the Royal Commission to inquire into an outbreak in Jamaica.

delivered the bill to Bailey to take the 10*l.* out of the proceeds from discounting it, and to pay over the balance as soon as he had satisfied himself as to the security. Mr. Bailey went to Mr. Batty to know if the signature was genuine, and Mr. Batty then learnt for the first time that Weekes had parted with the bill. He directed Mr. Bailey not to discount it, and not to return it to Weekes. Mr. Bailey claimed to hold it against Weekes until the 10*l.* was paid, and negotiations for a settlement having failed, upon the bill falling due and being dishonoured, Mr. Bailey, as a *bonâ fide* holder for value—that is to say, for the 10*l.*—issued a writ against Mr. Batty. Mr. Batty then took criminal proceedings against Weekes.

Ribton (*Besley* with him), for the prisoner, submitted that there was no case for the jury to consider. It was proved that this was a bill drawn by the defendant for the accommodation of the prosecutor, and that no debt of 30*l.* was due by Batty to Weekes. In “*Byles on Bills*,” 6th edition, p. 100, the relation of accommodation drawer and acceptor was defined, and it was clear that they were joint owners, undertaking mutually to meet the bill when due in the proportions in which they were to receive funds from it when discounted. He contended therefore, first, that a joint owner could not be a bailee; he could not make a contract of bailment with his co-owner, and whatever agreement they made must be in the nature of a trust. This accounted for the sections in the Larceny Act applicable to fraudulent trustees, because if fraudulent trustees could be treated as bailees those sections would be perfectly unnecessary. He also contended, secondly, that even assuming that a joint owner could be a bailee, the contract of bailment had not been broken. A joint owner of goods could not maintain trover against the co-owner in respect of any act of the latter consistent with his ownership (2 Wms.’ Saun. 647), and everything which the defendant had done in this case was consistent with his position as drawer of an accommodation bill.

Besley, on the same side, dwelt on the fact, that if there were any contract of bailment at all, it was to turn the bill into money in order to produce to Batty 26*l.* 10*s.* There was nothing in that to prevent Weekes getting 20*l.* from Bailey and supplying the 6*l.* 10*s.* out of his own pocket to make up the full amount. The negotiations between Weekes and Bailey did not result in the bill being discounted. The prosecutor interposed and forbade Bailey to carry out the arrangement with Weekes. There was never any conversion which would support an action of trover, and in *Reg. v. Jackson* (9 Cox Crim. Cas. 505), Mr. Baron Martin ruled that the conversion must be analogous to larceny, and that there were many instances of conversion sufficient to maintain an action of trover which were not sufficient to support a conviction under the statute.

Metcalf, for the prosecution, argued that there was abundant evidence for the jury. The bailment was to return the bill to Batty, or 26*l.* 10*s.* in cash. The defendant gave it to a creditor who was pressing him for payment of a debt, and put it out of his own power to fulfil the contract. There was therefore as much a conversion when Weekes put the bill into the hands of Bailey, as if he had discounted it for 10*l.* and put the 10*l.* in his pocket.

The COURT held that a joint owner might be a bailee, and that the defendant had parted with the bill under circumstances which were not in conformity with the arrangement made with the prosecutor. So far the defendant was wrong; but Bailey was bailee for both Batty and Weekes, and if Weekes intended to appropriate the 30*l.*, there was no act showing that intention. The bill was never discounted, and nothing was advanced upon it. Bailey held it wrongfully, and it might be recovered from him by the person who had the right to the possession of it. There was no conversion by the defendant analogous to larceny, and therefore no case for the jury to consider.

Not guilty.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.

CENTRAL CRIMINAL COURT.

BLACKBURN, J., Dec. 22, 1865.

REG. v. HOLCHESTER AND OTHERS.

10 Cox. C.C. 226.

Denman's Act (28 Vict. c. 19)—*Counsel*.

CRIMINAL LAW. D.—*Counsel for the prosecution has the right to sum up when prisoners are defended by counsel, but it is not a positive duty. The privilege should only be used sparingly, and in exceptional cases.*

Nathaniel Holchester, Samuel Berrens, Jules Bayer, Abraham Davis, Gersshore Silbeman, and Philip Braun, were tried upon an indictment, which charged them (under the 24 & 25 Vict. c. 98, s. 19) with having knowingly, and without lawful excuse, in their custody and possession 500 pieces of paper, upon each of which were printed parts of five-rouble notes of the Empire of Russia.

Ballantine, Serjt., Giffard Hardinge, Q.C., and Sleigh, for the prosecution.

Robinson, Serjt., and Turner, Chas., for Holchester; *Metcalf and Straight*, for Berrens; *Cooper*, for Davis; *Ribton and Collins*, for Silbeman. Braun was not defended by counsel; Bayer pleaded guilty.

The "Felony, Misdemeanor, Evidence and Practice Act" (28 Vict. c. 19) states in the preamble that "it is expedient that the law of evidence and practice on trials for felony and misdemeanor, and other proceedings in courts of criminal judicature, should be more nearly assimilated to that on trials at Nisi Prius," and enacts (sect. 2):—

"If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding Judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel, whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, defendant or defendants; and upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening, or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and, when all the evidence is concluded, to sum up the evidence respectively; and the right of reply, and practice, and course of proceedings; save as hereby altered, shall be as at present."

At the conclusion of the case for the prosecution, none of the counsel for the prisoners had announced their intention to adduce evidence, whereupon Ballantine, Serjt., made a second speech in support of the case for the prosecution by way of summing up the evidence against the prisoners.

BLACKBURN, J., in summing up to the jury, said, from my brother Ballantine's address, and from what I am given to understand has been the course of proceeding at this Court, the object of Mr. George Denman's Act has been quite misunderstood, and a practice introduced which, if continued, will render it absolutely necessary to repeal the Act, or allow the administration of criminal justice to be seriously impaired. It used to be considered that the counsel for the prosecution was in a *quasi* judicial position—to bring forward

proofs of the prisoner's guilt, but with the responsibility of doing so, not as mere counsel to try to get a verdict, but as an assistant of the Court, fairly to bring out the facts. At *Nisi Prius* the cause is between party and party, and the advocate must use every fair means to get a verdict; but in criminal courts he is in a very different position, and should avoid all technical objections, and *Nisi Prius* tricks, in order that the issue may be tried on the merits. The recent Act does not make it the duty of counsel for the prosecution to sum up in all cases, but it gives him the right to do so in exceptional cases, such as when erroneous statements have been made and ought to be corrected, or when the evidence differs from the instructions. The counsel for the prosecution is to state his case before he calls the witnesses; then, when the evidence has been given, either to say, simply, "I say nothing," or "I have already told you what would be the substance of the evidence, and you see the statement which I made is correct;" or, in exceptional cases, to say, "Something is proved different to what I expected," and add any simple explanation which is required. If that course, which was intended by the Legislature, be followed, the administration of criminal justice will go on as it has hitherto done in this country, and, as I hope, it always will, fairly and properly, the prosecuting counsel being really a part of the Court—a minister of justice filling a *quasi* judicial position. But if the counsel for the prosecution is to think it a matter of duty in every case to sum up the evidence, and introduce into criminal courts the practice of *Nisi Prius*—if, instead of feeling himself a minister of justice, he is to open his case slightly, call the witnesses, and then trust to a powerful and eloquent speech, as if he were a partisan—it will be utterly impossible to conduct criminal trials as they have hitherto been conducted. Instead of trusting to the counsel for the prosecution to assist him, it will be the positive duty of the Judge to watch and see that no *Nisi Prius* advantage is taken of the prisoner to catch a verdict upon some point not substantially affecting the merits of the case itself. It is in the discretion of counsel whether he shall sum up his case or not, but, in my opinion, the right should only be exercised in particular cases. If it is to be done in all cases I think the Act will, instead of a great boon, be a great curse. If it be carried out as it has been hitherto on the circuits, and the privilege of summing up be used sparingly, it will, no doubt, do, as it was intended to do, a great deal of good; but if that be not the mode generally adopted, the sooner it is repealed the better for the country.

All the prisoners, except Braun, were convicted, and sentenced to various terms of penal servitude.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

BYLES, J., June 14, 1866.

REG. v. THOMAS HOPKINS.

10 Cox. C.C. 229.

Murder—Manslaughter—Evidence as to the character of an assault on the prisoner by deceased at the time of the mortal blow.

CRIMINAL LAW. C.—On the trial of an indictment for murder, it was proved that the deceased rushed at the prisoner, her husband, with whom she had been quarrelling, took his hat off, and caught him round the neck; and she then received a mortal wound, inflicted by him with a knife which he had in his hand.

CRIMINAL LAW. D.—*To show the nature of the assault by the wife that the prisoner had reason to apprehend at the time, evidence of former attacks of this sort was allowed to be given. The prisoner was sensitive about the neck from old sores. The deceased used to seize his neckerchief, twist it round so tightly as almost to strangle him, and his neckerchief had to be cut to release him from his wife's violence.*

The prisoner was indicted for that he feloniously, wilfully, and of his malice aforethought, did kill and murder one Sarah Hopkins. To which indictment the prisoner pleaded "Not Guilty."

Sleigh and J. Thompson were counsel for the prosecution; and *Ribton* for the prisoner.

Rosetta Giles, a witness on behalf of the prosecution, proved that late on Monday night, the 21st of May last, she was at the Bell Inn, Edmonton, and that she saw the prisoner come in, and that afterwards Sarah Hopkins, the deceased woman, the prisoner's wife, came in; that a soldier was there playing the bagpipes, and that the prisoner and others were dancing; that Sarah Hopkins said to her husband, "You've been out all day, you've come home for a d—row; if you begin, I'll begin. If you don't hold your d—noise, I'll put this (meaning a quart pewter pot) at your head." They had more words and then went out.

Elizabeth Abdy.—I lived in the same house with the prisoner and his wife. About half-past eleven on Monday night, the 21st May, I was sitting on a bench outside the house. The prisoner came and went in and lit a candle. He said, "Have you seen anything of my old woman?" I said, "No." He took some knives out of the cupboard. At this time there was a cloth on the table. He took one of the knives away and sharpened it on the hearth. I said, "Tom, whatever are you going to do?" He said, "You will see what I am going to do." His wife came in a minute or so into the passage. He had just come out of the room. His wife went towards him, and took the hat off his head. I saw her catch him by the neck. Both of them had each other in their hands in the passage. She fell covered with blood.

The prisoner afterwards stated to the policeman who took him that he did it through jealousy.

It appeared that the deceased woman was a strong, powerful woman, and also a very violent one.

Ribton then addressed the jury for the prisoner, and stated that he should call witnesses to show that the deceased woman had been in the habit of making violent attacks on the prisoner, seizing him by the neckerchief, twisting it round tight, so as almost to strangle him, and that bystanders had on three or four occasions had to cut the neckerchief to release him; and that the prisoner was very sensitive about the neck, and was apprehensive of a similar attack on the unfortunate occasion in question.

BYLES, J.—At the present I do not see how such evidence can be admissible upon this charge. I presume you offer it to show the character of the assault the prisoner had reason to apprehend. I will consult with my brother *Bramwell, B.*

The learned Judge then left the court to consult with *Bramwell, B.*, who was presiding in the Old Court, and on his return said that the evidence might be received, but it was to be confined to explaining the nature of this particular attack by the deceased woman.

Ribton then called four witnesses, who proved that on three or four occasions the deceased woman had seized the prisoner in the way he described; that she twisted the neckerchief so tight that he became black in the face; that this caused a gurgling noise in his throat, and that the neckerchief was cut away by other persons.

The surgeon in the case, by the direction of Byles, J., examined the prisoner's neck, and reported that there were marks of old abscesses upon it which had been healed for three or four years, and consequently that the prisoner might be particularly sensitive about the neck.

BYLES, J., in summing up the case to the jury, said that he should leave these questions to them: (1.) Did the deceased woman commit a serious assault upon the prisoner? (2.) Did the prisoner in hot blood, and in irritation and anger at her attack, without any premeditated design to kill her, or to do her grievous bodily harm, cause her death? He cautioned them that they must be of opinion that she committed a serious attack on the prisoner, to justify them in reducing the charge from murder to manslaughter.

The jury found the prisoner guilty of manslaughter; and the learned Judge sentenced him to fifteen years' penal servitude.

[Reported by John Thompson, Esq., Barrister-at-Law.]

SOMERSET SUMMER ASSIZES.

MR. JUSTICE BYLES, Wells, August 5, 1866.

REG. v. BEAVER AND SHORE.

10 Cox. C.C. 274.

Deposition of sick witness—Use of same before the grand jury—Proof in presence of the accused by the presiding judge.

CRIMINAL LAW. D.—*Before the depositions of a witness who is too ill to travel can be given in evidence before the grand jury, the judge who presides must, by evidence in the presence of the accused, satisfy himself of the existence of the facts which, under sect. 17 of the 11 & 12 Vict. c. 42, make such deposition evidence.*

The two prisoners were committed to trial upon a charge of having uttered certain counterfeit coin, knowing the same to be counterfeit.

Whilst the bill of indictment was under the consideration of the grand jury, their foreman came into court and informed his Lordship that, in consequence of the absence of a material witness through illness (as he was informed), it would be necessary for them to have her deposition read before they could deal with the bill.

BYLES, J., informed the grand jury, that before the deposition could be read by them it must be proved in court before him that the witness was too ill to attend, and that it was taken in conformity with the statute,¹ and that the prisoner must be brought into Court to hear the evidence given.

(1) By sect. 17 of the 11 & 12 Vict. c. 42, after providing for the manner in which depositions before justices are to be taken upon charges of indictable offences, it is enacted, that "if upon the trial of the person so accused as that aforesaid it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if, also, it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

T. W. Saunders, for the prosecution, suggested that such a course was unusual, and might lead to great practical inconvenience; that the grand jury could themselves ascertain the facts necessary to justify the reading of the deposition; and that, as the evidence of the illness of the witness, &c., must ultimately be given in the full Court upon the trial, and the proceedings before the grand jury are *ex parte*, no prejudice could arise to the prisoners by the depositions being at once sent before such jury.

BYLES, J., said he had well considered the point, and was satisfied that before the deposition could be used by the grand jury, he must be satisfied that the witness was too ill to attend, and that it had been properly taken.

The prisoners were then placed in the dock, and informed of what was intended to be done. Evidence was then given that the witness was so ill as not to be able to travel, and that the deposition had been properly taken, whereupon his Lordship, having expressed himself as satisfied, the deposition was sent before the grand jury.²

[Reported by E. W. Cox, Esq., Barrister-at-Law.]

DEVON WINTER ASSIZE.

BARON BRAMWELL, Exeter, December 11, 1866.

REG. v. BENNETT.

REG. v. BOND.

10 Cox. C.C. 331.

Practice—Counsel.

CRIMINAL LAW. D.—*Two prisoners were separately indicted for successive rapes on the same woman. One of the prisoners was defended by counsel, the other was undefended.*

The Court refused the application of counsel for the defended prisoner to have that case first tried, the prosecution having elected to take the undefended case first.

Prisoners were separately indicted for a rape upon Elizabeth Jane Smith. They were charged with committing the offence immediately one after the other.

Clarke for the prosecution.

(2) It is impossible not to perceive that the practice thus established by the learned judge is likely, in certain cases, to lead to very great embarrassment in the administration of criminal justice. To say nothing of the case where the defendant is in actual custody, when, if a lengthy trial is going on, the grand jury may be kept waiting the better part of a day until the Court has leisure to adopt the course pointed out, it is difficult to understand how in many cases, where the defendant is upon bail, any bill whatever can be found by the grand jury. According to the ruling of the learned Judge, the proof of the inability of the witnesses to attend, and that the deposition has been properly taken, must be given before the presiding judge himself and *in the presence of the accused*. Now, when an accused is at large upon bail, he is under no obligation to surrender until a bill of indictment against him is actually found, for until such an event arises there is nothing for him to answer. If, therefore, the actual presence of the accused is necessary, and he does not choose to surrender, we do not see how the evidence can be given. If the evidence of the sick witness is essential to the finding of the bill of indictment, and it is necessary that the judge who presides should, by evidence given in the presence of the prisoner, satisfy himself as above mentioned before the deposition can be permitted to be taken before the grand jury, then, if the accused be on bail and declines to surrender, the proceedings may become altogether abortive.

Carter defended *Bond*.

Prisoner Bennett was undefended.

Clarke said he would take *Bennett's* case first.

Carter objected that it was necessary for justice to his client that the case should be fully sifted in the first instance. It would greatly prejudice the case of his client if the case against the other upon the same facts should be imperfectly investigated.

BRAMWELL, B., however, refused the application. He could not interfere with the right of the prosecution to proceed upon which of several indictments it pleased.

[Reported by E. W. Cox, Esq., Barrister-at-Law.]

LINCOLNSHIRE SUMMER ASSIZES, 1866.

MR. JUSTICE MONTAGUE SMITH.

REG. v. HARRIS.

10 Cox. C.C. 352.

Lottery.

GAMING AND WAGERING. E.—*A lottery in which tickets were drawn by subscribers of a shilling, which entitled them at all events to what was professed to be a shilling's worth of goods, and also to the chance of certain bonuses of goods of greater value than the shilling, is an illegal lottery within the statute.*

The prisoner was indicted for keeping a lottery.

The indictment had been removed into the Queen's Bench by *certiorari*.

Mellor for the Crown.

Digby Seymour, Q.C., and *Coltman*, for the defendant.

The defendant, who is a watchmaker, and also a hawker of watches, residing at Grimsby, had announced what he called "The Eastern Bazaar," to be conducted "according to the principles of the Art Union." There were to be 5,000 tickets of 1s. each, and in the prospectus it was stated that bonuses "to the amount of 250l. were to be distributed." The chief "bonuses" consisted of eight articles, either clocks or watches, varying in value from 12l. to 2l. The other "bonuses" were composed, in the words of the prospectus, of "geese, ducks, hares, rabbits, pipes, chimney ornaments, purses, &c.," and were so arranged that every subscriber obtained something. Every person who paid 1s. obtained a ticket, with a distinguishing number, on presenting which reference was made to a book, and the holder was informed of the "bonus" he had obtained.

D. Seymour contended that this was not a lottery, inasmuch as each person obtained the full value for his shilling.

M. SMITH, J.—Whether the full value of the shilling was or was not received by the subscribers, the case comes equally within the mischief against which the Act prohibiting lotteries was directed, inasmuch as the subscribers were induced to part with their money in the hope of obtaining not only their alleged shilling's worth, but something of much greater value, the right to which was to be ascertained by chance. He must direct the jury that the

answer of the defendant was no defence. He would also ask them to say if they were of opinion that each person did receive full value for his shilling, should it turn out that the point was material.

The jury found the defendant *guilty*, and that the subscribers did not in all cases obtain full value for the shilling.

The defendant was admitted to bail, to come up for judgment when called upon, in order that he might have an opportunity, if so advised, to move the Court above to enter the verdict for him, if the Court should be for opinion that the case was not within the statute.

[Reported by J. Stone, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

THOMAS CHAMBERS, Esq., Q.C., Common Serjeant, August 14, 1865.

REG. v. EMMA WARREN.

10 Cox. C.C. 359.

Larceny—Bailee—Servant—Prisoner living with prosecutor as his wife.

CRIMINAL LAW. C.—*The prisoner lived with the prosecutor as his wife, and was authorised by him to draw and sign cheques and bills in his name, he being blind and unable to do this himself. He entrusted her with a large sum of money to pay into the bank, which she did not do, but appropriated it to her own use:—Held, that the question, whether she was a servant to the prosecutor, was one for the jury.*

Emma Warren was indicted for stealing two table-covers and other articles, and 235*l.* in money, the property of Richard Holliday.

F. H. Lewis, conducted the prosecution.

Ribton, the defence.

It appeared that the prisoner had been living with the prosecutor Holliday, at 2, Pembroke Gardens, Kensington, as his wife for three years, and that during that time she had been in the habit of paying money into the bankers, and signing bills for him because he could not see to do it himself. On the 22nd of June, about eight o'clock in the morning, Holliday gave her 235*l.* in Bank of England notes to pay into the Kensington bank, among which were two notes of 100*l.* each. The prisoner counted them over, said they were right, and went out. When she returned, the prosecutor asked her whether she had paid them in, and she said, "Yes." The next morning she rose about four o'clock, and said she would have a drop of brandy and go out for a walk. The prosecutor got up about half-past six. She was not in then, but she came in while he was having his breakfast. He again asked her whether she had paid in the notes, and she said "Yes." The prosecutor said he wanted one of the 5*l.* notes, and she replied that he could not have it unless he drew a cheque. She and her sister then sent him out on some excuse, and on returning he found that they had both left, and that several articles were missing. The prosecutor had never told the prisoner to put away money on her own account. She had authority to draw cheques, and sign his name to them, and was mistress of his house. A clerk from the Bank of England proved that the prisoner changed two 100*l.* notes for gold on the 22nd of June, and wrote a name and address on the back of the notes, "Mr. Pawsey, 6, Cambridge Terrace, Notting-Dale."

Ribton contended that as the prisoner was not the prosecutor's servant,

and the money was not to be returned to the prosecutor in the very same state in which he gave it her, she could be a bailee, and had not committed any offence that came within the statute. He cited *Reg. v. Hassall*, and *Reg. v. Garrett*, (2 F. & F.).

M. SMITH, J., left it to the jury to say whether the prisoner acted as a servant.

Guilty of larceny as a servant.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

RUSSELL GURNEY, Esq., Q.C., Recorder, December 19, 1865.

REG. v. RICHARD WALLER.

10 Cox. C.C. 360.

Larceny—Servant—Prisoner carrying on business on his own account—Felonious intent.

CRIMINAL LAW. C.—A., carrying on business on his own account, entered into an engagement with B. to sell goods for him, and for certain purposes to be his servant. B. entrusted A. with certain goods to dispose of in a particular way. A. converted them to his own use:—Held, that it was a question for the jury to say whether, when A. received the goods, he had the intention of misappropriating them.

Richard Waller was indicted for stealing, on the 4th of November, a bracelet and two shirt pins, the property of Samuel Nathan.

F. H. Lewis prosecuted.

Sleigh defended the prisoner.

Samuel Lewis Nathan said: I carry on business as a wholesale jeweller and watchmaker. In April, 1864, prisoner was selling goods for me on commission. He remained with me on those terms until August, 1865, when an arrangement was made that every month we were to have a settlement of the accounts, and he was then to return the goods which were unsold, and enter the goods sold in a book. Towards the end of October I handed him a pair of turquoise and diamond earrings to sell. He brought back the earrings, and said he had shewn them to Mr. Johnson, of Threadneedle Street; that he admired them very much, and would have purchased them as earrings, but one of the young men put one of them into his scarf, and it looked so pretty as a pin, that if I would have them converted into pins he would give me 40*l.* for them, and also 30*l.* for a bracelet he shewed him at the same time. I said, "Very well, I will accept the offer." The earrings were converted into pins, and they were given to the prisoner to take to Mr. Johnson about the 4th of November. I asked him afterwards whether he had taken the pins to Mr. Johnson, and he said "Yes." In the day-book of November 4, 1865, there is an entry in the prisoner's handwriting: "Mr. Johnson, Threadneedle Street, two brilliant and turquoise pins, 40*l.*; one brilliant enamelled horseshoe bracelet, 30*l.*" In the ledger I find Mr. Johnson's name carried forward, in the prisoner's handwriting, as a debtor to the amount of 70*l.* The prisoner was to be my servant, to make the entries in the day-book, every day, of goods sold, and to enter the cash received, and to return the goods every night which were not sold. He was not to sell the goods for the best prices he could obtain; my selling prices were marked on them, and he was to

dispose of them at that price. There was an old debt due from him, and until that was liquidated he was not to receive any salary, but he was carrying on business on his own account at the same time.

Richard Johnson, a jeweller, in Threadneedle Street, said that the prisoner did not, in November, or at any other time, bring him a diamond bracelet; that he did not give any order for the conversion of the earrings into scarf pins, and that he never purchased anything from the prisoner.

Sleigh submitted that the relation of master and servant did not exist in this case, and, therefore, the offence was not embezzlement; and, further, that it did not amount to larceny, as the prisoner was in business on his own account.

The RECORDER ruled that, as the prisoner had received specific directions to take a portion of the goods to a particular person, and he did not do so, it was for the jury to say whether, at the time he received them, he had the intention of misappropriating them.

Guilty.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

RUSSELL GURNEY, Esq., Q.C., Recorder, December 21, 1865.

REG. v. FORBES AND WEBB.

10 Cox. C.C. 362.

Assault on constable in execution of duty—Knowledge of defendant.

CRIMINAL LAW. C.—*To support a charge of assault on a constable in the execution of his duty, it is not necessary that the defendant should know that he was a constable then in the execution of his duty; it is sufficient that the constable should have been actually in the execution of his duty and then been assaulted.*

John Forbes and John Webb were indicted for assaulting John Timothy Hughes and John Doyle, police officers, in the execution of their duty.

It appeared that John Doyle, P.C., R. 172, was at Rotherhithe, in plain clothes, and apprehended a boy in Church Street, who was carrying something in a bag, which he threw away, and then ran away. He went with the bag into Church Passage, on the way to the station, and when there he was repeatedly struck by the prisoner Webb, who called out to parties there to rescue the boy and pitch into the constable. Two men, not the prisoners, then took hold of the constable, and Webb struck him a strong blow on the forehead. He also struck the other constable, who was also in plain clothes. The other constable, Hughes, was down on the ground and was being kicked. Forbes was among the crowd.

The 24 & 25 Vict. c. 100. s. 38. enacts: "Whosoever . . . shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person for any offence, shall be guilty of a misdemeanor."

Straight submitted that there was no evidence to go to the jury in support of the count for the assault on the policemen in the execution of their duty, because, in consequence of their being in plain clothes, prisoners did not know that they were constables.

The RECORDER.—The offence was, not assaulting them knowing them to be in execution of their duty, but assaulting them being in the execution of their duty.

Forbes not guilty; Webb guilty.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

THOMAS CHAMBERS, Q.C., Common Serjeant, April 10, 1866.

REG. v. WILKINS AND DAVIS.

10 Cox. C. C. 363.

Larceny—Existence of something which may be made the subject thereof—Attempt to steal.

CRIMINAL LAW. C.—*In cases of robbery from the person, where the property alleged to have been stolen has not been seen or known to be safe immediately before the robbery, if there be any evidence on the subject, it is for the jury to say whether the property really was in a position to be stolen as alleged.*

Amelia Wilkins and Catherine Davis were charged with stealing a purse, 3l. 0s. 6d. in money, and an order for the payment of 40l., the property of George Fielder, from the person of Laura Mary Fielder.

Cooper prosecuted.

Harris defended Wilkins. Pater defended Davis.

It appeared that the two prisoners were seen standing near the prosecutrix, who was then spoken to, and found that she had lost her purse which had been safe in her pocket half an hour before. The purse, *minus* its contents, was picked up in the street where the robbery was committed, shortly after its commission.

Pater contended that as the prosecutrix had not seen her purse for half an hour, there was no proof that there was anything in her pocket to steal; and if it were said that the prisoners could be convicted of the attempt, the case of *Reg. v. Collins* (9 Cox Crim. Cas. 497, and 33 L. J. M.C. 177), had decided that there must be something which could be stolen.

The COMMON SERJEANT left it to the jury to say whether they believed the purse remained in the pocket of the prosecutrix for half an hour after she had known it to be safe.

Guilty.

[Reported by Edward T. E. Bealey, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

THOMAS CHAMBERS, Q.C., Common Serjeant, April 12, 1866.

REG. v. HARMAN MILTON AND MATTHEW MILTON.

10 Cox. C.C. 364.

Forgery—Alteration of receipt—Addition of words above signature—Alteration of effect of receipt.

CRIMINAL LAW. C.—*After a receipt was signed by the person giving it, the person to whom it was given added words above the signature:—Held, that it was for the jury to say whether the addition of those words altered the effect of the receipt. Held, also, that it was doubtful whether such addition amounted to a forgery.*

Harman Milton and Matthew Milton were indicted for feloniously forging and uttering a receipt for 5l. with intent to defraud.

Metcalfe prosecuted.

Straight defended Harman, and *Collins* Matthew.

John Cunningham Tacy, a stationer, of 35, City Road, said that, in April last, he saw an advertisement in the *Times* about a horse, and in consequence went to Milton's livery stables in Mount Street. The prisoner Matthew was there. Tacy saw a horse there, and agreed to leave his horse and 15*l.* for it. He was to have it for trial, and on trial found it lame and took it back again. He then saw Matthew, who said he had lent Tacy's horse to a man in the country. Ultimately Tacy got his horse back again and 5*l.*, and left the horse he had had with Harman. That was on the 1st of May, 1865. At that time Tacy obtained the following I.O.U. for 10*l.*, besides the 5*l.*: "John C. Tacy, I promise to pay the sum of 10*l.* a week from this date.—G. Milton for M. Milton." He also signed on the same day a receipt, which Milton would not allow him to write, in these words: "Received of Mr. H. Milton the sum of 5*l.* on April 26, 1865.—John C. Tacy." Since signing that receipt the following words had been added before the signature: "Which cancels the transaction arranged between me and M. Milton," and under the signature, "And also holds the I.O.U.—H. M. Milton." The body of the receipt was written by Harman.

Straight contended that there was no evidence to go to the jury, as the legal effect of the receipt was not altered and therefore there was no forgery.

Collins submitted that the I.O.U. cancelled the transaction.

The COMMON SERJEANT considered that it was a question for the jury whether the words added before the signature altered the original character of the receipt, but thought it was doubtful whether it was a forgery; but if necessary the point should be reserved.

Harman guilty of uttering. *Matthew* not guilty.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

MONTAGUE SMITH, J., April 14, 1866.

REG. v. JANKOWSKI.

10 Cox. C.C. 365.

Statement in prisoner's presence—Inducement.

CRIMINAL LAW. D.—*The Court will not exclude a statement made in the prisoner's presence by another party to a third person, merely because some inducement has been held out to that party to make it; but very little weight ought to be attached to the fact of no answer being given to such statement by the prisoner, as he would not know whether it would be better for him to be silent or not.*

Vincent Jankowski was indicted for feloniously having in his possession 1,000 pieces of paper, on each of which was printed, without the authority of the Emperor of Russia, parts of an undertaking for the payment of 25 roubles.

The principal witness in this case was an accomplice named Koche. Police Inspector James Thompson took the prisoner into custody, and took him to the station-house, into a room where Koche was sitting. They recognize each other, and nodded. Thompson said to Koche, "Is this the

man who gave you the papers?" He said, "Yes, it is." The prisoner made no remark. They then spoke together in some language which the inspector did not understand, and then Koche said, "He tells me he has some papers about him which he does not know what to do with." Thompson then searched the prisoner, and found two Polish bonds and the coupons belonging to them, and also some elaborate wood carvings. On the next day Jankowski and Koche were together at the station, and Thompson said to Koche, "You remember the statement you made to me last night; be good enough to repeat that statement to me now, because I am anxious that no mistake should arise respecting it." He then said, "I have been dragged into this by poverty, and a man named Vincent Jankowski; I have only been engaged in these transactions about a fortnight. Jankowski came to me and brought me forged notes, for which I was to find a customer." On cross-examination, Thompson said, "I did not tell him it would be better for him if he made the statement; he made the statement first. I did say, 'It will be better for you to begin at the commencement; I dare say it will be better for you,' but it was after he had made the statement."

Kenealy, for the prisoner, submitted that the statement was inadmissible, because, although it was not made by the prisoner, it affected him, and was obtained from Koche under a promise of advantage, and was therefore likely to be false.

M. SMITH, J., said that this was a matter of observation to the jury, and declined to exclude the statement, but suggested that the statement being made in the prisoner's presence, and his making no observation, ought not to weigh against him, as he would not know whether he had better be silent or not.

Thompson then went on to give the remainder of the statement made by Koche in the prisoner's presence.

Not guilty.

[Reported by Edward T. E. Besley, Esq., Barrister-at-law.]

CENTRAL CRIMINAL COURT.

THOMAS CHAMBERS, Q.C., Common Serjeant, May 9, 1866.

REG. v. WILLIAM JOHN MARKS.

10 Cox. C.C. 367.

Embezzlement—Larceny—Friendly society—Description of property.

CRIMINAL LAW. C.—*The secretary of a friendly society, of which A. B. and others were the trustees, was charged with embezzling money belonging to the society. In the indictment the property was laid as "of A. B. and others," without alleging that they were trustees of the society:—Held, that the indictment might be amended by adding the words "trustees of, &c."*

William John Marks was indicted for embezzling and stealing 7l. 2s. 6d. the moneys of Thomas Shean and others his masters.

Daly prosecuted.

Besley defended the prisoner.

The prisoner was secretary to the Deptford Pride Foresters' Court Benefit Society, of which the prosecutor and others were the trustees, and had received 7l. 2s. 6d. from the society to pay over to the surgeon of the society, which he failed to do.

Besley submitted that the money mentioned in the indictment should have been set out as the property of Thomas Shean and others, trustees of the society, and that, that not appearing on the face of it, the indictment was bad. He also submitted that this was such a variance as could not be amended.

Daly contended that it was within the power of the Court to amend.

The COMMON SERJEANT, after consulting the Recorder, decided that there was power to amend, but said he would reserve the point if it became necessary.

Not guilty.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

THOMAS CHAMBERS, Q.C., Common Serjeant, June 12, 1886.

REG. v. MATTHEW BYRNE.

10 Cox. C.C. 369.

False pretence—Completion of offence—Post-office servant.

CRIMINAL LAW. C.—*A postman falsely pretended that 2s. was payable on a post letter intrusted to him for delivery, whereas, 1s. only was payable:—Held, that the offence was complete when he made the pretence, and therefore the absence of any evidence to show positively that he did not pay over the extra 1s. to his superior officer, was quite immaterial to the guilt or innocence of the prisoner.*

Matthew Byrne was indicted for unlawfully obtaining 2s. by false pretences.

Patteson and Poland prosecuted.

Collins defended the prisoner.

Hannah Lefouski said: I live with my husband at 5, Hutchinson's Avenue. On the 14th of April I saw the prisoner. He asked for 2s. for a letter, and I gave it him.

Bertha Rosen said: I am the wife of Woolf Rosen, of Houndsditch. The prisoner came to our house in May, and said, "Mrs. Rosen, 2s. to pay." I had no money, and sent my little girl to my husband, who told me where to find the money, and I paid the prisoner.

William Wheeler said: I am a letter carrier at the Shoreditch district office. Hutchinson's Avenue is in the prisoner's delivery. The letter to Rosen bears the postmark of April 14th, and the prisoner would have to deliver it; 1s. only ought to be paid upon it. The letter with the post-mark of May 9th was in the prisoner's delivery also; 1s. ought to be paid upon it. The letters are charged to the man who takes them out, not singly, but in a lump sum, and he has to account for that sum when he comes back. He checks the amount before he takes the letters out, and then it is charged to him. When he accounts for the money, it is entered in a book and the charge is erased. There is no book to tell how the letters are addressed. On the 9th of May I charged him 1s. 2d. for all the letters he had of me, and on the 14th of April, he had a total of 5s. 8d. to receive.

Collins contended that there was no proof that the prisoner did not pay over to the post office authorities the whole of the money he received.

The Court considered that, as the false pretence was that 2s. was due, the offence was complete when the prisoner obtained the money.

Not guilty.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

COCKBURN, C.J., July 11, 1866.

REG. v. PATRICK HARRINGTON.

10 Cox. C.C. 370.

Murder—Manslaughter—Assault, not endangering life, on daughter of prisoner.

CRIMINAL LAW. C.—*The prisoner struck a fatal blow at the husband under the impulse of strong resentment caused by seeing his daughter violently assaulted by her husband, although not in a manner to endanger her life:—Held, that this might be a ground upon which the offence of murder might be reduced to that of manslaughter.*

Patrick Harrington was indicted for the wilful murder of Peter Mann.

Sleigh for the prosecution,

Montagu Williams for the defence.

The deceased had married the prisoner's daughter. On the 24th of June, the deceased and his wife came out of an alley into Royal Mint Street. The woman had a long-handled broom in her hand defending herself. Her husband hit her a blow in the face, and she lifted the broom again; he stopped the broom, and hit her a second blow; she did not strike him because he defended himself. She then said, "You call me a w—, I am none," and they both fell on the ground, he falling on the top of her. She dropped the broom, got up, and hit the deceased two blows with the right hand on his right cheek. The prisoner having seen all this, rushed up near the deceased, lifted his hand, and struck him a blow. The deceased turned round, said "Old man, you have stabbed me," and fell down. Both the prisoner and the deceased were the worse for liquor. The deceased's wife during the struggle with him had been screaming out "Murder."

M. Williams submitted that there was no evidence to go to the jury on the charge of murder.

COCKBURN, C.J., said that the only ground upon which the offence could be reduced to manslaughter would be that the fatal blow was struck under the impulse of strong resentment, caused by seeing his daughter assaulted by her husband, although not in a manner to endanger her life. This was a somewhat novel point, and if it became necessary it should be reserved.

Guilty of manslaughter.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

BARON BRAMWELL, June 15, 1866.

REG. v. CHRISTIAN OLIFIER.

10 Cox. C.C. 402.

Approved, *R. v. Prince*, [1875] E. R. A.; 44 L. J. M.C. 122; L. R. 2 C.C. 154; 32 L. T. 700; 24 W. R. 76 (C.C.R.).

Abduction—Statement of prosecutrix as to age—Corpus delicti—24 & 25 Vict. c. 100, s. 55.

CRIMINAL LAW. C.—*Anyone dealing with an unmarried girl does so at his peril, and if she turn out to be under sixteen is liable under the above Act.*

A man is not bound to return to her father's custody a girl who, without any inducement on his part, has left her home and come to him; but if, at any time, he has attempted to induce her to leave home without her parent's consent, and she afterwards does so, he is guilty of the abduction of the girl, even though he disapproves of the act at the particular time at which she gives effect to his previous persuasions.

Christian Olifier was indicted under the 24 & 25 Vict. c. 100, s. 55, for unlawfully taking away one Elizabeth Tolley, an unmarried girl under sixteen years of age, out of the possession and without the knowledge and consent of her father.

Ribton and F. H. Lewis prosecuted.

Sleigh and Besley defended.

Henry James Tolley, the father of the abducted girl, proved that his daughter left without his knowledge or consent.

Elizabeth Tolley said: I have known the prisoner four months. He came into the shop and asked me if I could go out for a walk with him. I told him I could not. Three weeks after his first visit, on a Sunday, I went out for a walk with him, and we called at his brother's house, where we stopped about half and hour. He then told me if I could get away from home he would marry me. He called on me again on the following Tuesday. Our conversation then was only about going away and getting married. On Good Friday I left home, and went to Mrs. Houghton's. She was not at home, and I waited till she returned. I then went with her to the Queen's Hotel, and the next day I wrote to Mr. Olifier at Mrs. Houghton's suggestion. He came to the hotel about four o'clock, and said we were to go to Redhill and stop there all the night, and he would meet us in the morning. He went with us to the railway station and purchased the tickets for us, and gave them to us. He also gave me 20*l*. I and Mrs. Houghton went to Redhill, and the next morning he met us there. He went on with us to Folkestone, and stopped at the hotel. On the next morning it was arranged that he should meet us on Saturday at Boulogne. He then returned to London, and we went on to Boulogne.

On cross-examination, Miss Tolley said: I had told him I was seventeen years of age. He told me that proceedings were in progress to obtain a divorce from his wife, and as soon as that was effected he would marry me. He said he would speak to my father about obtaining his consent to my being married. I did not see him on the Thursday before Good Friday, but I did on the Wednesday. I said nothing to him then about my intention to leave my home, and he said nothing to me about my going away. I had written to Mrs. Houghton on the Wednesday evening, telling her it was my intention to leave my father's house. I had mentioned my intention to leave to Mr. Olifier about three weeks before. I made up my mind to leave my father's house

about an hour before I left on Good Friday, but did not communicate that intention to any human being before I went away. On the next day I sent two letters to Mr. Olifier begging him to come to me, but, although I sent the first early in the morning, he did not come until four in the afternoon. He did not entreat me then to go home, but he said I had done wrong in leaving so soon. From Boulogne we went to Paris, and from there I wrote home, and said, "I am as innocent as when I left you, and intend to remain so; when I am married I shall come back to you. I left on my own accord, and would not take the advice of anyone. No matter who tries to get me back, it will be of no avail—not even the entreaties of the one I love so; I shall love him for his true and honourable intentions to me. It was against his wish I left home, as I ran away. All his persuadings would not get me back. I have done wrong, but it is all my own fault." From the first time I saw Mr. Olifier up to the time I saw him last he never took any indecent liberty with me, nor made a hint of the slightest impropriety or immodesty to me, nor made use of any indecent expression."

In answer to questions from the Court the witness said: He objected to my leaving so soon. He said he could not get away for six weeks. We were to have gone on Easter Sunday in the first instance, but the arrangement was altered, and he said we must wait six weeks. I left my father's house because the prisoner persuaded me to go away. He asked me to wait until he could get away. He did not persuade me to leave at the time I did, but my mother had found out something about Mrs. Houghton, and I was afraid I should not get away at another time. I wanted to go away after he had persuaded me, because he said he would marry me. I liked him. I wanted to marry him; that was why I left. I was partial to him.

The 24 & 25 Vict. c. 100, s. 55, enacts that "whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour."

Sleigh, on behalf of the defendant, wished to take the opinion of the Court upon the effect of the statement of the prosecutrix to the prisoner that she was seventeen years of age, and whether that statement did not relieve the prisoner from the present charge. In the case of *Reg. v. Robins* (Car. & Kir. 456), it was no doubt held that ignorance of the age was of no importance, but that was only the dictum of a single Judge, and the point had never been decided by the Court of Criminal Appeal. He also called the attention of the Court to *Reg. v. Tinckler* (1 F. & F. 513).

BRAMWELL, B., was of the opinion that any man who dealt with an unmarried person did so at his own peril; and if she turned out to be under sixteen, he was liable under this Act.

In stating the law of the case to the jury, BRAMWELL, B., said: I am of opinion that if a young woman leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet his not doing so is no infringement of this Act of Parliament, for the Act does not say he shall restore her, but only that he shall not take her away. It is, however, equally clear that, if the girl, acting under his persuasion, leaves her father's house, although he is not present at the moment, yet, if he avails himself of that leaving which took place at his persuasion, that would be a taking her out of the father's possession, because the persuasion would be the motive cause of her leaving. Again, although she may not leave at the appointed time, and although he may not wish that she should have left at that particular

time, yet if, finding she has left, he avails himself of that to induce her to continue away from her father's custody, in my judgment he is also guilty, if his persuasion operated on her mind so as to induce her to leave.

Guilty.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

RT. HON. RUSSELL GURNEY, Q.C., Recorder, Aug. 15, 1866.

REG. v. FRANK ALLEN.

10 Cox. C.C. 405.

Offence on the high seas—Nationality—British flag and owners—Register—Log-book.

CRIMINAL LAW. A. SHIPPING. A.—To prove that a ship is a British ship, it is not necessary to produce the register or a copy thereof; it is sufficient to show orally that she belongs to British owners and carries the British flag. Oral testimony as to the position of a ship at a given time, is better evidence than the production of the log-book.

Frank Allen was indicted for feloniously assaulting George Withers on the high seas, with intent to do him grievous bodily harm.

Besley prosecuted.

Lilley defended.

George Withers, the first mate of the *William Penn*, said that she was a new ship and sailed under British colours. That her owners were Malkinson Brothers, and they were British subjects. He then said that on the 22nd of June, between nine and twelve in the morning, the ship was off the banks of Newfoundland, and afterwards proceeded to give evidence of the offence with which the prisoner was charged. No other proof of the nationality of the ship, or of her position at the time of the commission of this offence, was given.

Lilley submitted that, in the absence of the register, there was not sufficient evidence of the *William Penn* being a British ship. The mere proof of her carrying the British flag, and being owned by a British subject, was not sufficient. Further, it was not proved that the ship was on the high seas within the jurisdiction of the Admiralty. The proper mode of proving that was by the production of the log-book.

Besley contended that the facts of the owner being a British subject and the ship sailing under British colours, were sufficient. He cited *Reg. v. Bjornsen* (34 L. J. M.C. 180).

The RECORDER, after consulting Keating, J., considered that it was sufficient to show that the ship sailed under the British flag, and that her owners were British subjects. It was more by implication than by any direct dictum that the production of the register or a copy was held to be necessary. As to her situation off Newfoundland, oral evidence was better than the production of the log.

Guilty.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

WILLES, J., Sept. 21, 1866.

REG. v. HORATIO CRACKNELL AND ROBERT WALKER.

10 Cox. C.C. 408.

Threat to accuse of infamous crime—Guilt or innocence of person threatened—24 & 25 Vict. c. 96, ss. 46, 47.

CRIMINAL LAW. C.—*On the trial of an indictment for threatening to accuse of an infamous crime in order to extort money, the guilt or innocence of the party threatened is quite immaterial. Therefore, although the prosecutor may be cross-examined with a view to shew that he is really guilty of the offence imputed to him, yet no evidence will be allowed to be given, even in cross-examination, by another witness, to prove that the prosecutor is really guilty.*

Horatio Cracknell and Robert Walker were indicted for feloniously threatening Henry Cundell Juler to accuse him of an infamous crime.

Woollett and Poland prosecuted.

Ribton and Cook defended the prisoners.

The prosecutor on cross-examination said, I did not say at the police court in the presence of three constables, "I admit the boy stayed at my house all night." The sergeant did not reply, "What! in your bed?" nor did I answer "Yes, in my bed." I know Sergeant Eames; I saw him at the station. He put questions to me and I answered them. They kept me talking for an hour or an hour and a half at the police station. The sergeant said, "Has he ever stayed a night at your house?" and I said, "He may or he may not; but not to my knowledge." It is not at all likely that he said, "What! in your bed?" and that I answered, "Yes, in my bed." I swear I did not say it.

Henry Edward Juler, the son of the prosecutor, was then called and in cross-examination was asked, "Did you hear Sergeant Eames ask him (the prosecutor) if it were true that the boy slept at his house." To which the witness answered, "Yes, I did not hear my father reply that he did."

WILLES, J., was of opinion that this evidence could not be given. It was matter for the cross-examination of the prosecutor only. It was quite immaterial to the issue whether he was innocent or guilty of the charge made against him by the prisoners.

Guilty.

[Reported by Edward T. E. Besley, Esq., Barrister-at-Law.]

CENTRAL CRIMINAL COURT.

COMMISSIONER KERR, Sept. 21, 1866.

REG. v. FREDERICK SCHLETER.

10 Cox. C.C. 409.

Arraignment—Prisoner standing mute—Practice.

CRIMINAL LAW. D.—*A prisoner, when called upon to plead to an indictment, stood mute. A jury was impanelled and sworn to try whether he was*

mute of malice or by the visitation of God. A verdict of mute of malice having been returned, the Court ordered a plea of "Not guilty" to be entered on the record.

Frederick Schleter was indicted for a burglary in the dwelling-house of Gerard Koesters, and stealing therein a lamp.

The prisoner, being called upon to plead, stood mute. The jury were therefore directed to try whether he was mute of malice or by the visitation of God.

Joseph Newman, police constable 146 H, proved that the prisoner was tried on the 21st of February last, at the Middlesex sessions, and that he pleaded then, and addressed the jury through an interpreter.

Charles Albert said he was in court on the 21st of February last, at the Middlesex sessions, and translated for the prisoner, who spoke to him, and made a long address.

John Rowland Gibson, surgeon of Newgate, said: The prisoner has been under my surveillance since the 4th of August. I have no reason to believe he is incapable of speaking, from either physical or mental reasons. He perfectly understands everything that is said to him. He has obeyed the instructions given him by the Governor.

The jury found that the prisoner was mute of malice, and not by the visitation of God.

The 7 & 8 Geo. 4, c. 28, s. 2, provides that if any person being arraigned upon, or charged with, any indictment or information for treason, felony, piracy, or misdemeanour, shall stand mute of malice or will not answer directly to the indictment or information, the Court may order the proper officer to enter a plea of "Not guilty" on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

Accordingly the Court ordered a plea of "Not guilty" to be entered on the record.

The trial then proceeded in the usual manner, and the prisoner was found guilty. He was further charged with having been previously convicted of felony, and he again stood mute. The jury were again directed to try if he stood mute of malice, or by the visitation of God.

Gerard Koesters, the prosecutor, said: I heard the prisoner speak on the night of the robbery. He said to me, "There he goes, there he goes."

Newman, police constable, repeated his previous evidence.

The jury again found that the prisoner stood mute of malice, and a plea of "Not guilty" as to the previous conviction was entered.

Guilty.

[Reported by Edward T. F. Besley, Esq., Barrister-at-Law.]

IN THE COMMON PLEAS.

ERLE, C.J., WILLES, KEATING, and SMITH, JJ., Jan. 11, 1866.

THE PENTREGUINNY FUEL COMPANY v. YOUNG, P.O.

12 Jur. N.S. 56.

Parol contract reduced to writing—Mistake—Evidence.

EVIDENCE. MISTAKE.—*A company had borrowed from a bank a sum of money, to be repaid with interest, and deposited a lease as security. Afterwards a document was drawn up by the company, stating that the lease had been deposited as security for the loan, without mentioning the interest. The*

bank refused to give up the deed until the whole of the interest as well as the loan had been repaid:—Held, in an action of detinue for the lease, that the written document was not conclusive against the bank as to the terms of the loan, and that parol evidence was rightly admitted to shew that the lease had been intended as security for the interest as well as the principal.

This was an action of detinue for an indenture of lease, tried before Erle, C.J., against the public officer of a banking company; and one of the pleas, in substance, alleged that the deed had been deposited with the bank, to be held by it until two sums advanced to the plaintiffs, and secured by certain promissory notes, should have been repaid with interest. It appeared that in the early part of 1861 the bank lent to the company the sum of 1,000*l.*, with interest. The deed was then deposited. In the month of July a second sum of 1,000*l.*, with interest, was lent. There was then no written memorandum of the terms on which the lease had been deposited; but subsequently it was agreed between those who were acting respectively for the plaintiffs and the bank, that the terms on which the lease was deposited should be put in writing. Accordingly, a document was drawn up by the plaintiffs, stating that the lease had been deposited as a security for the loan; but no mention was made of the interest. The affairs of the plaintiffs' company were wound up, and it was found that a balance of about 56*l.* was due to the bank, a portion of which was owing in respect of interest on the above two sums of 1,000*l.* each. The defendants claimed to retain the lease until the whole of the interest, as well as the sum of 2,000*l.*, had been paid. It was contended, on the part of the plaintiffs, that the written memorandum was conclusive evidence of the terms on which the lease had been deposited, and that parol evidence could not be admitted to shew that it had been intended to secure the interest as well as the principal. His Lordship ruled that parol evidence was admissible to explain the terms on which the lease had been placed under the control of the bank; and it then appearing that the deed had been put in the power of the defendant's company to secure the repayment of the interest, as well as the sum of 2,000*l.*, the jury found for the defendant.

Gray, Q.C., now moved for a rule calling on the defendant to shew cause why a new trial should not be had, on the ground that the learned judge had misdirected the jury. He argued that the question was, whether, after the sum secured by notes had been paid, the bank had a right to retain the deed. The written memorandum could not be varied by parol evidence, and the judge was wrong in ruling that, as it had been drawn up after the deposit of the deed, parol testimony could be admitted with the view of shewing that the original contract had been different. [*Erle, J.C.*—It is clear that this evidence was properly laid before the jury. *Keating, J.*—Would it not have been extraordinary if the bank had not taken security for the interest?] The memorandum professes to be the contract under which the deposit was made. [*Keating, J.*—How could it be the contract unless it was accepted by the persons to whom it was sent? Whether it was accepted or not was a question for the jury.] That question was not left to the jury. If there was a mistake, the only remedy of the bank was equitable. When a contract has been once reduced to writing it cannot be varied by parol. This doctrine is commented on in the judgment of Channell, B., in *Rogers v. Hadley* (2 H. & C. 227). [*Keating, J.*—There must be parol evidence to shew whether there was a contract at all.] It does not matter how long it is after the contract is made that it is reduced to writing; it is equally binding. Here the question put to the jury was, whether there was a verbal agreement that the deposit of the lease should be a security for not only the principal, but also the interest. If there was a mistake, a court of equity would reform the contract. [*Willes, J.*—Will equity give relief when a contract has been performed, and nothing remains but to enforce a right under it?]

WILLES, J.—There ought to be no rule. The bank had taken the lease

into its possession as security for the first sum of 1,000*l*. It was only by way of further assurance that the customer was to give the memorandum. If no document had been given, it would have been held as a security for the loan and interest. How were matters affected by the document actually sent? There was, in truth, a failure to send the agreement, which ought to have been sent; a memorandum accurately stating the terms ought to have been forwarded. A court of law has not machinery to reform a contract, as is done in equity; but under the Common Law Procedure Act, 1854, the real transaction may be set up. But here it may be shewn that the document was drawn up under a mistake.

KEATING, J.—I am of the same opinion. The contract was originally by parol, and the document subsequently drawn up was not conclusive. To have held otherwise would have been a misdirection.

SMITH, J.—The document was merely a letter sent from one party to the other; it was necessary to see whether the letter had been assented to. There could have been no other direction than that actually given.¹

Rule refused.

LORDS JUSTICES, Jan. 13, 1866.

CHADWICK v. TURNER.

12 Jur. N.S. 153.

Practice—Appeal—Right to begin.

PRACTICE. N.—*If one of several defendants appeals from the whole decree, the plaintiff has a right to begin.*

In this case one of several defendants appealed from the whole decree, so far as affected such defendant, though not from the entire decree. The question was raised, whether the plaintiff or the appellant had a right to begin.

Hobhouse, Q.C., and Kay, for the plaintiff.

Cole, Q.C., and Ince, for the appellant.

Sir J. L. KNIGHT BRUCE, L.J.—I am under the impression that this point has been already decided; where one only of several defendants appeals against the whole decree, so far as he is affected, the plaintiff has the right to begin.

Sir G. J. TURNER, L.J., concurred.

(1) Gray, Q.C., also moved on the ground that the verdict was against evidence; but the rule was refused on that ground also.

IN THE QUEEN'S BENCH.

COCKBURN, C.J., BLACKBURN, and MELLOR, JJ., Jan. 13, 1866.

SHEFFIELD GAS COMPANY v. THE OVERSEERS OF SHEFFIELD.

12 Jur. N.S. 162.

Quarter sessions—Poor rate appeal—Arbitration—12 & 13 Vict. c. 45—Costs of arbitration—Remedy for, if not taxed by clerk of sessions—Mandamus.

RATES AND RATING. C.—Upon a poor rate appeal to quarter sessions, there was a reference to arbitration under the 12 & 13 Vict. c. 45, and the respondents succeeded. The quarter sessions made an order for "such costs as they might be entitled to," and they claimed the cost of the arbitration. The clerk, however, deeming those costs not within the statute, declined to tax them:—Held, that mandamus could not go to the sessions to hear and determine the application for those costs, as it could not be put as a case in which they had declined jurisdiction, nor as a case in which they were clearly wrong.

Quære, whether the respondents are entitled to costs of arbitration?

In this case the gas company had appealed against a poor rate, and there had been a reference to arbitration, under the 12 & 13 Vict. 45, ss. 12, 13.¹

The order of reference made the costs of the award abide the event, but did not mention the costs of the arbitration.

After several hearings, the appellants abandoned the appeal, and the respondents had judgment that the rate be confirmed. The respondents applied for costs of the arbitration, and the Court ordered that they should have "such costs as they might be entitled to." The clerk declined to tax the respondents' costs of the arbitration, they not being mentioned in the order of reference.

Waddy, for the respondents, now moved for a rule for a mandamus to the sessions to enter continuances, and hear and determine the application for costs of the arbitration. He contended that they had not yet determined that matter, and that they had in effect declined to do so. Unless this rule was granted, the respondents, he urged, would have no remedy for costs, to which they were clearly by law entitled; for they had judgment, and the costs were incident to the judgment as usual, and the sessions had declined to order those costs. [He cited *Reg. v. The Justices of Merionethshire* (6 Q.B. 163), where it was held that the sessions were bound to allow an appeal to be entered against an order of removal (though it had been superseded) for the purpose of getting the proper amount of costs allowed. He also cited *Reg. v. Tunstall* (3 Q.B. 257), to shew that where notice has been given of the

(1) Sect. 12. "That at any time after notice given of appeal to any court of quarter sessions against any order or rate, or other matter, it shall be lawful for the parties, by order of a Judge of the Court of Queen's Bench, to submit the matters of such appeal to the award of any person, and to agree that the submission shall be made a rule of the Court of Queen's Bench; and, therefore, such and the like proceedings in all respects shall and may be taken with reference to such submission, and to enforcing accords thereupon, and setting aside the same as are authorized by the 8 & 9 Will. 3. c. 15, with regard to the cases therein provided for; and every award duly made under this act shall be as binding and effectual to all intents as if the same had been a regular judgment of the court of quarter sessions, and shall, on the application of either party, be inrolled among the records of quarter sessions."

Sect. 13. "That it shall be lawful for any court of quarter sessions, before which any appeal shall be brought, to order, with consent of the parties, that the matters be referred to arbitration on such terms as the court shall think reasonable and proper, and such order may be made a rule of the Court of Queen's Bench, on the application of either party, and the award may be entered as the judgment of the quarter sessions, and shall be as binding and effectual to all intents as if given by the court: provided that the Court of Queen's Bench may, if it think fit, on application within the term next after the award, either refer the case back to the arbitrator, or wholly set it aside, and in the latter case may order the court to enter continuances, and hear the appeal."

abandonment of an appeal or order, but costs have not been paid, the appellants or respondents, as the case may be, have a right to enter the appeal at the sessions in order to compel the opposite party to pay the costs. He also cited *Reg. v. The Justices of Denbighshire* (8 Jur. 537) to shew that the sessions ought to exercise a judgment as to the amount of costs to be awarded. And he cited *Reg. v. The Justices of Glamorganshire* (19 L. J., M.C., 172), to shew that the sessions are bound to consider the question of costs, and to award a fair and reasonable sum for the costs incurred.] The only course is to order them to enter continuances and hear the application. [Mellor, J.—Continuances of what? They have already heard and determined the appeal.] They have not heard and determined the application for the costs. They have, indeed, heard it, but not determined it. [Cockburn, C.J.—It is incident to the hearing of the appeal, and it is heard and determined. They have not yet declined jurisdiction.] It is submitted that, in effect, they have. [Blackburn, J.—You want a mandamus to the sessions to direct the clerk to review his taxation of costs, which they cannot do unless they hear the appeal; but it has been already heard and determined.] Not as to the costs. It is only as to the costs that they are now to be directed to hear and determine. [Blackburn, J.—They have determined; but you say the clerk has not duly considered their determination. It is by no means clear that he was wrong in his view. And even if he was, can a mandamus lie to the Court to correct it?] In taxing these costs he taxed as their officer; it was their act, therefore, and they have acted contrary to law. [Blackburn, J.—That is by no means clear,² and even if it were, can there be a mandamus to them to rehear and redetermine a matter they have already heard and already determined; and, moreover, to determine it in a particular way?] If they were bound to determine that the respondents were entitled to these costs, it is submitted that a mandamus may well issue to command them to do so. [Blackburn, J.—You are asking for a mandamus to compel them to decide in a particular way, which is never granted.] What other remedy have the respondents for their costs? [Blackburn, J.—It is by no means clear that they are entitled to them; but even if they were, this, certainly, is not the proper remedy. If the clerk has not carried out the decree of the sessions, apply to this Court. If he has, and they are wrong, mandamus to compel them to determine otherwise than as they have done, is not the proper remedy, supposing that there is any.]

THE COURT, for the reasons above given, refused the application.

[Reported by W. F. Finlason, Esq.]

IN THE QUEEN'S BENCH.

COCKBURN, C.J., BLACKBURN, MELLOR, and LUSH, JJ., Jan. 27, 1866.

EVANS v. THE HEART OF OAK BENEFIT SOCIETY.

12 Jur. N.S. 163.

Mandamus to reinstate a person in an office—What is an office for which it will lie—Benefit society.

MANDAMUS.—As a mandamus to reinstate a person in an office only lies where the office, and its tenure, are of a permanent nature:—Held, that it

(2) Where the matter of an appeal at quarter sessions is referred to an arbitrator under the 12 & 13 Vict. c. 45, s. 13, and the order of reference is silent as to the costs of the arbitration, the subsequent sessions, at which the award is entered as the judgment of the Court, has no power to order either party to pay the costs of the reference. (*Reg. v. The Justices of the West Riding, and The Sheffield United Gas Company v. The Overseers of Sheffield*, 34 L. J. M.C., 142).

was not an available remedy for the secretary of a benefit society, who had been dismissed, by a resolution of a meeting of the society.

Rule calling upon the members and trustees of the Heart of Oak Benefit Society to shew cause why a writ of mandamus should not issue, directed to them, commanding them to reinstate the applicant, one Evans, in the office of secretary of the said society. It appeared, upon the affidavits, that the society was established under the 18 & 19 Vict. c. 63, under which they were empowered to appoint a committee, a treasurer, and other officers. One of the rules (31) provided, "that one Hadlow, the founder of the society, be appointed secretary thereof, and shall not be removed from his office while he continues to deserve the favour of the society, nor without the consent and approbation of the majority of the society, specially convened at a general meeting." And it was further provided by the rules, that when a vacancy should take place, on account of death, removal, or resignation of any officer of the society, it should be filled up by a general election at a meeting of the whole of the members. It was also provided that the society should be governed by a general committee, and that for the purpose of transacting any business affecting the whole of the society, there should be a general meeting; and further, that should any extraordinary circumstances arise, in which the committee should think it beneficial to have the opinion of the whole of the society thereon, then, on the receipt of a requisition, &c., the secretary may convene a special meeting of all the members resident within ten miles, &c. The applicant, Evans, had been, upon Hadlow vacating the office of secretary, duly appointed secretary in his place. But in consequence of disputes which had arisen, the committee (he declining to do so) had issued notices to all the members, summoning a special general meeting of the whole of the society; at which meeting certain charges were made against the applicant, who, though not personally present, was represented by his son; and by a resolution agreed to at that meeting he was dismissed. Upon these facts he had then obtained this rule.

Quain shewed cause, contending that the office was not one for which mandamus would lie. *Rex v. The Churchwardens of Croydon* (5 T. R. 714); *Rex v. St. Nicholas, Rochester* (4 Mau. & S. 326); *Rex v. Baker* (3 Burr. 1268); *Doe d. Nicholl v. M'Kay* (10 B. & Cr. 721); *Doe d. Jones v. Jones* (10 B. & Cr. 718); *Wilkins v. Malin* (2 Cr. & J. 680); *Hall v. Reg.* (8 Moo. P. C. 138); Tapping on Mandamus, 174. It must be a freehold office, or one of a permanent nature, of which the applicant has a permanent tenure. Here neither element exists. The office, or rather employment, is temporary, depending on the will of a fluctuating body; and the tenure of it is equally so. [*Mellor, J.*—The society may agree to abolish the office.] Just so. [He was stopped.]

Giffard, contra, in support of the rule.—The office is necessary to the society, and is virtually held on good behaviour; and if so, it is sufficiently permanent, and so is the applicant's tenure of it. It is like the office of dissenting preacher, who has an endowment annexed to the office. [*Mellor, J.*—No; if it is held at the will of the trustees, and is not for life, it is *not* so. There is the distinction laid down in all the cases. *Blackburn, J.*—This was a precarious office, and the applicant's tenure of it was precarious. *Cockburn, C.J.*—What is to prevent the society from dissolving themselves, and re-establishing themselves without a secretary?]

THE COURT were clear that the office was not one for which mandamus would lie; and, accordingly—

Rule discharged.

[*Reported by W. F. Finlason, Esq.*

IN THE QUEEN'S BENCH.

COCKBURN, C.J., BLACKBURN, MELLOR, and LUSH, JJ., Jan. 27, 1866.

GALLOWAY v. THE CORPORATION OF LONDON.

12 Jur. N.S. 182.

Mandamus — Certiorari — Precept to assess compensation — Order by Recorder or sheriff to postpone execution of it — Validity of — Remedy in such cases — Quashing order for postponement.

COMPULSORY PURCHASE.—A precept having, at the instance of the corporation of London, issued under an Improvement Act, to the Recorder, as judge of the Mayor's Court, to issue his warrant to summon a jury for three days certain, to assess compensation for some land required by the corporation, but which the owner disputed their right to take, the Recorder, after a postponement by consent until after the day named, made an order, at the instance of the owner of the land, further postponing the execution of the precept until a more distant day; prior to which, the corporation applied to this Court, either for a mandamus to the Recorder to execute the precept, or for a certiorari to bring up his order for postponement, for the purpose of its being quashed:—Held, First, that as the day named in the precept had passed, a certiorari was the proper remedy; and, Secondly, that the order for postponement was bad, as the Recorder's duty was to execute the precept, and he had no power to put off its execution.

Quære, whether, when the order was quashed, a new precept could be issued, or whether the first should be proceeded on?

In this case the corporation, under an improvement Act (10 & 11 Vict. c. cclxxx), and the other acts connected therewith, had given notice to one Galloway, that they should require certain premises of his for the purpose of the improvements, and a precept had issued to the Recorder, as judge of the Mayor's Court, directing him to issue his warrant to summon a jury, for a day named (27th May, 1865), to assess compensation. The owner of the land, however, Galloway, disputed their right to the land, and had taken proceedings in Chancery to prevent them from taking it. The Lords Justices had declined to grant an injunction to restrain the proceedings for assessment of compensation, but an appeal was pending in the House of Lords. The execution of the precept was postponed by consent until a day in July, and then the Recorder, upon the application of Galloway, made an order to postpone the execution until a day in March next (1866), when it was supposed that the appeal would have been heard and decided.

Hawkins, on the part of the corporation, had, this term, applied for and obtained a rule calling upon Galloway to shew cause why a mandamus did not issue to the Recorder, directing him to execute the precept; but the Court thought, that as the day named in it had already passed, there would be a difficulty in issuing a mandamus to execute it, and that the better course would be, to take a rule for a certiorari to quash the order for postponement; and the rule was accordingly taken in that form.

Cleasby and *Garth*, for Galloway, now shewed cause.—They urged that it would be obviously absurd and inconvenient to assess compensation for the land before the right of the corporation to take it was established, and, moreover, it would be laid upon the owner, because, in the event of the right to take it being negatived, the expense of an abortive proceeding would fall upon him. [They cited *Reg. v. The Manchester Railway Company* (8 Ad. & El. 438), but which the Court thought not at all applicable.] They urged that it was a mere question of judicial discretion. [*Blackburn, J.*—No; it is a question of judicial power or jurisdiction. The Recorder has in

effect granted an interim injunction. The very thing the Lords Justices declined to do.] There must be some discretionary power of postponement. [*Lush, J.*—The Recorder has no greater power in that respect than the sheriff. Could the undersheriff postpone the execution of the warrant upon such a ground?] There is a power of adjournment. [*Cockburn, C.J.*—After the execution of the warrant has once commenced, of course there is a power for the adjournment of the inquisition from day to day. But this was quite different. It was a postponement of the execution of the commission altogether to a distant day.] The rule for a certiorari would be nugatory; the only remedy, if any, is a mandamus. [*Lush, J.*—While the order for postponement is in force, it prevents the corporation from raising the question whether the precept is still in force; or whether a new one should be obtained.] Either it is so or it is not; if it is, this rule is nugatory; if it is not so, then certiorari or mandamus would be equally nugatory. [*Blackburn, J.*—If the precept has spent its force, the order for postponement, at all events, is nugatory, and its being quashed can do no harm. But do you admit that the precept is spent; and that a new one might issue? If so, that would probably answer the purpose of the corporation.] [*Hawkins* stated that it would; and then the rule might drop.] No admission can be made; as it is avowed that the object is to prevent, if possible, the execution of an inquisition for assessment of compensation until the litigation as to the right to take the land is terminated one way or the other. [*Blackburn, J.*—Then, if you will not admit that the precept has spent its force, and treat it as still in force, you cannot object to the order for postponement being quashed, if we think it was made without jurisdiction. *Cockburn, C.J.*—The effect of the order for postponement is to bring the whole matter up; whereas, if the order is got rid of, there may be an application for a mandamus to execute the precept, upon which it may be discussed and determined, whether the precept is in force or not; and if not, then a new one may be had.]

Hawkins (with him the *Hon. A. Thesiger*) was not called upon.

THE COURT, for the reasons already given, said they were all clearly of opinion that the Recorder had no power to make such an order, and, therefore, they made absolute the rule for a certiorari to bring up the order.

Thesiger, on a subsequent day (*Jan. 31*), moved for a rule that when the order was brought up it should be quashed; otherwise, he said, the rule for a certiorari would be nugatory; for it would not be argued until next term (*April 15*), and the order for postponement expires in March. It would be idle to be discussing in April whether an order for postponing the execution of the precept until the previous March was valid or not. Notice had been given to the other side of the present application.

Cleasby, for Mr. Galloway, appeared, but declined to consent.

COCKBURN, C.J., therefore, said, that without consent, certainly, it could not be done. There was no authority or precedent for it; and he found, upon consulting the Master of the Crown office, that the practice was against it. For the practice was, first to bring an order up, and then to quash it when it was before the Court; whereas this, in effect, would be questioning it before it was brought up.

Rule refused.

[*Reported by W. F. Finlason, Esq.*

IN THE QUEEN'S BENCH.

Jan. 30, 1866.

REG. v. THE LONDON, CHATHAM AND DOVER RAILWAY.
COMPANY.

12 Jur. N.S. 230.

Practice—Costs—Taxation—Review of.

COSTS. H.—*Where, through some mistaken misconstruction, the Master has not exercised his discretion in the allowance of items under any head of costs, erroneously conceiving that he was not entitled to do so, the Court will direct him to review his taxation, in order to exercise his discretion. So, if he errs in principle, or departs from a positive rule; and there is no difference in principle between taxation in criminal and in civil cases.*

Rule to review the taxation. There had been several indictments against the company for alleged nuisances in the construction of the bridges over certain highways, and they were all referred to arbitration by order of Nisi Prius by consent. After several hearings before the arbitrator, and after considerable expense had been incurred in the preparation of plans, the evidence of witnesses, instructions to counsel, &c., the parties came to an agreement, by which certain means were to be used to obviate the alleged nuisances, and the company, the defendants, consented to a judge's order, that the Master of the Crown Office do tax to the prosecutors the costs upon the indictments, *including all sums paid to counsel, engineers, &c.* Upon that a question had arisen before the Master, as to whether he could tax the items under those heads, and he conceived that he could not do so; considering that the terms of the order, especially the word "including," implied that he was bound to allow all the costs under these heads without taxation or reduction of the amount. And further, he made a more liberal allowance, especially for plans, than would have been made in a civil case; conceiving that, this being a public prosecution, stood rather on a different footing. Upon this a rule was moved for to remit the matter to him, that he might review his taxation. A large sum had been allowed for plans, &c., instructions to counsel, &c.

Robinson, Serjeant, and J. A. Russell shewed cause.

Watkin Williams was heard in support of the rule.

COCKBURN, C.J.—An erroneous construction has been put by the Master upon the judge's order, which authorised the taxation of costs to the prosecutors, and the taxation must be reviewed. And he has also erred in principle. There is no difference in principle between taxation in civil and in criminal cases. There is a rule in civil cases that only a certain sum can ordinarily be allowed for plans, &c., and there can be no reason for a distinction in respect to taxation between civil and criminal cases. It is very probable that in a case of this kind, where several bridges were the subjects of indictment, and the question would necessarily be one of architectural construction, it was necessary that there should be plans. And very likely that the amount allowed is not more than their real cost. At the same time there is a rule that fixes a certain sum as a maximum, which is not—at all events ordinarily—to be exceeded; and though it is fit to be considered that there may be cases in which that sum may be too small, and it is essential that plans should be prepared; yet it appears here that neither on this nor any other of the heads of costs mentioned in the order has the Master exercised his judgment as he would have done in a civil case. As regards the plans, there appears to be a positive rule, and as to the other matters it appears that he has not exercised his discretion as he would have done in a civil case.

Rule absolute.

[Reported by W. F. Finlason, Esq.]

IN THE QUEEN'S BENCH.

COCKBURN, C.J., BLACKBURN, MELLOR, and SHEE, JJ., Nov. 8, 1865.

THE OVERSEERS OF ST. DIONIS, BACKCHURCH, *Appellants*, THE INHABITANTS OF ST. LEONARDS, SHOREDITCH, *Respondents*.

12 Jur. N.S. 292.

Pauper, irremovability of—Break of residence—9 & 10 Vict. c. 66. s. 1.

POOR LAW.—*To constitute a residence, within the meaning of the statute 9 & 10 Vict. c. 66. s. 1, as amended by the 24 & 25 Vict. c. 55. s. 1, it is not necessary that the residence should be in a house or ordinary place of abode.*

A woman, after sixteen years' residence in the respondent parish, was compelled by poverty to sell her furniture, and give up her lodgings. Being destitute, she wandered about the parish in the daytime, and slept for twenty-one nights in a refuge for the homeless poor situate in an adjoining parish, returning to the respondent parish by day:—Held, no break of residence.

On an appeal to the Middlesex Quarter Sessions against an order for the removal of Sarah Brand, widow, from the parish of St. Leonard, Shoreditch, to the parish of St. Dionis, Backchurch, the sessions quashed the order, subject to a case, of which the substance is hereafter set forth, the ground of appeal being that the pauper had resided in the respondent parish for three years next before the application for the order for removal, which was dated the 25th February, 1864, and it being admitted that the appellant parish was the place of settlement.

The pauper has resided in the parish of St. Leonard, Shoreditch, in various residences, for sixteen years previous, and up to September or October, 1863, when, in consequence of illness, whilst lodging in the said parish, she went into St. Bartholomew's Hospital, in the city of London, leaving at her lodgings certain furniture, and with the intention of returning. She remained an inmate of the hospital until near Christmas in 1863. Upon leaving the hospital she returned to her lodging, and soon after sold her furniture in order to satisfy the rent up to that time, and to defray other debts. She then quitted her lodging, and resided in the respondent parish with the person to whom she had sold the furniture for the space of a week; when, being destitute, she wandered about in the parish and out of it, and slept on the door-step of a house in the parish the night before she obtained shelter in a refuge for the homeless poor, situate out of the respondent parish, and in the adjoining parish of St. Luke. She slept there for twenty-one successive nights, her ticket of admission having been renewed at the end of the first seven, and again at the end of fourteen, days, such renewal being in compliance with the rules of the refuge. The said refuge is supported by voluntary subscriptions, and is opened during the winter for the purpose of receiving houseless persons, who are sheltered therein, and provided with a sleeping place, and an allowance of bread. During this period she wandered about in the daytime, chiefly in the respondent parish, until she met with a gentleman who knew her, and who endeavoured, but without success, to procure her admission into Shoreditch workhouse. She then slept for two nights in the parish, and upon again applying was admitted into the workhouse of that parish.

The appellants contended, that, upon these facts, the pauper was irremovable by virtue of a three years' residence next before the application for the order of removal in the respondent parish; it being contended, on behalf of the respondents, that the residence was broken.

The court of quarter sessions were of opinion that the pauper had no intention of permanently leaving the parish of St. Leonard's, Shoreditch, and that she did so, being destitute and houseless, and under compulsion, and quashed the order for removal.

The question for the opinion of the Court was, whether, upon the above-stated facts, the pauper was irremovable from the respondent parish by virtue of having resided therein for more than three years next before the order of removal.

Huddleston, Q.C., and *Hastings*, for the appellants, and in support of the order of sessions, were stopped.

G. Tayler, for the respondents.—The distinction between this and all other cases decided upon the 9 & 10 Vict. c. 66. s. 1, as amended by the 24 & 25 Vict. c. 55. s. 1, is, that here there was no place of residence to which the pauper could return; and this is a necessary ingredient in all cases of constructive residence—*Reg. v. The Guardians of Stourbridge Union* (11 Jur. N.S. 799). [*COCKBURN, C.J.*—The pauper never left Shoreditch; there can be no intention to return where there is no absence. The refuge where she slept was not her place of residence. *SHEE, J.*, referred to *Hartfield v. Rotherfield* (17 Q.B. 746).] The pauper had no place of residence in the respondent parish for some weeks previous to the 25th February. [*BLACKBURN, J.*—The mere fact of the sleeping out of the parish does not constitute a cesser of residence. She had been for many years, and still continued to be, a resident in Shoreditch.]

COCKBURN, C.J.—I am of opinion that the order of sessions was right, and that the pauper was irremovable. I start with this assumption—that to constitute a residence within the meaning of the statute which makes a pauper irremovable after three years' residence in a parish, it is not necessary that the residence should be in a house or other ordinary place of abode. There are, unhappily, a great number of unfortunates who have no regular place of habitation, but who are compelled to sleep in the open air, or under the dry arches of bridges, and such like places; and if a person under such circumstances of destitution should remain in a parish for the space of three years, shifting as best he could, that, in my opinion, would be such a residence as would satisfy the statute. Wherever a person lives, even under such circumstances, that is his place of residence. That being so, the residence is not interrupted by any temporary absence of the pauper, from motives whether of pleasure or convenience; and it is quite clear from the facts, that in the present case the pauper had no intention of abandoning her residence in the respondent parish. She was compelled to give up the room in the respondent parish, in which she had for many years resided, and then, being homeless, commenced wandering about the parish by day, and sleeping by night in a refuge situate in another parish, to which she was driven by the want of shelter and food, but returning day by day to the respondent parish. Then, after a while, and after an abortive attempt to get admission to the workhouse, she succeeds in doing so; whereupon the order is made. The residence in Shoreditch was not the less a residence than if she had been in the occupation of a house there; and there was no more interruption in the residence than if, having a place of abode, she had left it for a temporary purpose, with the intention of returning. *Mr. Tayler* contends, that in all the cases of constructive residence which have been before the Court, there has been invariably some house, or at all events a room, to which the pauper has a right to return. This is begging the whole question. I see no reason why, if actual residence may exist without a house, constructive residence may not also exist without a house. But the question does not rest there; I am clearly of opinion that this woman, going out of the parish for a number of nights for the purpose of finding a place to sleep in, and returning by day never left the parish at all. In fact, I go further than the finding of the sessions. They were of opinion that she had no intention of permanently quitting the parish. In my opinion, she never left it.

BLACKBURN, J.—I am of the same opinion. The pauper had resided for sixteen years in the respondent parish, and then falling into destitution, commenced wandering about the streets of that parish by day, sleeping in a

house of refuge out of its boundaries; and it is contended, that, having no house or lodging in the respondent parish, she under these circumstances ceased to reside there. I entirely agree with the Lord Chief Justice that, under the circumstances, there never was a break of residence. Generally speaking, the place where a person sleeps is an important element in ascertaining the place of abode of that person; but it is not conclusive. The pauper was driven to the adjoining parish for shelter by night, solely by destitution; and the fact of her sleeping for twenty-one nights out of the parish, returning to it by day, does not amount to a cessor of residence.

MELLOR and SHEE, J.J., concurred.

Order of sessions confirmed.

COURT OF EXCHEQUER.

Nov. 22, 1865; Feb. 26, 1866.

HOUGHTON v. THE EMPIRE MARINE INSURANCE SOCIETY.*

12 Jur. N.S. 376; 4 H. & C. 44.

Ship—Insurance—Risk.

MARINE INSURANCE. C.—*A ship insured for a homeward voyage at and from Havana to Greenock, met with an injury in Havana harbour while she was on her way to the spot where she was to discharge her outward cargo:—Held, that the risk had attached. Per Channell and Pigott, BB.*

Declaration on a policy of insurance on the ship *Urgent*, lost or not lost, at and from Havana to Greenock, alleging injury to the ship at Havana after the commencement of the risk. The defendants pleaded, *inter alia*, that the ship did not sustain injury after the commencement of the risk. Issue on the plea. The case was tried at the Liverpool Summer Assizes, before Smith, J.

The policy declared upon was a valued policy, and was framed according to the language of the declaration. It appeared that *The Urgent* arrived off Havana in the month of May, 1864, and entered the harbour under a pilot, to proceed to safe anchorage. The harbour is very extensive, having the town of Havana on the one side, and Regla, an appanage of the town, on the other. As she was following the tug she began to send up mud, but was not felt to touch ground. At last she touched a bank and was anchored, and the pilot left her as the tide fell; she settled on the anchor of another ship, and did not rise on the return of the tide; she was found to have sustained injuries on the starboard side, the repairs for which it was sought to recover. The harbour of Havana is both natural and artificial; it is of great extent and length; and at the spot where the ship was accidentally stopped, she had proceeded more than half the distance to the place where she was to be finally anchored.

The verdict was entered for the amount claimed, with leave reserved to the defendants to move to enter a nonsuit.

In Michaelmas Term,

Edward James obtained a rule accordingly, on the ground that the policy had not attached at the time of the accident.

Brett, Q.C., and *Baylis* shewed cause.—This ship was “at” Havana.

* *Coram*, Pollock, C.B., Martin, Channell, and Pigott, BB.

The plain grammatical meaning of the word is the only meaning which can be adopted with safety. Any other construction would lead to endless confusion. The difference is between being "off" the place and "at" the place. More than the homeward voyage is insured; else why are the words "at" and "from" used? It makes no difference that her turn to unload had not come, or that she had not had a tide strong enough to take a large ship into dock. It was not necessary that she should be at anchor; but, in fact, she was moored, and it makes no difference that she was not moored at her final destination. Suppose a ship going from the outer to the inner basin at Dover, and injured in going, would she not be within such a policy? When it is said, as in *Parmeter v. Cousins* (2 Camp. 285), that the ship must be in safety at a place, the expression is too vague, and gives no safe guide to a decision. [They referred also to *Bell v. Bell* (2 Camp. 475); *Ph. Ins.* 932-4; *Am. Ins.* 443; *Palmer v. Marshall* (8 Bing. 317); *Smith v. Surridge* (4 Esp. 25); and *Mount v. Larkins* (8 Bing. 108).]

Potter was heard in support of the rule.—The outward policy would expire twenty-four hours after the ship was moored in safety. Now, I do not say the outward policy must expire before the homeward policy can attach, but that she must be in such a position that by efflux of time the outward policy can expire. Now, that was not the case here. Properly speaking, she was performing the outward voyage. [He cited *Samuel v. The Royal Exchange Assurance Company* (8 B. & Cr. 119).]

Cur. adv. vult.

The following judgments were now delivered:—

CHANNELL, B.¹—The question in this case is, whether or not the policy had attached at the time when the damage occurred to *The Urgent*. In my opinion, the ship was at Havana, and consequently the risk under the policy had attached; the damage occurred at "Havana," geographically speaking; and there is nothing which, to my mind, shews that the parties, at the time this policy was underwritten, contemplated any other meaning of the word "at." All the limitations which the law appears even to have imposed as to the time of the commencement of the risk in such a case is, that the ship should arrive at the port at which she is insured in a state of sufficient repair or seaworthiness to be enabled to be there in safety. See *Parmeter v. Cousins* (2 Camp. 285) and *Bell v. Bell* (2 Camp. 475). In the latter of which cases, the ruling of Lord Ellenborough, C.J., at *Nisi Prius*, was upheld by the Court in banc. Here, however, there seems to be no doubt that the ship was really within the harbour in good safety, and the loss occurred from a peril in the harbour, and in no ways from any injuries she had received before her arrival. The ship being insured while at Havana, is evidently (in the absence of any provision to the contrary) insured all the time she is there, and, therefore, the risk commences on her first arrival, as put by Lord Hardwicke in *Motteux v. The London Assurance Company* (1 Atk. 545). Unless, therefore, we can say that her first arrival at the port is when she casts anchor there, instead of when she enters the port, our judgment must be for the plaintiff. In many cases the nature of the port may be such, that the two events may be identical. There may be nothing to shew the arrival till the vessel casts anchor. But here we have evidence as to the port of Havana, which is sufficient, in my judgment, to shew that the arrival was before casting anchor. It has been argued, that the first arrival, which must be, no doubt, in good safety, must be identical with the mooring in good safety, usually named in outward policies. But I think we cannot construe the terms of one contract by reference to those of another not referred to in it. And it is clear, that there is no usage that the duration of the outward and homeward policies should not overlap, because the

(1) Pollock, C.B., did not deliver any judgment, and Martin, B., heard only part of the case.

outward policy usually extends to twenty-four hours after the vessel is moored in good safety; during those twenty-four hours there is no question that there is a double insurance, and, therefore, I see no ground for saying that the parties contracted subject to any usage that such a policy would not attach until the previous one had determined. If they had wished to make such a condition, it might easily have been done, or if, having in view any special dangers, as shoals or the like within the port of Havana, they had chosen to make the risk date from the vessel being moored in safety, they would have done so; but, as it stands, it is from her first arrival, which, as a matter of fact, I think to be on her entering the port. My judgment is, therefore, for the plaintiff, that the rule be discharged.

PIGOTT, B.—I also am of opinion that the policy had attached when the mischief occurred. I agree with the plaintiff's counsel, that the language used by the parties ought to have a plain construction put upon it, and that, as the ship had arrived, geographically speaking, within the harbour of Havana, and was in safety there before the injury was received, the risk had then commenced.

A policy of insurance is to be constituted by the same rule as other contracts, the duty of the Court being to collect the meaning of the parties, by taking the language employed in a plain and ordinary sense, and not to speculate on some supposed meaning which they have not expressed. For the defendants it was argued, that Havana being an outward port, as regards the ship, the meaning of the words "at and from" such outward port was, that the risk should commence when the ship had so far performed her outward voyage, that nothing remained to determine the outward policy but the effluxion of the twenty-four hours from her arrival, and that, so understood, this policy had not attached, inasmuch as the ship had not arrived at her place of discharge. But it seems to me that this would be a very artificial construction to adopt, and we have no safe guide to conduct us to it. It might, with equal plausibility, be argued, that the risk "at and from" a port should not commence till the insurance "to" that port ceased, which is at the end of the twenty-four hours, and not at the commencement of them. The answer to both suggestions seems to be, that the construction of this contract cannot depend upon the contract of another and distinct contract, which is wholly unconnected with it, and that the Court is not called upon to know or assume that there is, in fact, any outward policy in existence.

This view is supported by the authority of Lord Hardwicke, who, in *Motteux v. The London Assurance Company*, mentions a case tried before him at Guildhall, in which he says, "It was debated, whether the word *at* and *from* Bengal, meant the first arrival of the ship at Bengal;" and he adds, "It was argued the words 'first arrival' were implied, and always understood in policies." Now, there can be no question about the sense in which Lord Hardwicke used the words "first arrival," viz., in contradistinction to her being moored in a particular place or discharging her cargo. In *Parmeter v. Cousins* Lord Hardwicke's report of the above case is mentioned, and the learned reporter adds, "there seems no doubt that the rule laid down by Lord Hardwicke, qualified by the principal case (to which the note is appended), is to be considered as established law upon the subject." The qualification there alluded to is, that the ship shall be once in good safety at the port—a matter not in dispute in the present case.

This doctrine, and the authority for it, are to be found in several of the text-books on insurance, and may be thus taken to have been long considered as the meaning of those who so word their policies. In *Arnould on Insurances* (p. 28, s. 25, 2nd ed.), it is the form recommended to be adopted for the advantage of the insured in protecting the ship from the moment of her arrival.

I do not think it necessary to advert to the other question raised, viz.,

whether, in fact, this ship had not anchored in the harbour before the damage was sustained, and at a place further within it, than her place of ultimate discharge; and whether that would make any difference in the case.

In my judgment the plaintiff is entitled to keep his verdict, and the rule should be discharged.

Rule discharged.

ADMIRALTY.

Jan. 30, 1866.

THE FLEUR-DE-LIS.

12 Jur. N.S. 379; L. R. 1 A. & E. 49.

Master's wages—Costs.

SHIPPING. A.—*A master suing for wages and disbursements is bound to furnish accounts before bringing his suit, otherwise he will not be entitled to his costs.*

This was a cause instituted by Donald Taylor, the master of *The Fleur-de-Lis*, against that vessel and her owners for his wages and disbursements. The plaintiff claimed a sum of 744*l.* 19*s.* 6*d.*, and, it being a matter of account, was referred to the registrar, who made an award of 476*l.* 4*s.* 1*d.*; and in his report expressed the following opinion:—"Seeing that the master's claim amounted to 744*l.* 19*s.* 6*d.*, and that only 476*l.* 4*s.* 1*d.* had been allowed to him; that, on the other hand, the owners sought to strike off therefrom the sum of 770*l.* 16*s.* 9*d.*, of which only 298*l.* 15*s.* 5*d.* was allowed against the master; I am of opinion that each party should be left to pay their own costs of the reference."

Butt moved, on the part of the master, that the defendants should be ordered to pay the costs of the cause.

Dr. Deane, Q.C., for the owners, opposed the motion, on the ground that no accounts had been furnished before action.

DR. LUSHINGTON.—The master was bound by practice and justice to furnish accounts before bringing his suit; he might have had the amount claimed without suit; he is, therefore, not entitled to his costs. I make no order as to the costs of this motion.

ADMIRALTY.

March 26, 1866.

THE CATHERINA MARIA.

12 Jur. N.S. 380

Collision—Evidence.

SHIPPING. G.—*The books containing the entries made by the coast-guard, and sent to the coast-guard office, are admissible in evidence to prove the state of wind and weather.*

This was a cause of damage brought by the owner of the Australian brig

Amalia, against *The Catherina Maria*, in respect of a collision which occurred off Ilfracombe on the 28th January last.

Dr. Deane, Q.C., and *E. C. Clarkson*, for the plaintiff.

The Queen's Advocate and *Dr. Tristram*, for the defendants.

In the course of the case the *Queen's Advocate* proposed to put in, for the purpose of shewing the state of the wind and weather, the original returns sent up by the coast-guard.

Dr. Deane, Q.C., objected, unless the person who made the entries was produced.

DR. LUSHINGTON.—I shall not object to receive this evidence, if the returns are proved to be the original entries. It would be extremely inconvenient to produce the person making the entries on all occasions.

Mr. Sharp, from the Coast-guard Office in Spring Gardens, then produced the book containing the entries in question, and stated that such a book was sent up by the coast-guard monthly.

Evidence admitted.

ADMIRALTY.

April 27, 1866.

THE CANOVA.

12 Jur. N.S. 528; L. R. 1 A. & E. 54.

Salvage—Agreement to tow.

SHIPPING. E.—*The plaintiffs sued for salvage services, alleging that an agreement entered into for towage service was invalid, by reason of the fact of the illness of a great part of the crew of the vessel salvaged having been withheld.*

The Court held, that as no danger to the property was proved, there was no salvage service, and pronounced for the agreement, with costs.

This was a cause of salvage instituted by the owners and crew of the steam-tug *Tiger*, for services rendered to *The Canova*.

The petition alleged (*inter alia*), that on the morning of the 13th October, 1865, *The Tiger* left the Mersey and proceeded to sea in search of inward-bound vessels. At about 9 a.m., when off Little Orme's Head, those on board *The Tiger* saw a vessel (which afterwards proved to be the above-named ship *Canova*), lying to an anchor in Rhudlan Patches, and about three or four miles from the shore. The wind at that time was blowing strong from the north-east, and there was a heavy sea. *The Canova* was riding by her port anchor, head to wind. *The Tiger* proceeded to her and rounded up on her port side, and the master of *The Tiger* hailed her and asked if she wanted a tug. The master of *The Canova*, in answer, said he did, and after some bargaining between the two masters it was agreed that *The Tiger* should tow *The Canova* up into the Mersey for 25*l*. *The Tiger* accordingly went ahead of *The Canova* and took her hawser and towed her to her anchor, and the crew of *The Canova* commenced heaving in her chain, but were very slow about doing it. *The Tiger* kept easing the ship on to her anchor for nearly two hours, at the expiration of which time the crew of *The Canova* had not succeeded in getting in more than fifteen fathoms of chain, when the ship struck the ground heavily aft.

The pilot of *The Canova* immediately called out to *The Tiger* to go ahead full speed, and the master of *The Tiger* immediately ordered her to go ahead full speed, but whilst giving such order the ship again struck aft very heavily.

The master of *The Tiger* called out to the pilot of *The Canova* to slip chain, and pointed to her sails, which were hanging loose. The pilot replied, "All right, go ahead full speed," and immediately afterwards the chain was slipped. The tug towed ahead full speed, but *The Canova* continued to bump heavily for a considerable time before the tug succeeded in towing her clear of the sand. Upon her coming clear of the sand, *The Tiger* proceeded with her for Liverpool, and safely docked *The Canova* in the Birkenhead Dock.

That the master and crew of *The Tiger* subsequently discovered that the crew of *The Canova* had for some time been suffering from scurvy and other complaints; that thirteen of them were totally incapable of doing their duty, and that eight only of her crew, including a boy, were able to work, and these eight were all ill; that her crew had for ten days been short of food; that at the time when she was found by the tug the eight of her crew who were able to work had been at work for forty-eight hours, and were completely fagged out; and that *The Canova* had been compelled to let go her anchor in consequence of her having missed stays, owing to her crew being unable to work her, and that *The Canova* was altogether unable to get under way without assistance.

That the state and condition of the crew of *The Canova* and the several facts and circumstances set out in the last preceding article of this petition were improperly concealed by the master and those on board *The Canova* from the knowledge of the master of *The Tiger*, who, but for such concealment, would not have made the said agreement.

The defendants by their answer took issue upon the statement contained in the petition, and alleged that at the time when the agreement with *The Tiger* was made some of *The Canova's* crew were sick, but there were sufficient hands on board to weigh the anchor without difficulty, and navigate the ship to Liverpool. The agreement was made entirely in good faith and without concealment of any material fact, and the said agreement was binding upon the parties; and that in performance of the service *The Tiger* did not incur any risk whatever, and did not perform any duty which was not included in the original agreement, except in docking *The Canova*, which was an ordinary towage service.

The defendants had paid the sum agreed (25*l.*) into court. Evidence having been taken *vivâ voce*,

Dr. Deane, Q.C., and *E. C. Clarkson*, for the plaintiffs.—When a vessel makes an agreement with a tug, she is bound to disclose the real state of affairs. The captain admits, that if he had disclosed the fact of thirteen of his crew being laid up with the scurvy, the tug would not have made the bargain. The bargain is therefore not good, for it was not made in good faith.

Milward, Q.C., and *Vernon Lushington*, for the defendants.—Unless fraud be shewn, which is not even suggested here, there can be no reason to vitiate the contract merely because every fact has not been mentioned, and to convert this case into a case of salvage.

Dr. Deane, Q.C., in reply.—Everything material ought to be told. The illness of the crew was material, because if the crew had been in good condition, the towage service would not have been required.

Dr. LUSHINGTON, in his address to the Trinity Masters, said—The main question in this case is, whether this agreement, admitted to have been made, ought to be set aside because certain circumstances were kept back which now appear? If, though unintentionally, there was a concealment of a fact so material that it ought to invalidate the agreement, I should not enforce it. We must consider whether the owners of the tug were injured in the performance of their task by the withholding of certain facts. Whether, if more time were taken up than should have been, the plaintiffs would be entitled to more than their bargain. I think neither of the parties to this suit believed that the vessel was in any danger, because I consider if the tug had contemplated danger, she would have demanded heavier terms for the service. If you

should be of opinion that there was no danger to this property, I could not say it was a salvage service.

The Court and Trinity Masters retired for consultation. On their return,

DR. LUSHINGTON said—We are all of opinion that there was no salvage service whatever in this case, and that none of the circumstance which occurred ought to induce the Court to set aside the agreement.

I pronounce for the tender, with costs.

KINDERSLEY, V.C., May 7, 1866.

STONE v. THE CITY OF LONDON REAL PROPERTY COMPANY.

12 Jur. N.S. 558.

Light and air—Injunction.

The plaintiffs are colonial brokers, carrying on business in Mincing Lane. At the back of their premises is a large sale-room, lighted by two sloping windows in the roof. This is used for the display of the samples of different colonial produce, and all the witnesses agreed, that a clear but not a strong light was required to test the quality of the samples, and that, the transactions being very large, any diminution of the light would cause great disturbance in prices and inconvenience. The defendants propose to raise a house, overlooking this room, to such a height as will, according to the plaintiffs, materially affect the light. The defendants, on the other hand, assert that they have made experiments, which shew that no material difference will result.

Glasse, Q.C., and *Bristowe*, for the plaintiffs.

Osborne, Q.C., and *G. N. Colt*, for the defendants.

SIR R. T. KINDERSLEY, V.C., after referring to the facts of the case, and the difficulty in arriving at a conclusion, owing to the buildings not being completed, said—That his opinion was, that he should be causing the least amount of inconvenience by granting an injunction to restrain the defendants from proceeding with the works. Plaintiffs to undertake to be answerable in damages, and to give notice of motion for decree in one month.

WOOD, V.C., July 28 and 30, 1866.

Re JOHNSON'S TRUSTS.

12 Jur. N.S. 616; L. R. 2 Eq. 716.

Will—Construction—Settled estate—Trusts by reference of personality—Tenant in tail absolutely entitled.

SETTLEMENT.—*The testator devised freeholds to A. for life, with remainder to the first son of A. in tail male, with remainders over; and he gave his residuary personal estate in trust to lay it out in the purchase of 3l. per Cent. Bank Annuities, and to pay the dividends "unto such person or persons as for the time being should by that his will be entitled to the rents and profits of his freehold hereditaments thereinbefore devised," with gifts over in case of the total failure of the estates tail limited by this will. On a petition by A. and his eldest son for a transfer to them of the fund which had*

been paid into court:—Held, that the general intention of the testator being, not to create a perpetuity, but to give the personalty so as to go with the freeholds, the first tenant in tail was absolutely entitled to it, and an order was made as prayed.

The principles on which the Court acts in the construction of such gifts stated.

This was a petition for payment of money out of court, and the question was, whether or not the petitioners were entitled to certain personal estate, under trusts of it declared by will, by reference to a previous devise in settlement of real estate.

Dr. Johnson, by his will, dated the 18th June, 1830, devised his freehold lands to trustees to the use of H. W. R. L. Johnson for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first son of H. W. R. L. Johnson in tail male, with remainders over. And the testator devised and bequeathed his leasehold and copyhold estates upon trusts corresponding as near as might be with the devise of freeholds. And after bequeathing certain annuities, he gave the residue of his personal estate in trust to convert and pay debts and legacies, and to raise and set apart the sum of 10,000*l.*; and after declaring certain trusts of this sum for his sister Clarentia Mason during her life, after her death, for his niece Clarentia Chichester for life, with remainders over, the testator directed his executors to lay out the remainder of his personal estate and effects (after paying his debts, legacies, and funeral expenses, and setting apart the sum of 10,000*l.* for the purposes aforesaid) in the purchase of 3*l.* per Cent. Consolidated Bank Annuities, and to pay the dividends and interest thereof from time to time, as the same should become due and be received, unto such person or persons as for the time being should, by virtue of that his will, be entitled to the rents and profits of his freehold hereditaments and premises thereinbefore devised. And the testator gave certain other legacies in case of the total failure of the estates tail limited by his will.

The testator died in 1831. The residue of his estate consisted of 22,231*l.* 7*s.* 7*d.* Bank 3*l.* per Cent. Annuities, which had been transferred into court by the surviving trustee.

This petition was presented by H. W. R. L. Johnson and his eldest son, J. L. Johnson, who had attained twenty-one, for the transfer to them of the fund, as being together absolutely entitled to it.

Giffard, Q.C., for the petitioners.

Willcock, Q.C., for some of the respondents, cited *Foley v. Burnell* (1 Bro. C. C. 274; 4 B. P. C., Toml. ed., 319); *Lord Scarsdale v. Curzon* (1 Johns. & H. 52); *Lord Dungannon v. Smith* (12 Cl. & Fin. 546); and *Hogg v. Jones* (9 Jur., N.S., 507).

Waller, for other respondents.

Judgment was reserved.

July 30.—SIR W. P. WOOD, V.C., after stating the question, said—Of course the ultimate bequests, in case of the total failure of issue of the several persons who take estates tail under the previous limitations, are being given after failure of estates tail. I did not think it necessary on that question to summon here one of the persons entitled under those bequests, namely, the president and fellows of St. Mary Magdalene College, Oxford. But the question is, what is to be done with the personal estate itself, whether, in truth, it goes, as in the ordinary limitation of chattels, to the same uses as freeholds, as by the will it would go, namely, to the first tenant in tail coming into esse, as he is not required to attain twenty-one, or whether there is an attempt on the part of the testator to create a perpetuity, so that the limitations were not to take effect for the benefit of the first tenant in tail absolutely, but were intended to be merely a series of life interests, and, therefore, as far as they are too remote, must fail.

I think, upon the whole of this will, that the scope and aim of it are apparent. I had occasion to look through all the authorities in the case of *Lord Scarsdale v. Curzon*. The Court does not look so much to see whether the testator has intended to tie up his personal estate in a way which the law will not allow, and so to create a perpetuity, as to see what the whole intent of the limitation is; and if it finds that the whole intent of the limitation was to pass the property in exactly the same form and mode as the real estate, then the law laying hold of the personal estate, and dealing with it according to that mode in which alone it can be dealt with, namely, vesting it at once in the first taker of an inheritable interest in the freehold estates, effect is given to the general intention of the testator; and although the words may seem in many instances very strong, as in *Foley v. Burnell*, where they pointed to an intention of tying up the property for successive takers, so that they should not be able to dispose of it, yet, as the word "heirlooms" occurred, and there was a general indication of an intention that the property should go with the estate, it was held that it ought to be directed by the Court so to go in the only way in which it could be, namely, by vesting it in the first taker of the first estate of inheritance. There is always this exception; of course, if the words are too plain in the limitation of successive life interests, or to successive takers, for the Court to overcome them, in which case, such part of his intention as offends against the law of perpetuity must fail.

In this case it appears to me that the testator has not experienced anything which ties up the property in a manner which the law will not allow, because his words are so far very well adapted to carry into effect the general intention. There are two things clear. He means the property to go to the persons interested in the estate according to the limitations in tail. He means also that it is not to go over until all those limitations are spent, and, in fact, by the very limitation over, in the event of those limitations being spent; and in that event alone he indicates his intention that it shall pass through the successors to his property. He does not, however, indicate that meaning, which might fail, as erring against the law with reference to perpetuity, in express terms, by limiting it to them in that succession, because his words are, that the trustees are to pay "the dividends and interest thereof as the same shall become due, and be received, unto such person or persons as for the time being shall by virtue of this my will be entitled to the rents and profits of my freehold hereditaments and premises hereinbefore by me devised, given, or limited as aforesaid." Therefore, he directs the limitations of the dividends and interest to follow the limitations of his real estates; and he does not tie them up in any way, but he seems to me to give them as fully and freely as he has given the rents and profits of his freehold estates; as to which he has given the rents and profits of them for life to A., and the estates, with the rents and profits, in remainder to B. in tail. He has given, therefore, absolutely an estate of inheritance in the rents and profits to the second taker; and so here, I think, he has given an absolute interest in the income and dividends to the second taker—that is, the taker of the first estate of inheritance, whether he is first, second, or third in order; and he intends him to have it in the same manner as his freehold estates, but he has not adverted to the difference which, no doubt, is made by the law, that where there is an estate tail in the freehold, it gives an absolute interest in the personalty. But it is not because he has not adverted to that circumstance that the Court will say that there is a distinct limitation offending against the rules with reference to perpetuity. On the contrary, if the Court sees that there is an intention to carry the two properties together, and an intention that they shall not go over until the limitations of the real estate are spent, it, therefore, deals with that property as being settled to the same uses as the real estate.

I think, therefore, I ought to do that which is required of me by this petition. I pass over the property to the tenant in tail, he having become

entitled, though not in actual possession, his father being in possession. That part of the case is exactly within the doctrine of *Foley v. Burrell*, where the infant tenant in tail became entitled, although he did not become entitled in possession, and although the words were "in possession," yet, by force of the word "heirlooms," the Court held that the two properties were to be settled together; and in that case, which is always thought a strong case, though recognised at law, the Court actually gave to the infant tenant in tail an immediate interest, the effect of which was to vest it in the father, as against whom, in truth, the testator was providing. Therefore, the order on the petition will be as prayed.

STUART, V.C., June 28, 1866.

WARREN v. WYBAULT.

12 Jur. N.S. 639; 15 L. T. 155.

Marriage settlement—Money to be "raised" or "secured" by a policy of insurance in the name of the husband—Departure from the actual terms of the trust—Bonuses—English and Irish currency.

SETTLEMENT.—The trustees of a marriage settlement were directed to keep up the premiums of a policy of insurance "to be taken out from some office in England or Ireland," on the life and in the name of M. W., the husband, out of the annual income of the property in the settlement. They were then directed to stand possessed of the said policy, and a sum of 4,000*l.* thereby to be "raised" or "secured," upon certain trusts, after the decease of M. W., for the wife and the children of the marriage. The said M. W. covenanted to execute a regular assignment of the policy of insurance, "together with the said sum of 4,000*l.* sterling, to be insured upon the trusts, and for the purposes aforesaid." M. W. did actually assign to the trustees an Irish policy for 4,000*l.*, Irish currency, which he had effected before the date of the settlement. Some time after, the trustees allowed the policy so assigned to drop, and effected an English policy on the life of M. W., but in their own names, for 3,666*l.* 13*s.* 4*d.*, which sum of English currency they were advised was equivalent to 4,000*l.* Irish currency. This policy they purported to hold on the trusts of the settlement in substitution for the Irish policy of 4,000*l.*, and they paid the premiums out of M. W.'s life income, as directed by the settlement. M. W. afterwards died, having by his will bequeathed the bonuses, which with the sum of 3,666*l.* 13*s.* 4*d.*, amounted to nearly 5,000*l.*, on certain trusts:—Held, on bill filed by some of the persons claiming under the marriage settlement, that the bonuses belonged to the trustees of the settlement, and did not pass by the will of M. W.

Cause.—The point arising in this cause related to the destination of certain bonuses on a policy of insurance effected by the trustees of a marriage settlement. A question was also mooted as to whether a policy for a certain sum "to be taken out from some office in England or Ireland," meant a policy for that sum in English or in Irish currency.

By an indenture of settlement, dated the 7th January, 1825, being the marriage settlement of Sarah Eaton Swettenham, afterwards Sarah Eaton Warren, and Michael Warren, it was recited, inter alia, that it had been agreed that a sum of 4,000*l.* sterling, to be raised by insurance, in manner therein-after mentioned, on the life of the said Michael Warren, should be conveyed, settled, and disposed of to such uses, upon such trusts, and to and for such

intents and purposes, and in such manner as was thereafter mentioned concerning the same. Then, after various other provisions, the said Sarah Eaton Swettenham, with the privity and approbation, &c., and also the said Michael Warren, according to their respective interests, did give, grant, bargain, sell, alien, release, and confirm unto the trustees of the settlement, their heirs and assigns, a certain messuage or tenement, together with several closes or parcels of land situate at Over Whitley, in the county of Chester, upon trust that they, the said (trustees), and the survivor of them, his heirs and assigns, should, during the life of the said Michael Warren, receive and take the clear yearly rents, issues, and produce of all and singular the said messuage and tenement, and the several closes, closures, fields, or parcels of land aforesaid, and should and would, immediately after the solemnisation of the said intended marriage, apply the same, or a competent part thereof, in defraying and paying the premiums and other expenses attendant on taking out one policy of insurance on the life and in the name of the said Michael Warren, from some office of insurance of lives in England or Ireland, in the sum of 4,000*l.* sterling, for the life of the said Michael Warren (which the said Michael Warren did thereby fully authorise and empower them to do); and in defraying and paying, yearly and every year during the life of the said Michael Warren, the annual premium, charges, or expenses to be made, paid, or disbursed on the said insurance of the said Michael Warren's life; and after payment of the said annual premium, charges, or expenses for such insurance, that they the said trustees, and the survivor of them, his heirs and assigns, should permit and suffer the said Michael Warren and his assigns during his life to receive and take to his and their own use and benefit the residue and surplus (if any) of such yearly rents, issues, and produce of the said messuage and tenement, and the several closes, closures, fields, or parcels of land aforesaid (over and above so much thereof as should be sufficient from time to time yearly during the life of the said Michael Warren, to defray and pay the annual premium or charges on the insurance of the life of the said Michael Warren for the sum of 4,000*l.* sterling as aforesaid). Then, after various other provisions, the trustees were directed to stand possessed of the said policy of insurance on the life of the said Michael Warren, and the sum of 4,000*l.* thereby to be secured, upon trust immediately after the death of the said Michael Warren, to permit the said Sarah Eaton Swettenham, in case she should survive the said Michael Warren, her intended husband, during her natural life to receive the interest of "the said sum of 4,000*l.* to be insured on the life of the said Michael Warren;" and after the decease of the survivor of them, the said Michael Warren and Sarah Eaton Swettenham, to stand possessed of "the said sum of 4,000*l.* to be raised by insurance as aforesaid," upon certain trusts for the children of the said marriage, and the like. And by the said indenture the said Michael Warren entered into a covenant, which contained (*inter alia*) the following words:—"And further, that he, the said Michael Warren, his executors or administrators, shall and will at any time hereafter, upon the report of them the said trustees, execute a regular assignment to them, or any of them, of the before-mentioned policy of insurance, so to be taken out in the name and for the life of him the said Michael Warren, together with the said sum of 4,000*l.* sterling to be insured upon the trusts and for the purposes aforesaid." And it was by the said indenture declared that it was the intention and meaning of the parties thereto, that the said trustees should immediately after the decease of the said Michael Warren, invest the said sum of 4,000*l.*, when received from the insurance company, in the funds or other Government securities in England or Ireland, and from time to time alter, vary, and transpose such securities, and stand possessed thereof upon the trusts and for the uses and purposes thereinbefore expressed and declared respecting the said sum of 4,000*l.*, and for and upon no other uses, trusts, or purposes.

The trustees of the settlement omitted to effect a policy for 4,000*l.*, as

directed by the settlement, under the following circumstances:—Prior to the preparation of the above-mentioned deed of settlement, that is, on the 31st December, 1824, the said Michael Warren had effected an insurance on his own life for 4,000*l.*, Irish currency, in the Irish Alliance Assurance Company in Dublin; and by an indenture, dated the 31st October, 1825, he assigned the said policy to the trustees. This, at least, was believed to be the case, and the various parties admitted the assignment in argument, though the indenture of the 31st October, 1825, could not be found. After the date of this assignment, that is, on the 31st December, 1825, the trustees effected a policy for 3,666*l.* 13*s.* 4*d.* in an English office, the Norwich Union Insurance Society, on the life of the said Michael Warren, but in their own names. This policy they purported to effect in substitution for the Irish policy (considering 3,666*l.* 13*s.* 4*d.* to be equal to 4,000*l.* Irish currency, and supposing that the settlement, which was prepared in Ireland, referred to Irish currency), and to hold on the trusts declared by the settlement of the policy for 4,000*l.*, therein directed to be effected in the name of the said Michael Warren.

Many years after the date of the settlement, the trustees discovered that it was doubtful whether the policy for 3,666*l.* 13*s.* 4*d.*, could properly be deemed to be in compliance and satisfaction of the provision contained in the said indenture of settlement for the insurance of the life of Michael Warren for 4,000*l.* They accordingly applied to Michael Warren to give them an indemnity for any loss that they might sustain in respect thereof, and the said Michael Warren executed a deed, dated the 4th June, 1844, whereby he covenanted, for himself, his heirs, executors, and administrators, to indemnify the trustees, their heirs, executors, administrators, and assigns, against all claims and demands whatsoever which any child, children, or issue of the said Michael Warren and Sarah Eaton his wife, or any other person or persons whosoever, could or might have against them, the said (trustees), their, or either of their, heirs, executors, administrators, or assigns, for or by reason or on account of the said sum of 3,666*l.* 13*s.* 4*d.* British money only having been so insured on the life of the said Michael Warren, or the difference between such sum and the sum of 4,000*l.* of like money, and from and against all actions or suits, &c.; and also that it should be lawful for the said (trustees), their heirs, executors, administrators, or assigns, by and out of any bonuses or other sum or sums of money which might come to their hands from the said Norwich Union Insurance Office, or any other insurance office or offices, or otherwise, to retain to and reimburse himself and themselves all such sum and sums of money, losses, costs, charges, damages, and expenses as he or they might pay, incur, or sustain on account or by reason of any such claims or demands as aforesaid, or otherwise in the premises.

Michael Warren died on the 19th November, 1863, leaving several children of the said marriage, and having duly made and executed his last will, in which he recited that a bonus of 1,316*l.* 17*s.* 4*d.* had been declared on the said policy up to the 20th March, 1862, and bequeathed "all bonuses" to the Rev. Nicholas Power and Alexander Hamilton, the trustees of his said will, on certain trusts. The said Sarah Eaton Warren died in the lifetime of her husband, without having made any appointment or disposition under the settlement above mentioned.

One of the trustees of the settlement died on the 5th November, 1861. The present bill was filed by the plaintiffs, two of the children of the marriage, against the surviving trustee of the settlement and the executrix of the deceased trustee. The plaintiffs submitted, among other things, that the bonus or bonuses on the said policy for 3,666*l.* 13*s.* 4*d.* formed part of the trust funds of the settlement, and ought to be disposed of accordingly. The defendants to the suit, besides the surviving trustee and executrix above mentioned, were the trustees of the will of Michael Warren, and one of the children, Annette Josephine de Bergue (who was interested under the trusts of the will), and her husband, Miguel de Bergue.

Malins, Q.C., and *Riddell*, for the plaintiffs, represented, that if there were an assignment to the trustees of a settlement of a policy of insurance, or of a sum insured thereby, the assignment carried with it not only the actual money, but also other moneys accruing by it, unless a contrary intention appeared by the policy. [*Sir J. Stuart, V.C.*—Yes; but if it is a fixed sum of 4,000*l.* secured by a policy, then the assignment can only carry the 4,000*l.*] A covenant to assign a policy was in equity an assignment. That was the circumstance arising here. The Irish policy was actually assigned to the trustees, and the policy in the Norwich Union Insurance Office was only in substitution for the original policy, and must be held to have been assigned in equity. Consequently, all bonuses belonged to the trustees of the settlement. [They cited *Parke v. Bott* (9 Sim. 388) and *Courtney v. Ferrers* (1 Sim. 137).]

Osborne, Q.C., and *Kay*, for the trustees of the will of Michael Warren and for Mrs. De Bergue, argued that the bonus or bonuses were not subject to the trusts of the settlement, but passed by the will. It was clear that the trustees of the settlement were themselves dissatisfied with the assignment to them of the Irish policy, since they took an indemnity from Michael Warren afterwards. The present policy, on the other hand, was effected by the trustees merely as a security for a sum of 4,000*l.*, which alone was covenanted to be raised or secured by insurance. [*Sir J. Stuart, V.C.*—There is no doubt about the words of the settlement; but the Irish policy, having been actually assigned, was afterwards allowed to drop. The trustees of the settlement then made a bargain for themselves with the trust fund, and effected a smaller policy, which, however, ultimately amounted to more than 4,000*l.* There is here no resulting trust for Michael Warren, because this is not the policy that he assigned. If the policy had ultimately turned out less than 4,000*l.*, then the *cestuis que trust* could have come on the trustees of the settlement, and the trustees on Michael Warren, to make up the deficiency. But he has no right to any surplus; the new policy was irregular, but it was a dealing with the trust property. It might have produced a loss, but it produced a gain, in which Michael Warren could have no part.] The policy, however, as admitted by the bill, was merely a substituted policy, under which Michael Warren was entitled to any surplus over 4,000*l.* Had the policy been taken out in Michael Warren's name, as the settlement directed, then there would clearly have been a resulting trust for him, and consequently there would be a resulting trust now. By the settlement Michael Warren was entitled to any excess over 4,000*l.*; for any policy taken out under the settlement was merely for raising a sum of 4,000*l.* That was the case with the original policy, which was merely a security for 4,000*l.*, and that must, consequently, be the case also with the substituted policy. It could not be said that the trustees of the settlement had become entitled to any larger sum by departing from the terms of the settlement. No dealings of the trustees could place more property in the settlement than was in it before. Moreover, the trustees of the settlement were directed to pay premiums out of Michael Warren's life estate under the settlement; they had done so, and had paid more than necessary. The excess of the actual policy over 4,000*l.* represented an excess of expenditure in premiums out of Michael Warren's money. There was, consequently, a clear equity in favour of Michael Warren to that extent, and the excess of the policy should be restored to him, as being the produce of his money laid out by the trustees.

Greene, Q.C., *Chitty*, and *Bird*, for other parties.

SIR J. STUART, V.C. (without calling for a reply).—There is no resulting trust for Michael Warren. There must be a declaration that the whole proceeds of the policy in the Norwich Union Office, including bonuses, are subject to the trusts of the settlement. Costs of all parties to be paid out of the proceeds of the policy.

IN THE COURT OF EXCHEQUER.

POLLOCK, C.B., MARTIN, BRAMWELL, and CHANNELL, BB., June 8, 1866.

KELLOCK v. THE HOME AND COLONIAL INSURANCE SOCIETY.

12 Jur. N.S. 653.

DISCOVERY. A.—*What inspection of documents is allowable in an action on a policy of marine insurance.*

The action was brought upon a policy of marine insurance for a total loss on the steamer *Carlo*, which was abandoned at Bermuda, and notice of the abandonment given to the defendants the underwriters. The defendants, *inter alia*, pleaded that the vessel was not seaworthy, and that she was not lost by perils of the sea. The defendants, with the consent of the plaintiff, sent out a captain to have the ship repaired and brought home; the same to be at the expense and risk of the defendants, and without prejudice to the rights and claims of the plaintiff. This captain took the ship in ballast to New York. Another captain was then sent out by the defendants, who took her to Bermuda, and ultimately brought her home to Liverpool in ballast.

After the commencement of the action the plaintiff applied at chambers for an order requiring the defendants to state in an affidavit the documents in their possession relating to the matters in dispute, or what they know as to the custody thereof, and if they objected to produce such as they were able to produce. The summons was heard before Martin, B., who, after hearing both sides, made the order as desired. In obedience thereto, the defendants deposed that they had in their possession the following documents:—

1. The risk book of the defendants' company.
2. The ledger and journal of the same.
3. The opinion of M. Rossier (the surveyor employed by the defendants) on the report of damage sustained by *The Carlo* at Bermuda.
4. Copies of letters from the secretary of the Wreck and Salvage Association at Lloyd's, on behalf of the defendants and other underwriters, to the plaintiff's attorneys and brokers.

On the 8th March, the plaintiff, not being satisfied with these particulars, obtained leave from a judge at chambers to administer interrogatories to the defendants' agent, and he accordingly administered interrogatories concerning the whole course and condition of the vessel from the time when she was abandoned by the plaintiff to the time when she was brought home, including inquiries as to whether she was repaired at Bermuda, at New York, at Newfoundland, and at Liverpool, and the amount of the expenses of such repairs at each place severally. The plaintiff also inquired, by his interrogatories, what correspondence had passed between the captain of the vessel for the time being at all times since she was taken into the possession of the defendants and until her return home, and the defendants or others in their interest, during the period in question; and what surveys or reports concerning the state of the vessel, and also what documents concerning the insurance of the vessel by the defendants, and otherwise concerning the vessel, were in the hands of the defendants. The defendants declined to answer the interrogatories of the plaintiff in so far as they consisted of the above question; and in Easter Term,

Mellish obtained a rule calling upon the defendants to shew cause why the officer of the company should not make an affidavit setting forth the documents in the possession of the company's secretary relating to the facts inquired into by the interrogatories, as above set out, and why the plaintiffs and their attorneys should not be at liberty to inspect and take copies of such documents.

Edward James shewed cause against the rule.—This is entirely the risk

of the defendants. If the defendants were able to shew that the repairing of the ship had been an entirely profitable transaction, they would not be allowed to prejudice the plaintiff's case.

Mellish, in support of the rule, cited *The Chartered Bank of India v. Rich* (8 L. T. 454); *Daniel v. Bond* (9 C.B. N.S. 716); *Woolley v. Pole* (14 C.B. N.S. 538); and *Flight v. Robinson* (8 Beav. 22).

Cur. adv. vult.

The COURT now said that the plaintiff should be allowed to inspect the log of *The Carlo* on her voyage, since she was abandoned, home, but nothing else.

Order accordingly.

IN THE COMMON PLEAS.

ERLE, C.J., WILLES, KEATING, and SMITH, JJ., Jan. 23, 1866.

TUNNEY v. THE MIDLAND RAILWAY COMPANY.

12 Jur. N.S. 691; L. R. 1 C.P. 291.

Applied, *Lavell v. Howell*, [1876] E. R. A.; 45 L. J. C.P. 387; 1 C.P. D. 161; 34 L. T. 183; 24 W. R. 672 (C.P. D.). Discussed, *Holness v. Mackay*, [1899] E. R. A.; 68 L. J. Q.B. 724; [1899] 2 Q.B. 319; 80 L. T. 831; 47 W. R. 531 (C. A.).

Master and servant—Injury by fellow-servant.

MASTER AND SERVANT. C.—*The plaintiff was employed to pick up stones from off the defendants' line; while returning in the evening after his work was over in a train driven by the defendants' servant, a collision occurred by the negligence of one of them, whereby the plaintiff was injured; it was a term of the contract, that the plaintiff should return in the defendants' train:—Held, that the plaintiff could not recover damages from the defendants, as he and the person who was guilty of the negligence were fellow-servants engaged in a common employment, within the meaning of the rule of law.*

This was an action brought by the plaintiff, who had been employed by the defendants, to recover compensation for injuries received from the negligence of his fellow-servant; he received 2s. 6d. per day to pick up stones on the defendants' line; while returning in the evening to Birmingham after his work was over, in a train driven by the defendants' servants, a collision occurred through the negligence of one Parsons, in the defendants' employ, whereby the plaintiff was injured. The verdict was entered for the defendants, leave being reserved to the plaintiff to move to enter the verdict for 100l., and a rule was obtained accordingly.

Field, Q.C., and Wills shewed cause.—The question is, were the plaintiff and Parsons in a common employment? [They referred to *Morgan v. The Vale of Neath Railway Company* (33 L. J. Q.B. 260; 10 Jur. N.S. 1074; 35 L.J. Q.B. 23); *Priestly v. Fowler* (3 M. & W. 1); *Waller v. The South-Eastern Railway Company* (32 L. J. Ex. 205; 9 Jur. N.S. 501); *Lovegrove v. The London and Brighton Railway Company* (33 L. J. C.P. 329; 10 Jur. N.S. 879); and *Gilshannon v. Stonybrook Railroad Corporation* (10 Cush. (Massachusetts) Rep. 228).]

The COURT called on

Gibbons to support the rule.—It was not the negligence of Parsons that

caused the accident, but the negligence of the company, in having an insufficient staff. It was not any part of the plaintiff's remuneration that he should be taken back to Birmingham; he went as a passenger, and was not in this respect the defendants' servant; he ceased to be a servant when he had finished his work. The plaintiff admits that he would have had no cause of action if the accident had happened while he was at work.

ERLE, C.J.—Parsons was in the same employment with the plaintiff, however dissimilar their duties may have been. The plaintiff was clearly in the employ of the defendants at the time of the accident. I cannot find any distinction from the cases which have been mentioned by the defendants' counsel.

WILLES, J.—The company is not liable; the damage was sustained by the negligence of the plaintiff's fellow-servant. It is impossible to afford him a remedy.

KEATING, J.—We are bound by the finding, and it has been found that it was part of the contract that the plaintiff should return by the defendants' train.

SMITH, J., concurred.

Rule discharged.

IN THE COMMON PLEAS.

ERLE, C.J., WILLES, KEATING, and SMITH, JJ., Jan. 24, 1866.

THE GREAT WESTERN RAILWAY COMPANY, *appellants*, REDMAYNE, *respondent*.

12 Jur. N.S. 692; L. R. 1 C.P. 329.

See *Woodger v. Great Western Railway*, [1867] E. R. A.; 36 L. J. C.P. 177; L. R. 2 C.P. 318; 15 L. T. 579; 15 W. R. 383 (C.P.).

Carrier—Delay in transmission of goods—Damages.

CARRIERS.—A plaintiff had forwarded certain goods to an agent by the defendants' railway; owing to a delay occasioned by their negligence, the goods did not arrive at their destination until the agent had gone:—Held, that the plaintiff was not entitled to recover damages for the loss of the profits which he might have gained if the goods had arrived in time, they having been delivered to the defendants without notice of the purpose for which they were sent.

This was an appeal from the county court. It appeared that the plaintiff had forwarded certain goods to an agent by the defendants' railway; owing to a delay occasioned by their negligence, the goods did not arrive at their destination until the agent had gone. The county court judge decided that damages for the loss of the profits which might have been gained, might be recovered, though the goods had been delivered to the defendants without notice of the purpose for which they were sent.

Clerk, for the appellants.—The loss of a particular contract cannot be recovered, as no notice was given. [He referred to *Borries v. Hutchinson* (34 L. J. C.P. 169; 11 Jur. N.S. 267); *Collard v. The South-Eastern Railway Company* (30 L. J. Ex. 393; 7 Jur. N.S. 950); *Wilson v. The Lancashire and Yorkshire Railway Company* (30 L. J. C.P. 232; 7 Jur. N.S. 862); *O'Hanlan v. The Great Western Railway Company* (34 L. J. Q.B. 154; 11 Jur. N.S. 797); *Hadley v. Baxendale* (9 Exch. 341; 18 Jur. 358); and *Black v. Baxendale* (1 Exch. 410).]

Pope, for the respondent.—The respondent is entitled to recover the value which would have attached to the goods if they had arrived in time. [WILLES, J.—In *Wilson v. The Lancashire and Yorkshire Railway Company* damages were recovered for deterioration arising from delay; but that was because the season for using the goods was past; the season of the year may have great influence in enhancing the value; it was as if a quantity of skates had been ordered for the 1st December, and delivered on the 1st May; but in this case there was only one person to whom the goods were of the value in question. The cases are quite distinguishable.]

ERLE, C.J.—The respondent was not entitled to the sum awarded to him by the county court judge; he is not to have the sum which he might have gained if the goods had been sold with all the skill of his agent.

WILLES, KEATING, and SMITH, JJ., concurred.

Judgment for the appellant.¹

IN THE COMMON PLEAS.

ERLE, C.J., WILLES, KEATING, and SMITH, JJ., Jan. 25, 1866.

BUCK v. HURST AND ANOTHER.

12 Jur. N.S. 704; L. R. 1 C.P. 297.

Joint liability—Evidence.

MONEY COUNTS. C.—Where a plaintiff lent money to B. on a guarantee of H., and afterwards B., the principal debtor, and H. signed a paper, promising, jointly and severally, to repay the money borrowed by B. from the plaintiff:—Held, that there was evidence to charge B. and H. jointly, and that they were liable to be sued in an action in which they both were defendants.

The facts of this case appear to have been as follows:—The plaintiff was asked to lend money to Bailey, which he refused to do unless Hurst would be surety; the money was advanced, and the two defendants signed a paper containing the words, "We jointly and severally promise to pay." An action having been brought, the jury found for the plaintiff.

J. O. Griffiths now moved for a rule, calling on the plaintiff to shew cause why a new trial should not be had.—The cause of action, as laid in the declaration, is joint, but the defendants were liable separately. Hurst was liable only on his guarantee. In *Lemere v. Elliott* (30 L. J. Ex. 350; 7 Jur. N.S. 1206) it was decided, that an I O U, not given in acknowledgment of a debt due, nor as the result of an account stated between the parties, is not evidence under a count on an account stated. In that case it had been verbally agreed that the plaintiff should sell, and the defendant buy, the plaintiff's business, lease, stock-in-trade, and fixtures; the plaintiff should introduce the defendant to his customers, and instruct him in his business, the defendant giving his I O U for 25l. on account. The plaintiff, in pursuance of this agreement, did afterwards introduce the defendant to his customers, and instruct him in his business, but the defendant refused to complete the purchase. It was held, in an action to recover the 25l., for which the I O U was given, the declaration being a count upon an account stated, and

(1) The parties agreed to decide what sum should be paid to the respondent as compensation for the remaining heads of damage which he had sustained through the delay in forwarding the goods.

the plea the general issue, that on these facts the plaintiff had been rightly nonsuited. In *French v. French* (2 Man. & G. 644), A., by letter, acknowledged to have received from B. 321l. 5s. By a contemporaneous account taken between these parties, it appeared that 146l. 3s. 6d., part of the 321l. 5s., was a sum due from C. to B., which A. allowed to be transferred to the debit of his account with B. A. was sued by B., *inter alia*, for money lent, and upon an account stated; and it was held that A. was not liable for the 146l. 3s. 6d., the arrangement amounting to a promise, without consideration, to pay the debt of another. *Petch v. Lyon* (9 Q.B. 147; 11 Jur. 37) is similar. [He referred to *Green v. Davies* (4 B. & Cr. 235) and *Gould v. Coombes* (1 C.B. 543).]

ERLE, C.J.—This rule must be refused; there was evidence from which the jury might find that the two defendants were jointly liable.

WILLES, KEATING, and SMITH, JJ., concurred.

Rule refused.

ADMIRALTY.

July 3, 31, 1866.

THE KESTREL.

12 Jur. N.S. 713; L. R. 1 A. & E. 78.

Mortgage suit—Costs, charges, and expenses—Taxation of—Items disallowed.

SHIPPING. A.—*Mortgagees' costs in a mortgage suit will be taxed as between party and party, in accordance with the practice of the Court of Chancery, and not as between solicitors and clients, where a decree has been made by consent that the plaintiffs are to receive their "costs, charges, and expenses properly incurred."*

On a motion by the plaintiffs, mortgagees, to review the registrar's taxation disallowing—

First, charges by the plaintiffs' solicitors for attending to take particulars of other suits against the vessel to which the plaintiffs were not parties;

Secondly, costs of negotiations between rival incumbrancers which led to nothing, and to which the owners of the vessel were not parties;

Thirdly, costs of conference with counsel at a stage of the suit when it is not usual for a conference to be held;

The Court affirmed the registrar's taxation, and refused the motion, with costs.

This was a motion to review the registrar's taxation of the plaintiffs' costs in a cause of mortgage instituted by James Morrish and Francis Nash, the first mortgagees, by transfer of the steamship *Kestrel*, against the proceeds of the sale of that vessel remaining in the registry of the court, the vessel having been sold in a suit of bottomry.

A decree had been made by consent that the plaintiffs should receive the sum claimed by them, and the "costs, charges, and expenses properly incurred" by them as mortgagees; and the question raised on this motion was, whether the taxation of those costs, &c., ought to be as between party and party, or as between solicitors and clients.

The circumstances of the case are fully stated in the judgment.

July 3.—*Osborne Morgan*, in support of the motion.—The whole question is as to costs, charges, and expenses of mortgagees. A mortgagee is not allowed to be out of pocket if his costs, charges, and expenses are fair.

(*Fisher on the Law of Mortgage*, 561). He is to be recouped all money which he is liable to pay, or has fairly expended. (*Ramsden v. Langley*, 2 Vern. 535; *Lomax v. Hide*, 2 Vern. 185; *Dryden v. Frost*, 3 My. & C. 670). All the mortgagee has to shew is, that he has not wantonly incurred costs. The registrar has taxed these bills as between party and party. Our objection is to the taxation on principle; we have really had no taxation at all. If the taxation has been on a wrong principle, the Court will send the bill back to the registrar to be treated in a different manner.

E. C. Clarkson, for the owners.—The suit was by the mortgagees to enforce their security; it was a hostile suit; they were entitled only to costs as between party and party. The term "costs, charges, and expenses properly incurred" implies some discretion in the registrar as to what he should allow.

O. Morgan replied.

Cur. adv. vult.

July 31.—Dr. LUSHINGTON delivered judgment.—There is no question that can come before the Court which is so disagreeable as that of reviewing the taxation of costs, because it is manifestly clear that, for the greater part, it is impossible to find a clear principle whereon to proceed, and whether the charge be right or wrong depends upon a practice, and upon a practice with which the Court cannot be familiar, and can only obtain information by applying to other sources. This is a motion for the Court to review the taxation of the registrar. This vessel has been the subject of much litigation. Amongst other suits instituted against her are the following:—1864, September, No. 2357, by a bottomry bondholder; October, No. 2398, by the third mortgagee; November, No. 2414, by the second mortgagee. In these suits the first mortgagees were defendants. 1865, February, No. 2616, by the first mortgagees. The last cause, the one in which the first mortgagees are plaintiffs, is the one in which this motion is made. Besides these suits in the Admiralty Court, in which the first mortgagees were plaintiffs or defendants, there were other suits to which they were not parties, and there was also a Chancery suit, *Smith v. Morrish*, instituted by the trustees for the creditors of the owners of the vessel, in which the first and other mortgagees were defendants. The vessel was sold in the suit of the bondholder, No. 2357, and the proceeds, amounting to 12,050*l.*, were paid into the registry. On the 8th December, 1865, a compromise of this suit, No. 2616, by the first mortgagees, was entered into between the solicitors for the various parties interested in the proceeds of the vessel—viz. the trustees for the creditors of the late owners, the third mortgagees, the second mortgagees, and the first mortgagees. This compromise was carried into effect by the decree of the Court of the 12th December following. By that decree, the proceeds of the ship were condemned in a specified sum of 5,655*l.* 6*s.* 1*d.* for principal and interest due to the first mortgagees, and in the costs, charges, and expenses properly incurred by them as mortgagees, including therein the costs incurred by the first mortgagees as defendants in the above-mentioned Chancery suit, and in the causes in this court, Nos. 2357, 2398, 2414, instituted respectively by the bondholder, the third mortgagee, and the second mortgagee. Subsequently the plaintiffs, the first mortgagees, brought in their several accounts of costs to the registry, consisting of—first, costs of first mortgagees as plaintiffs in 2616; second, costs of first mortgagees as defendants in 2357; third, costs of first mortgagees as defendants in 2398; fourth, costs of first mortgagees as defendants in 2414; fifth, costs of first mortgagees as defendants in Chancery suit; sixth, a separate account of charges by Messrs. Davidson & Co., the solicitors for the first mortgagees. The fifth account was taxed by the Master in Chancery, to whom it was referred. The other accounts were taxed by the registrar, and it is to review his taxation of the costs of the first account and of the sixth account that the present motion is made by the plaintiffs. The

chief ground of complaint by the plaintiffs is, that their costs have not been taxed as between solicitors and clients. On this question I have endeavoured to obtain, from the most competent persons, information; and I am informed that, in a mortgage suit in the Court of Chancery, the mortgagees' costs are always taxed as between party and party; and I cannot construe the provision in the decree which was made by consent, that the plaintiffs should receive their costs, charges, and expenses properly incurred, to mean that their costs should be taxed as between solicitors and clients. The exact meaning of that term, "costs, charges, and expenses properly incurred," it is impossible to define beforehand. In a mortgage suit, it would, I apprehend, consist of expenses incurred by the mortgagee in the protection of his security. Whether or not any expense has been properly or improperly incurred, must obviously depend upon the circumstances of each case. It is necessary, therefore, to go into further detail. With regard to the registrar's taxation of the bill of costs for this suit, in which the first mortgagees were plaintiffs, three classes of items are specified by the plaintiffs as having been improperly disallowed. The first class consists of charges by the plaintiffs' solicitors for attending to take particulars of the other suits instituted in this court against the vessel—suits in which the first mortgagees were not parties. As to these, however, I am of opinion that they are covered by the fees allowed to the plaintiffs for instituting their own suit. In point of fact, such inquiries as to other suits are a necessary preliminary to any plaintiff in order to enable him to shape his suit aright. But such an inquiry consists simply in a reference to the cause book, for no person who has not appeared in a suit can claim to see the documents in that suit. The second class consists of the costs of certain negotiations that took place between the various incumbrancers of the fund. There are two reasons why these costs should not be considered as properly incurred, so as to be chargeable against the fund—one, that the negotiations led to nothing; the other, that the owners of the vessel (who would be entitled to the residue of the fund after paying off the incumbrances) were not parties to them. I quite agree, therefore, with the registrar, that it would be improper to saddle the fund with these costs. The third class were thus incurred:—At the last moment the validity of the claim of the first mortgagees was disputed by the third mortgagee. The first mortgagees thereupon consulted their counsel as to whether they should get rid of the opposition of the third mortgagee by disputing his right to oppose, on the ground that his mortgage had been obtained by fraud. I had some doubt as to this item; but, upon further consideration, I think the costs of this conference were rightly disallowed by the registrar, on the ground that the conference was held at a stage of the suit when it is not usual to allow for a conference to be held. The registrar further disallowed most of the items in the bill No. 6. That bill seems to have been sent in by the plaintiffs as an account of costs, charges, and expenses properly incurred, as distinct from the proper costs of the several suits. On examination it proves to contain many items of a kind already alluded to, viz. items for the cost of negotiations between the rival incumbrancers on the fund, which I have already held were properly disallowed by the registrar. It also includes items for consultations between the proctors and solicitors of the plaintiffs, for communications between the proctors and their clients, although charges in the other bills had been allowed for instructions; also items which are duplicates of charges made in the other bills and allowed. All these items the registrar, in my opinion, did right to disallow; and, generally, he seems to me, in this taxation, to have proceeded upon a correct principle, and to have exercised his discretion in a just manner. I shall, therefore, refuse the motion, with costs.

PRIVY COUNCIL.

SIR J. L. KNIGHT BRUCE, L.J., SIR G. J. TURNER, L.J., SIR E. V. WILLIAMS,
June 18, 19, Aug. 4, 1866.

ROLET AND OTHERS, *appellants*, REG. AND ANOTHER, *respondents*.

12 Jur. N.S. 715; L. R. 1 P.C. 198.

Sierra Leone—Vice-Admiralty Court—Deputy judge—Illegal unshipping—Jurisdiction—Burthen of proof.

COLONY. B.—*The Chief Justice of the Vice-Admiralty Court of Sierra Leone went on leave, after duly appointing a deputy, who died, whereupon her Majesty's advocate, being Chief Justice in the colony during the absence of the Chief Justice, with the concurrence of the acting governor, appointed N. to be deputy judge:—Held, that N. was duly appointed.*

SHIPPING. B.—*By certain Colonial Ordinances and a certain Order in Council it was made illegal for any goods to be unladen from any ship in the said colony until due entry should have been made of such goods, and other requisitions complied with, and goods unladen contrary to such provisions, as well as boats, &c., used in their removal were to be forfeited:—Held, that such forfeiture was only to arise if the ship from which the goods were unladen was within the jurisdiction of the colony when the goods were unshipped; but, where goods were unshipped from a vessel and brought in boats into the port of the colony, the onus probandi lay upon those who sought to shew that the vessel was not within the jurisdiction of the colony when the goods were unshipped.*

This was an appeal from a decree of the Vice-Admiralty Court of Sierra Leone, by which the Court condemned as forfeited to her Majesty a large quantity of goods belonging to Victor Rolet, one of the appellants, and two boats belonging to other appellants, on the ground, as to the goods, that they had been illegally unladen and unshipped contrary to the provisions of certain Ordinances of the colony and of an Order of her Majesty in Council, and, as to the boats, that they had been illegally used in the removal and conveyance of the goods.

The 6th section of the said Order in Council (dated the 13th February, 1849) is as follows:—"And it is hereby further ordered, that no goods shall be laden or waterborne to be laden on board any ship, or unladen from any ship, in the said colony, until due entry shall have been made of such goods and warrant granted for the lading or unlading of the same, and the person entering any such goods shall deliver to the collector of the customs or other proper officer a bill of the entry thereof, fairly written in words at length, containing the name of the exporter or importer, and of the ship, and of the master and of the place to or from which bound, and of the place within the port where the goods are to be laden or unladen, &c."

The 21st section of the said Order in Council is as follows:—"And it is hereby further ordered that all vessels, boats, carriages, and cattle made use of in the removal of any goods liable to forfeiture under this Order, &c., shall be forfeited, &c."

By the 4th section of the Colonial Ordinance, dated the 31st December, 1849, it is enacted as follows:—"The importer of any goods shall pay down all duties due thereon at the time of making the entry of the same previous to the unlading thereof, directed by the 6th section of the Order in Council of her Majesty (of the 13th February, 1849), and the collector or other proper officer shall thereupon grant his warrant for the unlading and lading or transhipment of such goods."

By the 11th section of the said Ordinance, "No goods subject to the payment of any duties of customs upon importation shall be unladen from any ship or vessel in the colony until due entry shall have been made of such goods

and warrant granted for the unloading of the same in conformity with the provisions of the 6th section of the Order in Council (of the 13th February, 1849); and if any such goods shall be unladen contrary hereto by the regulations of the said section of the said Order, such goods shall be forfeited."

By the 13th section of the said Ordinance, "Goods subject to the payment of duties of customs shall not be unladen at any other place than Freetown, or landed at any other place than the public wharf, unless warrant or sufferance be first granted expressly for the same, and unless in the presence of an officer of customs, except when the officer granting the warrant states therein that the presence of an officer is unnecessary. Goods landed contrary to this provision to be forfeited."

By the 2nd section of the Colonial Ordinance, dated the 19th July, 1854, "If any goods liable to the payment of duties shall be unshipped from any ship or boat in the colony of Sierra Leone (customs or other duties not being first paid or secured), the same shall be forfeited."

By the 8th section of the same Ordinance, "All ships and boats, &c., made use of in the removal or conveyance of goods liable to forfeiture, shall be forfeited."

By the Colonial Ordinance, dated the 9th March, 1850, "Every ship or vessel that shall arrive at any port or place of or belonging to, or shall come within, the jurisdiction of the said colony, shall pay certain lighthouse dues therein mentioned."

The appellant, Victor Rolet, was a Frenchman, residing in France, and he had a mercantile establishment at Freetown, in the colony, where he carried on business through an agent, Honoré Leconte, under the title of Malfilatre & Co. The goods in question were sent by him from France to his mercantile establishment at Freetown, on board a brig called *The Belus*, which was consigned to some merchants at Fouricaria, near Mellicourie, a place which lies to the southward of Sierra Leone, and about 100 miles distant from it. On the 11th April, 1864, *The Belus* in course of her voyage to Mellicourie came to anchor off Sierra Leone, and her captain communicated to Leconte that she had goods on board for Malfilatre & Co., and that she was anchored out of the jurisdiction of the colony. Leconte thereupon directed boats to be sent out to bring in the goods. Four boats were accordingly dispatched to *The Belus* for that purpose early in the morning of the 12th April. These boats had not returned from *The Belus* when the custom-house was about to close on the evening of that day. Application was in consequence made in the first instance by Barlatt, a clerk of Malfilatre & Co., and subsequently by him and Leconte to Shaw, the acting collector, to allow the goods when they arrived to be placed on the custom-house shed for the night. Shaw appears at first to have refused, but afterwards to have acceded to the application. He gave a permit for the goods to be received in the shed, and in the course of the evening they were landed and stored accordingly. On the following morning, the 13th April, Barlatt went to the custom-house and made a report inwards of the boats and the goods. This report described the boat as a British boat of Sierra Leone, of which Daniel Coker was master for this present voyage from Mellicourie. It set forth the particulars of the goods, and purported that the entry was a just report of the name and particulars of the ship, and contained a true account of her lading; and further stated that bulk had not been broke nor any goods delivered out of the ship since her loading in Mellicourie. The report was signed by Coker, who was master of one of the boats which had been sent out for the goods, and was declared by him in the presence of Shaw, by whom it was also signed.

Barlatt at the same time made two entries inwards of the goods, some of them being for consumption in the colony, and others for exportation, and requiring a separate entry. Each of these entries purported to be "an account of merchandise imported by Malfilatre & Co. in a British boat from Mellicourie." These entries were also declared before Shaw. The wharfage dues were paid,

and the usual bonds given for payment of the duties. Some of the goods intended for sale in the colony were then removed from the custom-house shed to the store of Malfilatre & Co. On the morning of the same 13th April the boats had again been dispatched to *The Belus* for the purpose of bringing in some more of the goods; and these goods were brought in, as to some of them, in the evening, and as to the rest, in the night of the 13th April. They were landed at the custom-house, and stored in the Government sheds. In the meantime Shaw had taken steps for ascertaining whether *The Belus* was or was not within the jurisdiction of the colony, which appears to extend three miles seaward from the Cape of Sierra Leone. On the morning of the 13th April he sent out Hanson, the landing surveyor at the custom-house, to *The Belus* and other vessels which were lying off the Cape, and Hanson went on board *The Belus*. He returned in the afternoon, and reported that he thought that the vessel was within the jurisdiction.

Pike, the harbour master, was then sent out, but he did not reach the vessel that night. He went out, however, again to the vessel on the morning of the 14th April, and then took her bearings, and found her to be within the jurisdiction. On the same morning of the 14th April the goods which remained in the custom-house sheds, and two of the boats which had been employed in bringing them in, were seized by Shaw. Two or three days after the seizure had been made *The Belus* left the colony, and on the 9th May following a monition was issued calling upon the appellants to shew cause why the goods and boats should not be condemned. The monition was granted in pursuance of an affidavit of seizure at the suit of her Majesty, by his Honour John Carr, the Chief Justice and Judge of the Vice-Admiralty Court of Sierra Leone, against the appellant Victor Rolet, which monition was served on Leconte as his agent. By this monition penalties amounting to 2,450*l.* were sought against the appellant Victor Rolet.

On the 20th May, 1865, his Honour John Carr, the judge of the Vice-Admiralty Court of Sierra Leone, embarked for England, having first nominated and appointed, in pursuance of the power conferred on him by his commission, and with the concurrence of the acting governor of the colony, Mr. Skelton to be his deputy judge of the said Vice-Admiralty Court, for the purposes specified in the commission.

Mr. Skelton died shortly after his appointment, whereupon Mr. Horatio James Huggins, her Majesty's advocate, being acting Chief Justice in the colony during the absence of the Chief Justice, by an instrument under his hand dated the 23rd May, 1865, with the concurrence of his Excellency the acting governor, nominated and appointed the Hon. George William Nicol, the then Colonial Secretary of Leone, to be deputy judge of the Vice-Admiralty Court of Sierra Leone, who in such character assumed jurisdiction in the case, his commission being in the following form:—

“ I, Horatio James Huggins, duly appointed Chief Justice of the colony of Sierra Leone to act in the place and stead of his Honour John Carr, Chief Justice of the said colony, and to perform and execute the duties of the said office during the absence on leave from the said colony of the said John Carr, do hereby, in pursuance of the power vested in me as judge for the time being of the Vice-Admiralty Court of the said colony of Sierra Leone, under and by virtue of letters-patent bearing date at London in the High Court of Admiralty in England, the 26th day of May, 1859, and the twenty-second of the reign of her Majesty Queen Victoria, and on good and sufficient cause shewn to and approved by his Excellency Colonel William John Chamberlayne, acting governor of the said colony, testified by his signature to these presents, depute and surrogate the Hon. George William Nicol, colonial secretary of the said colony, in my place and stead, for the purposes specified in the said letters-patent, and the said George William Nicol is hereby duly appointed deputy judge of the said Vice-Admiralty Court of Sierra Leone accordingly.

" Given under my hand and seal of the said court at Freetown, in the said colony of Sierra Leone, this 23rd day of May, 1865.

(Signed) " HORATIO JAMES HUGGINS,
Judge for the time being of the Vice-
Admiralty Court of Sierra Leone.

" Approved,

(Signed) " W. J. CHAMBERLAYNE,
" Acting Governor."

On the 23rd May, 1865, the appellants brought in a claim for the goods and boats.

The libel in the cause was filed on the 1st June, 1865, and on the 23rd June following the appellants filed their plea or responsive allegation. Witnesses were then examined both on the part of the seizor and of the claimants (the evidence being sufficiently set out in the judgment); and upon the hearing of the cause on the 17th of August, 1865, a decree was made by the deputy judge of the court rejecting the claim, holding the libel to be sufficiently proved, and condemning the goods and boats. It was from this decree that the present appeal was brought.

The appeal was heard on the 18th and 19th June.

Moore and Rainy (*Pater* with them), for the appellants, contended that the burthen of proof was on the seizor, who failed to establish any case to justify the seizure of the boats and goods of the appellants; that *The Belus* was out of the jurisdiction of Sierra Leone; that the appointment of Mr. Nicol by Mr. Huggins was illegal, and the whole of the proceedings before him as acting judge in the matter were illegal, null, and void.

The Queen's Advocate (*Sir R. Phillimore*) and *Hannen* (*The Attorney-General, Sir R. Palmer*, with them), for the respondents, *contra*.

Cur. adv. vult.

Their LORDSHIPS now (August 4) delivered the judgment of the Judicial Committee, which, after a statement of the facts, proceeded as follows:—Upon the opening of the appeal a great number of points were insisted upon on the part of the appellants, having reference to the competency and regularity of the proceedings in the cause, and to the validity of the appointment of the deputy judge, and his power and authority to deal with the cause; but in the view which we have taken of the case, it is not necessary for us to give any opinion upon these points. In order, however, to avoid any possible question in other cases, we think it right to say, that we have no doubt whatever that the deputy judge was duly appointed, and had full power to adjudicate upon the questions in the cause. With this exception, we lay these preliminary points out of consideration.

The real question in this case seems to us to be, whether these goods and boats were liable to seizure and condemnation upon any of the following grounds:—Either, first, that the goods, being liable to the payment of duty, were unshipped from *The Belus*, at anchor within the colony, before due entry had been made of the goods, and before any warrant or sufferance had been granted for the unloading thereof; or, secondly, because the goods, being subject to the payment of duty, they were unladen from *The Belus*, at anchor as aforesaid, at a place other than the port of Freetown; or, thirdly, because the goods, being liable to the payment of duties, were unshipped from *The Belus* while in the colony, customs and other duties not being first paid or secured. These are the points which appear to us to arise upon the Ordinances and the Order in Council referred to in the libel, and which were considered by the deputy judge to be the real points in the case, and they are the points which were mainly, if not solely, relied upon on the part of the respondents in the course of the argument before us.

We proceed, therefore, to consider these points. It is to be observed, in

the first place, that the third ground of seizure above referred to rests upon the non-payment not only of customs duties, but of other duties also; but the seizure in this case clearly proceeded upon the non-payment of customs duties only; and upon examining the Ordinances and Order in Council, we do not find that any forfeiture could arise upon the non-payment of other duties. The case, therefore, must depend upon the goods having been unshipped, as they undoubtedly were, before the payment of the customs duties. In considering this question, it is not in our opinion necessary to enter into the details of the Ordinances and Order in Council. It is sufficient to say that, in our opinion, if *The Belus* was within the jurisdiction of the colony when the goods were unshipped, the goods and boats were liable to seizure and condemnation, but that they were not so liable if *The Belus* was not within the jurisdiction of the colony when the goods were unshipped.

The material question, therefore, which we have to consider is a mere question of fact, whether *The Belus* was within the colony when the goods were unshipped. We have carefully examined the evidence upon this question, and considered the collateral facts bearing upon it, and the conclusion at which we have arrived is, that *The Belus* was not, in fact, within the jurisdiction of the colony when the goods were unshipped. First, as to the testimony of the witnesses. Upon the witnesses on the part of the seizer being first examined, not one of them ventured to swear that on the 12th and 13th, when the goods were unshipped, this vessel was not beyond the three miles which form the limit of the jurisdiction of the colony. The only witnesses who speak directly to this point are Hanson and Johnson, and each of them upon cross-examination declines to swear that the vessel was within the three miles on either of those days. The evidence of Pike, the harbour master, however, goes to shew that the vessel was within the three miles on the 14th, and that she was then in the same position as she had been on the two previous days, but on cross-examination he admits that the fact of the vessel having been in the same position on the 14th as on the 12th and 13th, was no more than supposition on his part; and it is most remarkable that Hanson, who was on board the vessel both on the 13th and 14th, and must, therefore, have known whether she had changed her position or not, is upon his first examination wholly silent upon that point.

There can be no doubt, therefore, that this evidence was insufficient to support the seizer's case, but it was insisted on his part that the *onus probandi* rested upon the appellants, and that it was upon them to shew that the vessel was not within the jurisdiction of the colony when the goods were unshipped, and this argument on his part appears to us to be well founded. We must consider, therefore, the evidence on the part of the appellants upon this point, and we think it quite sufficient to establish their case. The testimony of the boatmen, no less than five in number, clearly shews that the vessel was beyond the three miles when the goods were unshipped, and we find nothing to displace this evidence, for the rebutting evidence on the part of the seizer is, as it seems to us, quite insufficient for the purpose. It goes no further than this: that Hanson, on his further examination, says he has every reason to believe that the vessel was in the same position on the 13th and the 14th, but he assigns no grounds for this belief. Taking the case, therefore, to rest on the testimony of the witnesses, we think that there was no sufficient case to warrant the sentence condemning these goods and boats.

Then, how does the case stand upon the collateral facts? They seem to us to be strongly in favour of the appellant's case. It is clear from the evidence that the goods in question might have been sent on to Mellicourie, and thence imported into Sierra Leone on payment of duties; and we cannot but think it in the highest degree improbable that Leconte should have ventured to incur the risk of seizure for the mere purpose of saving the expense of bringing back the goods from Mellicourie, which, so far as we can see, was the only benefit he could gain by unshipping the goods at Sierra Leone. Again: notwithstanding what is said by Shaw, we consider it to be sufficiently proved that it was

customary to admit the importation of goods from vessels outside upon the payment of duties, and it is admitted by Shaw that he saw the vessel outside on the 12th. It is surely most improbable that he should have granted the permit on the evening of that day, should have received the report and entries on the following morning, and should even have allowed some of the goods to have been removed from the custom-house sheds on that morning, if he had then believed the vessel to be within the jurisdiction. Such conduct on his part goes far to shew that he did not then entertain any such belief, whatever he may have thought afterwards.

The excuse which is made for this course of conduct on his part is that he was told that the goods came from Mellicourie; but it is clear from the evidence that it was the custom to insert Mellicourie and other places in the entries at the custom-house when the goods came from vessels outside; and we cannot readily believe Shaw to have been ignorant of this practice, to say nothing of there being two witnesses (Barlatt and Macrae), who distinctly state that they told him that the goods were coming from the outside. There are also these further facts in favour of the appellants' case; that the character of the boats was of itself almost, if not fully, sufficient to shew that the goods had not come from Mellicourie; that no custom-house officer was put on board *The Belus* on the 13th, which, as we apprehend, would have been the ordinary, if not the necessary, course, had she been within the jurisdiction; and that the monition was not issued till so long a time after *The Belus* had left the colony, and the appellants had lost the benefit of testimony which they might otherwise have been able to adduce.

We think it right to add, that we desire to give no encouragement to the practice of importing goods from vessels outside, and thus evading payment of duties which would otherwise be payable; and that where such a course is pursued the parties adopting it must expect to be strictly dealt with; but looking to the evidence and to the conduct of the custom-house officers in this case, we are satisfied that this vessel was not within the jurisdiction of the colony when the goods were unshipped; and we shall therefore humbly recommend her Majesty to reverse this sentence, with costs, in the court below and of the appeal, and to condemn the respondent Shaw in damages and costs.

Wood, V.C., June 25, 26, 1866.

Re THE IMPERIAL MERCANTILE CREDIT ASSOCIATION—
COLEMAN'S, M'ANDREW'S, FIGDOR'S, AND DOYLE'S CASES.

12 Jur. N.S. 739.

Company—Resolution to wind up voluntarily—Interference of Court.

COMPANY. M.—*The Court will not, on the application of a minority of shareholders, interfere with a resolution of a company to wind up voluntarily, unless the resolution was obtained by fraud, or by overbearing conduct, or by improper influence.*

These were petitions for winding up the above company. The first petition was that of Mr. Coleman, a director, which was presented on the 12th May, 1866, and advertised on the 14th May. He asked for a winding up by the Court, or for an order that the voluntary winding up should continue, subject to the supervision of the Court.

At a meeting on the 15th May, 1866, of the principal shareholders not regularly convened, a resolution to wind up voluntarily was passed, and on

the 28th May, 1866, a resolution for winding up the company voluntarily was passed at a meeting of shareholders duly convened, and resolutions were also there passed appointing Mr. Ball and Mr. Young liquidators. At a meeting of creditors of the company, held on the 7th June, 1866, these resolutions were approved and recommended for the approval of the creditors generally, and a committee of creditors was appointed to act in the matter. A very large proportion of the unsecured creditors had given their assent to these resolutions. The secured creditors were covered by their securities.

Mr. M'Andrew, who was also a contributory, presented his petition before he had notice of Coleman's petition.

The petitions of Mr. Fidgor, a creditor, and Mr. Doyle, another contributory, sought a compulsory winding up. Mr. Doyle also opposed the appointment of the liquidators named in the resolutions, and sought the appointment of an independent liquidator. He alleged (though this was denied) that there was great confusion at the meeting of shareholders on the 28th May, and he also alleged that the notice convening it had contained a clause requiring payment of a call before any shareholder could vote, and that though this was withdrawn by a circular of the 25th May, 1866, it was then too late for any shareholder to send in proxies. It appeared, however, that by the articles of association, proxies were to be sent in two clear days only before the time fixed for the meeting.

Westlake appeared in support of the petition of Mr. Coleman.

Locock Webb, *Hume Williams* (of the common-law bar), and *Babington*, for Doyle.

W. M. James, Q.C., and *Eddis*, for M'Andrew.

G. M. Giffard, Q.C., and *Swanston*, for Fidgor, did not oppose the voluntary winding up under supervision.

Rolt, Q.C., and *Lindley*, for the company, in support of Coleman's petition.

SIR W. P. WOOD, V.C. (without calling on the company).—This case is a very plain one. As regards shareholders, the Legislature thought that they might be the best judges of their own interests, and it authorised the Court to avail itself of their assistance, by directing meetings to be called when it thought fit, in order to know what were the views of the shareholders with reference to winding up. The Court is not entirely bound by the conclusion that they may come to, but it has the advantage of having the assistance of men of business, by seeing what the majority who attend the meetings say would be right in reference to their own interests. On the other hand, the Court has been armed by the Legislature with power to overrule their conclusions. It may see cases of fraud or misconduct, in which, by arbitrary acts on the part of the directors, or by their contrivance, majorities may be secured, and steps taken which might not give every person a fair hearing; and therefore any one is entitled to have an opportunity of bringing his case before the Court, in order that it may decide questions like this.

Now, as regards the present case, there is no misconduct imputed to the directors. [His Honour then stated the facts, and continued:] As far, then, as appears before me, if I take the poll on the present occasion, a large number of persons, as generally happens in cases of this kind, being acquiescent, neutral, or under disability, shareholders holding 42,000 shares differ from a person who, with those concurring with him in opinion, holds altogether about 2,000 shares. The ratio is a little greater in persons (namely, 49 to 400) than it is in numbers of shares, but still it is very large against Mr. Doyle. As to the creditors, they are unanimous. How is that case to be compared with any of the cases before me, except that it would induce me to take the same course that I took in the case of *The London and Mercantile Discount Company* (1 L. R. Eq. 277). There I took this view, that where the company desire to wind up their affairs voluntarily, the Court ought not to interfere on slight grounds, or unless the resolution was obtained by fraud or by an inequitable overbearing of the rights of a dissentient minority by improper influence; and Vice-Chancellor Kindersley

in the case of *The St. David's Gold Mining Company* (1 Weekly Notes, 196) concurred in that view, and refused to interfere on the same ground.

In the case of *Barnet's Banking Company* (14 W. R. 722) a petition was presented by a very large creditor insisting upon a compulsory winding up. There the Master of the Rolls thought there ought to be, for three reasons specially, a compulsory winding up. One reason was, because the assets ought to be realised immediately, and that could be better done by an official than by a provisional liquidator. Secondly, because his Lordship was not satisfied that proper security could be required from the liquidators in the case of a voluntary winding up under supervision, and such security was of great importance where sums so large would pass through the liquidators' hands; which is, no doubt, a point to be attended to in many cases as one of great importance; but here the shareholders, by an enormous majority, and the creditors unanimously, wishing to have this winding up voluntarily, know best what is for their own interest, and take such security as they think fit, and it is not imperative on the Court to call on those persons to give security, when you find such a concurrence of all the persons interested as I find here, desiring that the thing may be done in a different manner. The third reason given by the Master of the Rolls was, that it was a case requiring greater investigation, there being a serious question as to how far that company had properly carried on their business, having started with a very limited capital, and finding itself in one or two years greatly in debt. With the exception of security to be required from the liquidators, there is not one of those things that arises in the case before me. This is not a creditor making the application. It is all the other way; it is a small body of shareholders.

Now, let us consider the position of Mr. Doyle. He says, what he wants is another opportunity for the shareholders to express their opinion, as they have not had a fair opportunity of doing so. Before the meeting he was aware of it as being about to be held. He was perfectly competent to form his own opinion as to what his rights were with reference to voting; and anterior to the meeting he himself sends a circular of his own to all the shareholders, that circular being dated the 22nd May; and although he says it was not competent for the meeting to appoint a liquidator, he canvasses for a particular liquidator himself. He being, therefore, perfectly competent to attend the meeting, says, "I did not get a notice that I might vote by proxy." As against him, I may take it that he received the notice on the 25th May, he living in London. But supposing he received it the next morning, as he was living in London it was not a question of proxy. Why did he not go to the meeting to express his views? The meeting being held on the 28th May, I am now asked to deal with the matter, though he does not appear to have got anybody to support him, beyond the forty-nine who take his view. That being all the result of his efforts in the course of a month, am I to put this company to this inconvenience and delay, with these enormous claims, against the wishes of a large body of shareholders, and the whole body of creditors, because he finds he cannot persuade the shareholders to take the view he takes, and to call another meeting, he having had an ample opportunity of attending the meeting and doing what he pleased there. The notice might be regular or irregular, but it would not vitiate the meeting. It would be for everybody to assert their rights, and it was their business to attend. Mr. Doyle might have gone and tried to persuade the meeting to come to any views he thought fit. That would have been better than sending a circular, because he would have met them face to face, and have had an opportunity of arguing the question. It appears to me, that in that state of circumstances, I cannot do anything on this petition. It was presented after the other petitions, and I must dismiss it, with costs.

With regard to the official liquidators being appointed regularly, no notice was given of appointing the official liquidators at the first meeting, but there was in the notice for the second meeting an express notice to appoint them, so that it takes the form of confirming the resolution at the previous meeting.

With regard to the appointment of Messrs. Ball & Young, I see nothing to prevent my appointing them, otherwise the Court might constantly shut itself out from appointing the most fit person, because he happened to be related to some person, or because he knew something about the business which is, in fact, the best recommendation for his conducting the affairs of the company.

I stand on the broad principle, that it is not for this Court to interfere (except to prevent fraud and overbearing, and to correct undue influence) with the judgment of the company, who must know a great deal better than the Court can what is best for their interest. Therefore, I shall confirm all they have done. There will be a voluntary winding up under the supervision of the Court, and I shall appoint those two gentlemen liquidators. That order will be made on the three other petitions, and all parties served on them will have their costs. Then I dismiss Mr. Doyle's petition, with costs.

IN THE COMMON PLEAS.

ERLE, C.J., KEATING and SMITH, JJ., Jan. 31, 1866.

Re THE WANSBECK RAILWAY COMPANY *v.* TROWSDALE.

12 Jur. N.S. 740; L. R. 1 C.P. 269.

Contract—Reference—Amalgamation of company.

ARBITRATION. A.—*A railway company entered into a contract, one of the terms of which was that T., "if and so long as he shall continue to be the company's principal engineer," should be the arbitrator as to matters in difference. Afterwards the company was amalgamated by act of Parliament with another railway company. Disputes having arisen between the parties to the contract, T. made two awards as to the subject-matter of it:—Held, that T. was still the proper person to make the awards.*

In 1859 an act (22 & 23 Vict. c. lxxxv.) was passed, called "The Wansbeck Railway Act, 1859;" it was intituled "An Act for the making and maintaining of the Wansbeck Railway from Morpeth to a Junction with the North Tyne Section of the Border Counties Railway, and with Branches to the Morpeth Branch of the Blyth and Tyne Railway, and the main Line of the North-Eastern Railway respectively, and for other Purposes." Subsequently the company, incorporated under this act, entered into a contract with Messrs. Trowsdale for the performance of certain works; by one of the terms it was stipulated that Mr. Tone should be the company's engineer; by another term it was agreed, that all differences which might arise in the course of the performance of the contract should be referred to Mr. Tone, "if and so long as he should continue to be the company's principal engineer;" if he ceased to be so, Mr. Stephenson was to arbitrate between the parties.

In 1863 an act (26 & 27 Vict. c. exciv.) was passed, called "The North British Railway (Wansbeck Railway and Finance) Act, 1863;" it was intituled "An Act to authorise the North British Railway Company to raise more Money, and an Amalgamation with them of the Wansbeck Railway Company, and for other Purposes." By section 24 power was given to the Wansbeck Railway Company to amalgamate with the North British Railway Company. By section 26 the Wansbeck Railway Act, 1859, was partially repealed: sections 27, 29, 31 were respectively as follows:—Section 27, "After the commencement of the amalgamation, the provisions of the Wansbeck Railway Act, 1859, not repealed by this act, shall apply to the (North British Railway) Company in like manner in all respects as before the amalgamation they applied to the Wansbeck Railway Company, and as if the (North British Railway) Company had been originally named and referred to therein instead of the Wansbeck Railway

Company, and the railways and works authorised by the Wansbeck Railway Act, 1859, shall thenceforth form part of the undertaking of the (North British Railway) Company." Section 29, "All purchases, sales, conveyances, assignments, leases, mortgages, bonds, contracts, agreements, and all securities and calls upon the shareholders, and all other acts and things made, done, entered into, executed, or instituted under or by virtue of or in consequence of, or confirmed by, the act hereby in part repealed, or with reference to any of the purposes thereof, shall, after and notwithstanding such repeal, be as good, valid and effectual, to all intents and purposes as they would have been if the said act had not been hereby in part repealed, and may be proceeded on and enforced accordingly; the (North British Railway) Company, after the commencement of the amalgamation, being in all respects with reference to such matters, substituted for the Wansbeck Railway Company." Section 31, "Notwithstanding the amalgamation and repeal in part of the Wansbeck Railway Act, 1859, and except only as is by this act otherwise expressly provided, everything before the amalgamation done and suffered under, or confirmed by, any provision thereby repealed of the said act, shall be as valid as if such provision were not repealed; and the repeal thereof, and this act and the amalgamation respectively, shall accordingly be subject, and without prejudice, to everything so done, suffered, or confirmed, and to all rights, liabilities, claims, and demands, both present and future, which, if the said provisions were not repealed, and this act were not passed, and the amalgamation had not taken place, would be incident to, or consequent on, any and every thing so done or suffered; and the (North British Railway) Company, after the commencement of the amalgamation, shall be liable in respect of all such rights, liabilities, claims, and demands in the same manner and to the same extent as the Wansbeck Railway Company would have been liable in respect of such rights, liabilities, claims, and demands, in case the act had not passed, or the amalgamation had not taken place: provided always, that the generality of the provisions in this enactment shall not be confined or restricted by any special provision in this act." After the passing of the latter act, disputes arose between the company and Messrs. Trowsdale, which the company claimed the right to refer to Mr. Tone; but Messrs. Trowsdale objected, on the ground that the Wansbeck Railway Company had ceased to exist, and that consequently Mr. Tone was no longer their principal engineer. Mr. Tone, however, made two awards; he had continued to superintend the works specified in the contract.

C. E. Pollock (Jan. 23) obtained a rule, calling on the company to shew cause why the awards should not be set aside.

Mellish, Q.C. (Jan. 31), appeared to shew cause, but

C. E. Pollock was called on to support the rule.—Tone was made arbitrator because he was engineer in chief of the Wansbeck Railway Company; the words as to his continuing to be arbitrator are important. If the North British Railway Company had merged in the Wansbeck Railway Company, matters might have been different. Tone did not continue to be engineer in chief of the Wansbeck Railway Company; his office ceased to exist.

ERLE, C.J.—I think that this rule ought to be discharged. One of the terms in the contract was, that Mr. Tone should be the arbitrator; the amalgamation having taken place, many provisions of the Wansbeck Railway Company's Act were repealed; but section 29 continues the right of parties to have Mr. Tone as referee: to construe section 29 in this way, is in accordance not only with letter, but also with the spirit, of the statute. Thus, the provision as to Mr. Tone in the contract is kept alive, and he virtually continues in the same office.

KEATING, J.—I am of the same opinion.

SMITH, J.—I am of the same opinion. Section 29 keeps alive the contracts and their remedies; the Legislature has substituted the North British Railway Company for the Wansbeck Railway Company.

Rule discharged.

ADMIRALTY.

July 17, 31, 1866.

THE COLLIER.

12 Jur. N.S. 789; L. R. 1 A. & E. 83; 16 L. T. 155.

See, *The Scout*, [1872] E. R. A.; 41 L. J. Adm. 42; L. R. 3 A. & E. 512; 26 L. T. 371 (Adm.).

Salvage—Owners of salving and charterers of salved vessel the same persons—Pleading.

SHIPPING. E. K.—*The owners of a vessel rendering salvage services, being also the charterers of the vessel receiving the services, are not thereby debarred from claiming salvage reward, unless the effect of the charterparty has been to divest the owners of the possession and control of the salved vessel, and to transfer the same for the time to the charterers.*

On a motion by the plaintiffs, salvors, in objection to certain articles of the defendant's answer, which averred, that though the services rendered might be of the nature of salvage service, yet that because the owners of the salving and the charterers of the salved vessel were the same persons, no salvage was due; the Court ordered the article denying that any salvage was due to be struck out, but not the other articles detailing the facts, which if proved might not bar the claim for salvage, but might affect the quantum.

This was a motion on the part of the plaintiffs, in objection to the following articles of the defendant's answer, in a cause of salvage brought by the Brighton Railway Company, the owners, and the master and crew of the steam-ship *Lyons*, against the steamer *Collier*, her cargo and freight.

The petition alleged, in substance, that on the 31st October last the steam-ship *Lyons*, while on a voyage from Newhaven to Dieppe fell in with *The Collier* in a disabled condition, took her in tow, and after considerable difficulty, towed her into the port of Newhaven.

The portions of the answer objected to were as follow:—

2. "*The Collier*, at such time was under a time charterparty from her owners to the London, Brighton, and South-Coast Railway Company, the owners of the steam-ship *Lyons*, plaintiffs in this cause, and was at such time engaged in the regular packet service of the said company; and the said cargo and passengers of *The Collier* had been taken aboard, and were being carried in *The Collier* by the said company for their own benefit, and the freight and passage money for such carriage belonged to the said company."

The 3rd article, after stating the circumstances of the collision, alleged that "those on board *The Collier* knowing that *The Lyons* belonged to the London, Brighton, and South-Coast Railway Company, signalled *The Lyons*, in the belief that it would be for the best interest of the said company for *The Lyons* to assist *The Collier*, and *The Lyons*, in consequence of such signal, bore down to *The Collier* and reached her at about 3.30 p.m. of the same day."

4. "The master of *The Collier* then informed those on board *The Lyons* (who were aware that *The Collier* was in the service of the owners of *The Lyons*), that a warp had been entangled in the screw of *The Collier*, and requested that *The Lyons* would tow *The Collier* with her to Dieppe."

12. "By reason of the premises, neither the owners of *The Lyons*, nor her master and crew, are entitled to salvage remuneration in respect of their services to *The Collier* or to her cargo."

July 17.—Dr. Deane, Q.C., in support of the motion, cited *The Waterloo* (2 Dods. 433).

E. C. Clarkson, contra.—The company were merely assisting a vessel

chartered to them; they were bound to take *The Collier* in tow (*The Maria Jane*, 14 Jur. 857).

Cur. adv. vult.

July 31.—DR. LUSHINGTON delivered judgment.—This is a cause of salvage brought by the master, owners, and crew of *The Lyons* against this vessel, *The Collier*, her cargo and freight. A petition has been given in, and an answer filed on behalf of the owners of *The Collier*, and of the owners of her cargo. The plaintiffs now object to the admission of the 2nd, 3rd, 4th, and 12th articles of the answer—articles the effect of which is to aver, that though the services rendered by *The Lyons* may have been of the nature of salvage services, yet that no salvage is due, because the owners of *The Lyons* and the charterers of *The Collier* are the same persons, viz., the London, Brighton, and South-coast Railway Company. It appears that at the time the salvage service was rendered, *The Collier* was under a charterparty to the railway company. The terms—so far as are material to the present motion—were, that *The Collier* was let for the sole use of the charterers for the space of three months; that the captain should use all dispatch in prosecuting the voyage, and that the crew should render all possible assistance with the vessel's boats, and in loading and discharging the vessel, consistent with their other duties; that the owners (not the charterers) should find ship's stores and pay crew's wages; that all derelicts and salvages should be for owners' and charterers' benefit, in moieties to each, after settling with the crew; that the owners should appoint their own captain and engineer, who, with all the crew, should be under the control of the superintendent and agent of the charterers; and should any occasion arise for appointing a new captain, officers, and crew, the appointment was to be made jointly by the charterers, superintendent, and the owners. *The Lyons*, as I have said, belonged to and was in the employ of the railway company. The defendants, in support of their articles, to which objection is made, relied on the case of *The Maria Jane* (14 Jur. 857), as a case where a claim for salvage against a ship was rejected, although salvage services had been rendered, because the ships rendering the services belonged to the person who was the charterer of the vessel receiving those services. But, in that case, the effect of the charterparty was to divest the owners of the possession and control of the vessel, and to transfer the same for the time to the charterer, who was required to provide and pay for the master and crew. And it was on this ground—the ground of the charterer being in possession of the salvaged vessel—that the judgment proceeded. The Court held that the claim for salvage could not be maintained against the owners of the salvaged vessel by the charterer of that vessel in his other capacity as owner of the vessels rendering the salvage services, or by his servants on board those vessels. In the present case the circumstances are obviously different. The charterers of *The Collier* were not in possession; the owners paid the wages of the crew. *The Maria Jane*, therefore, is not a case in point. On the other hand, the plaintiffs cited the case of *The Waterloo* (2 Dods. 433). That was a claim of salvage preferred by the owners, officers, and crew of *The Winchelsea* for services rendered to *The Waterloo* and her cargo. *The Winchelsea* at the time was chartered to the East India Company, but her commander, officers, and crew were appointed by her owners. *The Waterloo* and the bulk of her cargo were owned by the East India Company. Lord Stowell allowed the claim for salvage, having, in a very luminous judgment, discussed all the circumstances of that case. I think that *The Maria Jane* does not apply to the present case, and that the principles laid down in *The Waterloo* govern it. The argument against a claim for salvage is founded on the supposition that the salvor is claiming in substance for the salvaging his own property, which, certainly, is against reason. There is no place for such an argument here, as the owners of *The Collier* are not the owners of *The Lyons*. *The Collier* is chartered to the Brighton Company, but the owners of *The Collier* are not divested of possession, as was substantially the case in

The Maria Jane. These questions are not without difficulty, for distinctions might be taken between the owners of the salving ship and the crew and the property in the cargo. Again: I am not prepared to say that there may not be such a connexion between two ships which, though it would not bar a claim for salvage, might affect the quantum, I shall order the 12th article to be struck out, which denies that any salvage whatever was due; but not the three first articles, which, though the facts therein detailed, if proved, would not bar a claim for salvage, might possibly affect the quantum. I think it right to be upon my guard, because, no doubt, the amount and quantum of a salvage service may be affected by particular circumstances, though the claim for salvage is not barred. I speak, for instance, where fishing vessels render assistance to each other, and matters of that description. That is the view the Court holds.

ADMIRALTY.

July 31, 1866.

THE OBEY.

12 Jur. N.S. 817; L. R. 1 A. & E. 102.

The Empusa, 1879, 5 P. D. 6 (Adm.).

Collision—Limitation of liability—Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 54.

SHIPPING. G.—*In a cause of limitation of liability, under the 54th section of the Merchant Shipping Act Amendment Act, 1862, one of the owners of the vessel sued being master as well as part owner, but not having been on deck at the time of the collision:—Held, that there was no obligation upon the master to be upon deck; that the fact of the master being part owner was no reason for charging the other owners with blame; and that there was no evidence to shew that the collision took place by the "fault" or with the "privity" of the master.*

This was a cause of limitation of liability, brought by George Deslandes and Charles Le Gros, the owners of the barque *Obey*, against the owners of the vessel *Arthur* and her master and crew, the plaintiffs in a cause of damage arising out of a collision which occurred on the 22nd February, 1866, between the vessels *Obey* and *Arthur*.

The petition alleged, that the plaintiffs were the registered owners of the British ship *Obey*, of the burthen of 271 $\frac{1}{10}$ tons, the plaintiff George Deslandes being the registered owner of 48-64ths, and the plaintiff Charles Le Gros being the registered owner of 16-64ths: that on the 22nd February, 1866, *The Obey*, whilst on a voyage from Monte Video to Leith, came into collision, off Lowestoft, with the British schooner *Arthur*, and in consequence of such collision *The Arthur* shortly afterwards sank: that at the time of the happening of the collision *The Arthur* was laden with a cargo, and had on board her divers effects belonging to her master and crew, and such cargo and effects were lost: that at the time of the happening of the collision *The Obey* was also laden with cargo, and the plaintiffs are apprehensive that claims may be preferred against them in respect of damage caused to such cargo by reason of the collision: that on the 1st March, 1866, a cause was instituted in this court against the vessel *Obey* and her freight by the defendants, the owners of *The Arthur*, and her master and crew, for the recovery of damages in respect of the losses sustained by them respectively by reason of the collision; and bail was subsequently given in such cause, and *The Obey*

released from arrest: that the said collision occurred without the actual fault or privity of the plaintiffs, or either of them: that no loss of life or personal injury was caused by reason of the said collision: that the plaintiffs admit, for the purposes of this suit, that in respect of the said collision they are answerable in damages in respect of loss or damage to ship's goods, merchandise, and other things, to the extent provided by the 54th section of the Merchant Shipping Amendment Act, 1862; that is to say, that they are answerable in damages in respect of loss or damage to ship's goods, merchandise, and other things, to an aggregate amount not exceeding 8*l.* sterling for every ton of the registered tonnage of *The Obe*y; but they allege that such aggregate amount is insufficient to answer the claims of the defendants: that no other action has been brought against the plaintiffs or *The Obe*y in respect of loss occasioned by the said collision; but the plaintiffs submit, that, in case any other action or actions shall be brought against them or *The Obe*y, in respect to damage or loss to ship's goods, merchandise, or other things occasioned by the said collision, they ought to be at liberty, after any order shall have been made herein, to apply for and obtain from this Court an order restraining or staying such action or actions.

The defendants, in their answer, alleged, that the collision did not occur without the fault or privity of the plaintiffs, or either of them: that at the time of the collision Charles Le Gros, one of the plaintiffs in this cause, was the master, and in command of the vessel *Obe*y, whose owners are the plaintiffs in this cause: that the collision was occasioned by the fault or with the privity of the said Charles Le Gros.

The plaintiffs in their reply admitted that Charles Le Gros was at such time master of and on board *The Obe*y, but said that at the time when the collision happened it was the said Charles Le Gros's watch below, and denied that the collision was occasioned by his fault or with his privity.

The portion of the 54th section of the Merchant Shipping Act Amendment Act, 1862, referred to, is as follows:—"The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity; that is to say—

- "(1). Where any loss of life or personal injury is caused to any person being carried in such ship;
- "(2). Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship;
- "(3). Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person carried in any other ship or boat;
- "(4). Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat;

"be answerable in damages in respect of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding 15*l.* for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury, or not, to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage, without deduction on account of engine-room," &c.

E. C. Clarkson appeared for the plaintiffs.

Dr. Deane, Q.C., for the defendants.

The evidence of Charles Le Gros, the master, was to the effect, "That in the course of the voyage from Monte Video he had put into Queenstown,

where he engaged a coasting pilot; that about 8 p.m., when *The Obey* was off the Kentish Knock Light vessel, the second mate came up and took charge of the deck, that he, the master, then went below to rest, leaving the vessel in charge of the second mate and pilot; that between the time of his going below and the collision, he was on deck two or three times; that he found on these occasions that the second mate and the pilot were attending to their duties; that at about 11 p.m. he was lying down in the cabin, and hearing a noise on deck, he went on to the quarter deck, and stepped from there on to the main deck; that he had no sooner done so, than he saw *The Arthur* on the starboard bow, but too near to avoid a collision; that he sang out 'down with the helm,' but it was too late, and the collision immediately took place."

Dr. Deane, Q.C., argued that it was the duty of the master to have been upon deck; that he ought not to have left the vessel in charge of the second mate; and that he was therefore "privy" to the collision.

E. C. Clarkson, contra, cited *Wilson v. Dickson* (2 B. & Al. 2) and *The Volant* (1 W. Rob. 385), and argued that the mere fact of the master not being on deck would not make him liable for the collision. *Nicholson v. Mounsey* (15 East, 384).

Dr. Deane replied.

DR. LUSHINGTON.—I would take time to consider this case if I really felt any difficulty as to what is the true solution of the objections raised, but I confess I feel none. I am called upon to construe the 54th section of the Merchant Shipping Act Amendment Act; but before I attempt to undertake that task, I will state the facts, as I understand them, from the evidence. I think it is unfortunate that this case, which is a proceeding to entitle the owners to immunity beyond a certain amount, should be left entirely upon the evidence of the master, who is one of the parties more particularly interested in the ultimate result; but I must take it as it stands. In the first place, I must consider whether there is any fault on the part of the master, looking at the state of the facts, and I will consider the question of privy afterwards. Now, the master, in bringing this vessel from Queenstown to Leith, laden with a cargo, and under the circumstances set forth in the petition, puts into the port of Ramsgate, but takes the assistance of a coasting pilot. I apprehend that is a very common and ordinary precaution, and an additional precaution to a master who is navigating on a voyage of that description. Under the guidance of that coasting pilot, he prosecutes his voyage after having left Ramsgate, and certainly I cannot see that there was any obligation upon the master to be upon deck. Undoubtedly, he could not be exempted from that obligation, if it existed, by any fatigue he had undergone, or any privations; but I do not agree with *Dr. Deane's* argument, that he was at all compelled to be upon deck. I apprehend that there is no rule or principle, that a master shall be bound to keep watch on a vessel of this description with such a crew—twelve hands; and the watch could be kept by the two mates on board—alternate watches—and it was the duty of the master to superintend both, and go on deck as occasion might require, and see that the vessel was properly navigated. I know of no authority whatever to say that a master must keep the watch. I know, if the first and second mate happen to be young men, and it is boisterous weather, then it is the duty of the master, whether the first mate is in charge or both are in charge, to be on deck to prevent damage, if damage can be prevented. I therefore do not think it necessary to say more than this—that there was no obligation upon the master. He seems to have continued on deck for several hours, and intrusted the vessel to the second mate, assisted by the coasting pilot; and, unless the contrary be shewn, I must presume the coasting pilot was adequate to the duty intrusted to him. The master goes below, hears a noise, and the moment he hears it he goes upon deck; but it was then too late to do anything, because, according to his evidence, the other vessel was close under

his bows. He gave an order of "Down with the helm;" but that order takes no effect—indeed, it seems to be impossible it could have done at that moment, because the two vessels were in collision, and part of his evidence states that, as he gave the order, the two vessels were in collision, and nothing could be done on his part. Looking at these facts, I have no hesitation in coming to the conclusion, that there was no fault on the part of the master; and to say that, because the master is a part owner, you could charge the other owners with blame, would be contrary to all reason and principle, as it would be charging a person with that which he had no power to prevent.

The next question is, whether there is any privity. Perhaps there is some difficulty in that word; but, without laying down any precise rule which might govern other cases, the question is, whether there was any fault here, to which it might be said the master was privy, according to the terms of the statute. It has been truly said, that in all probability this collision was either the fault of the second mate, or the fault of the coasting pilot. It is probable, because the parties have agreed to pay the damage, and have come here for a limitation. I think there is no evidence shewing that the master was at all privy, or that there was anything done by him which induced or brought about this collision. There might be most grievous misconduct in navigating the ship—the helm might have been put to starboard when it ought to have been put to port, or any other mistake might have been committed; but there is no evidence to shew that the master was privy to anything that took place. I do not think, in this case, I can make the master amenable to the exception in the act. I will not be tempted to say what I think may be the true meaning of the word "privity," but I am of opinion that the case on the part of the plaintiffs is established.

IN THE QUEEN'S BENCH.

BLACKBURN, SHEE, and LUSH, JJ., May 2, 1866.

WHITFIELD, *appellant*, BAINBRIDGE, *respondent*.

12 Jur. N.S. 919.

Alcouse—License—Wine license—Harbouring prostitutes—9 Geo. 4, c. 61—Local act.

INTOXICATING LIQUORS. C.—*W.*, a freeman of the Vintners Company of London, selling foreign wines without license, was subjected by a local improvement act to the same penalties as those licensed to sell. In his house one night a constable saw forty prostitutes, about half of them taking refreshments, and talking with men, and he told *W.* what they were. An hour afterwards some of the same women were there with other prostitutes, only a few of them taking refreshments, and they were going out and coming in with men. There was no indecent or improper behaviour:—Held, there was evidence sufficient to sustain a conviction against *W.* for suffering persons of notoriously bad character to assemble and meet together contrary to the license.

Case for the opinion of the Court, under the provision of the 20 & 21 Vict. c. 48.

This was an information laid by James Bainbridge, an inspector of police of the borough of Liverpool, which stated that the then defendant and now appellant, one Thomas Whitfield, "being a person who, by reason of his freedom of the mystery or craft of vintners of the city of London, or right or privilege of such mystery, claims to be entitled to sell foreign wine by retail, to be drunk or consumed on certain premises in Lime Street, within the same

borough, without a license, and being subject to all the provisions of all acts made for the regulation of persons so licensed, except those provisions which require or refer to the taking out of a license, either from any justice of the peace or from the Commissioners of Excise, did, on the 8th of November instant, on the said premises, commit a certain offence, to wit, that he did then and there knowingly suffer persons of notoriously bad character to assemble and meet together therein, against the tenor of the license granted under the provisions of a certain act of Parliament made and passed in the 9 Geo. 4, c. 61, intituled 'An Act to regulate the granting of Licenses to Keepers of Inns, Alehouses, and Victualling Houses, in England, for the Sale of Exciseable Liquors by Retail, to be drunk or consumed on the Premises;' for which offence, the same being his second offence, he has forfeited a sum not exceeding 10l., and whereby he was liable to be dealt with, proceeded against, and punished, in like manner as if selling wine by license, and not by virtue of such claim or privilege, pursuant to a certain other act of Parliament made and passed in the 5 & 6 Vict., intituled 'An Act for the Improvement, good Government, and Police Regulation of the Borough of Liverpool.' "

The case came on for hearing at the Liverpool police court on the 17th November last, before John B. Brancker, John J. Stell, and Nathaniel Caine, Esqrs., three of her Majesty's justices of the peace of the borough of Liverpool.

In support, it was proved before the said justices by the informant, Inspector Bainbridge, that the appellant occupied a house in Lime Street, wherein he sold wine by retail without being licensed either by the justices or excise, but under and by virtue of his freedom of the same craft or mystery of a vintner; and that on Wednesday, the 8th November last, at half-past eleven at night, the informant went to the appellant's place of business, situate in Lime Street aforesaid, and found the appellant present. He also found forty prostitutes in the room, and a number of men (how many men he could not say, as he did not count them). Some of the women were sitting at tables, some were talking with men, and some were walking about the room. There were no refreshments before those sitting down, or before more than half of those present. Witness pointed out the prostitutes to the appellant, and told him they were prostitutes. The witness went again to the appellant's house, fifty-five minutes afterwards, and then found there eleven prostitutes, and a number of men; seven of the women were the same witness had seen there on his previous visit at half-past eleven p.m. Very few of them were taking refreshments. Witness did not either see them going in or coming out. The room where the persons were was a large room. Saw several couples go in and out on a second visit.

On cross-examination the inspector said, that when he spoke to the appellant on his first visit, the appellant said the parties present were being served as quickly as possible, and that they were very busy so doing, and it was impossible to serve so many at once. It was Liverpool races at the time. All the persons were quiet and well behaved, and there was no indecency or improper behaviour whatever. There were about as many men as women present. There was a counter in the room, round which part of the company were assembled taking refreshments. The waiters or attendants were serving some of the parties. On his first visit witness remained in the room five minutes. On the second visit, the appellant was refusing admittance to parties, and putting out the gas and he heard the appellant order those in the room to leave. There was no noise or disturbance on the second visit, but all was quiet and orderly. The house is generally closed at twelve o'clock, and is not opened on a Sunday. A previous conviction was proved against the appellant for a similar offence at the same premises in April last.

No evidence was called for the appellant, but it was contended on his

behalf, that there was no evidence that the women present, as stated by the informant, were persons of notoriously bad character, although prostitutes. That they were all orderly and well behaved, and that the mere fact of their being prostitutes did not, without other adjunct, necessarily render them notoriously bad characters, and that, under the facts, they were not within the meaning of the description "notoriously bad characters." That the information and complaint were not sustainable, for that the 9 Geo. 4, c. 61, by section 36, specially excepted freemen and commonalty of the vintners of the city of London from its operation, and the appellant was not licensed under that act. That the local act, 5 & 6 Vict. c. cvi, had no retrospective operation, and that that act, by section 248, imposed penalties for the infringement of any enactments within its purview. That section 21 of the 9 Geo. 4, c. 61, and which imposed penalties for offences against the tenor of the licenses, on a conviction of a third offence, directed the forfeiture of the license. That such forfeiture of a free vintner's license would occasion the forfeiture of freedom of the commonalty of vintners of the city of London, on the wife of the appellant, her children who are free by birth, and of any apprentices he might take who would become free by servitude to a free vintner. That such penalty and collateral punishment was not within the meaning and operation of the 9 Geo. 4, c. 61.

The attorney for the informant having been heard on the points of law, the justices overruled these objections, and upon the facts stated, convicted the appellant, as a free vintner of the city of London, under the local act, 5 & 6 Vict. c. cvi, s. 248, taken in connexion with the 9 Geo. 4, c. 61, s. 21, and the license referred to, for permitting persons of notoriously bad character to assemble and meet in his house and premises, and fined the said appellant in the sum of 10*l.* and costs, as for a second offence against the tenor of the license referred to. The above acts of Parliament are to be taken as part of the case. The appellant thereupon applied for a case, and the same was granted as above, for the opinion of the Court, whether the conviction was right in law.

The 9 Geo. 4, c. 61, s. 36, enacted that nothing in that act contained should extend to alter or in any manner affect the master, wardens, freemen, and commonalty of the vintners of London.

The form of license in that act provided that the ale-house keeper should not knowingly permit or suffer persons of notoriously bad character to assemble and meet together thereon.

The Liverpool Improvement Act, 5 & 6 Vict. c. cvi, s. 248, enacts, that every person who, by reason of his freedom of the mystery or craft of vintners of the city of London, or of any right or privilege of such mystery, shall claim to be entitled to sell foreign wine by retail, to be drunk or consumed on the premises, within the borough, without license, shall be subject to all the provisions of all acts made for the regulation of persons so licensed (except those provisions which require or refer to the taking out of a license); and in the case of any offence committed by him against the tenor of the license granted under the provisions of any act for the sale of exciseable liquors by retail, to be drunk or consumed on the premises, shall be liable to be dealt with, proceeded against, and promoted in like manner, if selling wines by license, and not by virtue of such claim or privilege."

Milward, Q.C., and *Crompton*, for the appellant, contended, that the conviction was wrong, for prostitutes were not notoriously bad characters, as the justices seemed to assume, and there was no evidence to sustain the conviction. *Grey v. Bendens* (1 El., Bl., & El. 136), *Belasco v. Hannant* (3 B. & S. 13; 8 Jur. N.S. 1226), *Parker v. Green* (2 B. & S. 299); 8 Jur. N.S. 409).

Mellish, Q.C., contra, contended that the conviction was right, and there was evidence to support it. All that was required was to shew that these women were then exercising their trade or vocation.

BLACKBURN, J.—Here the case does not state exactly what were the facts which the justices found. It certainly cannot be laid down as a proposition of law, that prostitutes are notoriously bad characters; but I suppose what the justices really find is, that there was evidence to shew that these women were allowed by the appellant to be on his premises in the exercise of their vocation. If so, we think they were quite right in convicting the appellant, for he had transgressed his license.

SHEE and LUSH, JJ., concurred.

Judgment for respondent, with costs.

IN THE COURT OF EXCHEQUER.

KELLY, C.B., MARTIN, CHANNELL, and PIGOTT, BB., Nov. 17, 1866.

COLEMAN v. SOUTH-EASTERN RAILWAY COMPANY.

12 Jur. N.S. 944; 4 H. & C. 699.

Negligence by railway company.

CARRIERS. B.—*A porter closing the door of a compartment so as to touch a passenger who had just got inside, and crushing the fingers of a child (who was just seating himself) between the hinges:—Held, per Martin, Channell, and Pigott, BB., that there was evidence of negligence:—Held, per Kelly, C.B., that there was no evidence and that the child was guilty of negligence.*

This was an action for negligence against a railway company, the issue being not guilty.

The case was tried at the sittings at Westminster after Trinity Term, before Martin, B. The facts were, that the plaintiff, who was a child of about nine years of age, and his father, had taken tickets at the Charing Cross station to travel by a train of the defendants, and the plaintiff had already entered, and was taking his seat. His father was just entered, and was in the act of walking along the compartment, when a porter in the service of the defendants closed the door of the carriage, and injured the fingers of the plaintiff's hand, which were between the door and the side of the carriage, where they join by hinges. The door in closing touched the plaintiff's father on the back.

On this case, it was submitted to the learned Judge on behalf of the defendants, that there was no evidence of negligence, and that the plaintiff had been guilty of contributory negligence, which precluded him from recovering. The learned Judge refused to take the case from the jury, but reversed both points for the defendants to move to enter a nonsuit thereon. His Lordship left to the jury both the question of the negligence of the company and of the contributory negligence of the plaintiff. The jury found a verdict for the plaintiff, with 5*l.* damages. This term,

E. U. Bullen obtained a rule according to leave reserved, which was argued on a following day;

Willis shewing cause.

Lynch v. Nurdin (1 Q.B. 29) and *Hughes v. Macfie—Abbott v. Macfie* (16 Jur. N.S. 682), were cited in the argument.

KELLY, C.B.—As the majority of the Court are of opinion that the evidence was such that the case could not be withdrawn from the jury, the rule will be discharged; and in such a case as this I am not sorry that my opinion should be overborne; at the same time, I entertain a decided opinion upon both the points submitted to our judgment.

I am of opinion that there was no negligence on the part of the defendants' servant, and I am unable to understand what precautions he could have taken which he did not take, or altogether what he was to do to escape the charge of negligence which is brought against him. That the plaintiff had sufficient time to enter and seat himself is clear, for his father, who followed him, was inside the compartment when the door was shut, and the plaintiff had taken the seat nearest the door. Then it is the regular duty of the porter to close the doors.

Then, as to the question of contributory negligence, I do not think any one could imagine that it could be of any use or advantage to a passenger to place his fingers in the chink or crevice between the door and the side at the hinges. We cannot treat the case of a person of this age otherwise than the case of any other person; and this conduct on his part certainly contributed to the accident.

MARTIN, B.—I thought at the trial that the case was such that I could not go so far as to withhold it from the jury, and I think that if I had nonsuited the plaintiff, this Court, if it had proceeded on the system on which it acted in the cases of *Scott v. The London Dock Company* and *Byrne v. Boadle*¹ (10 Jur. N.S. 1107, 1108), would set the nonsuit aside. I should have been better pleased if the jury had found the other way. The negligence, if there was any, was of the very slightest kind, and the jury seem to have thought so from the amount of damages they have found.

CHANNELL, B.—I am not without doubt; but, on the whole, I think the case could not have been withdrawn from the jury. It might have seemed to them that the fact that the door in closing struck the plaintiff's father on the back shewed undue haste and negligence in the company's servant. I do not say I should have come to that conclusion, or that I am satisfied with their verdict, but it was a question for them. It may be that the plaintiff had set his hand against the door to settle himself on his seat.

PIGOTT, B.—I have entertained some doubt in the course of the argument, but in the result I agree in thinking that the case of negligence was very questionable, but that it was for the decision of the jury.

Rule discharged.

KINDERSLEY, V.C., Nov. 12, 1866.

Re PEACOCK'S SETTLED ESTATES.

12 Jur. N.S. 959.

Practice—Settled Estates Act (19 & 20 Vict. c. 24)—Form of order on sale of settled estates.

Colt asked the Court to make an order directing a sale by trustees of certain settled estates. The trustees had entered into a contract for the sale, and they now sought the sanction of the Court, and asked that any further application as to the disposal of the proceeds might be dispensed with.

Sir R. T. KINDERSLEY, V.C.—I do not think this Court can empower the trustees to sell generally, as they might then sell on unfavourable terms. The order must be to carry out the contracts, if the trustees can satisfy the Court that they are beneficial, with a direction, under the 24th section of the act, to apply the proceeds without any further application to the Court.

(1) It will be seen, on reference to the cases cited by his Lordship, that the discussion on them turned upon the *presumption* of negligence against the defendant, under certain circumstances, where the facts constituting the cause of the accident *were not known*.

ADMIRALTY.

July 10, 1866.

" THE LADY JOCELYN."

12 Jur. N.S. 965.

Collision—Sailing ship and ship under steam—Rules, articles 15, 18, and 19.

SHIPPING. G.—*The 15th article of the sailing rules provides, that "If two ships, one of which is a sailing ship, and the other a steam ship, are proceeding in such directions as to involve risk of collision, the steam ship shall keep out of the way of the sailing ship."*

Article 18. "*Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article.*"

Article 19. "*In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger.*"

A collision took place between a sailing ship and a steam ship on a dark night, the wind S. S. E., the sailing ship steering N. E. by E., the steam ship S. S. W., so that the lights of the sailing ship were seen about four points on the starboard bow. The sailing ship, instead of keeping her course, ported her helm; thereupon the helm of the steam ship was put hard a port, and her engines were reversed:—Held, that the steam ship was solely to blame for the collision.

Collision.—This was a cause of damage instituted by the owners of the late barque Heart of Oak, and the owners of the cargo laden therein, against the steam ship Lady Jocelyn.

The petition alleged that the barque Heart of Oak, of 297 tons register, or thereabouts, sailed from Aguilar, on the coast of Spain, on or about the 13th April, 1866, laden with a cargo of lead and grass, bound to Shields; that at about 2.30 a.m. on the 25th of the same month, the weather was dark, but clear, and the wind was blowing strong from S.S.E., and the barque, in the prosecution of her voyage, was in the Bay of Biscay, proceeding under double-reefed topsails, foresail, mainsail, jib, and foretopmast-staysail, steering N.E. by E., and making about from seven to eight knots an hour, with a good look-out being kept from on board her; that whilst The Heart of Oak was so proceeding, a bright white light, which afterwards proved to be the masthead light of the steam-ship Lady Jocelyn, was seen on the port bow, bearing about N.N.E., and at the distance of from four to five miles, and immediately reported, and thereupon the Admiralty regulation lamps were lighted and exhibited on board The Heart of Oak, and The Heart of Oak was kept on her then course in the expectation that The Lady Jocelyn would keep out of her way. The Lady Jocelyn, instead of keeping out of the way of The Heart of Oak, approached her, and caused danger of collision, whereupon the master of The Heart of Oak was called from below, and came on deck, and immediately began hailing The Lady Jocelyn, and by his order the helm of The Heart of Oak was ported; but The Lady Jocelyn ran into and struck The Heart of Oak on her port side, and did her so much damage that she shortly afterwards went down, and the whole of her crew, with the exception of one who was saved by the boat of The Lady Jocelyn, were unfortunately drowned; that the collision, and the damages and losses consequent thereon to The Heart of Oak, were caused by the negligent and improper navigation of The Lady Jocelyn, &c.

The defendants, in their answer, alleged that The Lady Jocelyn was an iron auxiliary screw steam ship of 1692 tons registered tonnage, with engines

of 350 horse power, and at the time of the collision in question was bound from London and Portsmouth for Gibraltar and Malta, with troops and Government stores; that on the 25th April, 1866, *The Lady Jocelyn*, in the prosecution of her aforesaid voyage, was in the Bay of Biscay. Shortly before three o'clock a.m., the wind was blowing from S.S.E., the weather was thick and cloudy, with a small rain, and a heavy confused sea, *The Lady Jocelyn* was steering S.S.W. by the standard compass. She had the foretopmast-staysail and the fore, main, and mizen trysails set, and was going at the rate of about five and a half knots an hour; that *The Lady Jocelyn* had her proper lights duly fixed and burning brightly, and a good and efficient look-out was being kept on board her; that in these circumstances the red light, and almost directly afterwards the green light, also of a vessel (which proved to be *The Heart of Oak*), suddenly appeared about a quarter of a mile off, and about four points on the starboard bow of *The Lady Jocelyn*; it being apparent to those in charge of *The Lady Jocelyn*, that if *The Heart of Oak* kept her course, as she was bound and ought to have done, she would pass clear astern of *The Lady Jocelyn*. The latter's course was not altered, but *The Heart of Oak*, instead of keeping her course, suddenly and improperly ported her helm, thereby shutting in the green light, and endeavoured to cross the bows of *The Lady Jocelyn*, thereupon the helm of *The Lady Jocelyn* was put hard a-port, and the engines were stopped and reversed, but she nevertheless came into collision with *The Heart of Oak*; that prior to the collision, *The Heart of Oak* was not carrying her proper lights duly burning, and her lamps were not lighted until she was close to *The Lady Jocelyn*, when they were immediately seen; and that the collision was solely caused by the neglect, default, and mismanagement of *The Heart of Oak* and those on board thereof, and especially in not carrying lights pursuant to the regulations, and in improperly porting her helm instead of keeping her course, &c.

Dr. Deane, Q.C., and E. C. Clarkson appeared for the plaintiffs.

Brett, Q.C., and Pritchard, for the defendants.

The evidence on behalf of *The Lady Jocelyn* was to the effect, that she was steering about S.S.W.; that a red light was seen about four points on the starboard bow, then a green light, which was almost directly afterwards shut in, shewing that the approaching vessel had ported her helm; that the engines of *The Lady Jocelyn* were then stopped and reversed, and her helm put hard a-port; that the collision then took place; that had both vessels kept their courses, *The Heart of Oak* would have passed under the stern of *The Lady Jocelyn*, but that the barque hauled her wind, and thereby caused the collision.

The evidence given by a seaman, the only person saved from the barque, was, that the mast head light of *The Lady Jocelyn* was first seen from two to three points on the barque's lee bow, about three miles off, and then a lot of bright white lights; that he then ordered the regulation lights to be lit; that he afterwards saw the green light of *The Lady Jocelyn*; and that he luffed by the captain's orders.

Dr. LUSHINGTON, in his address to the Trinity Masters, said—Gentlemen, in this case we have, in the first place, to consider which of the regulations were applicable to these two vessels. The one, *The Lady Jocelyn*, is a steam vessel; the other, *The Heart of Oak*, is a sailing vessel. The 15th article enacts, "If two ships, one of which is a sailing ship and the other a steam ship, are proceeding in such directions as to involve risk of collision, the steam ship shall keep out of the way of the sailing ship." According, then, to the evidence which has been produced in this case, were these vessels approaching each other in such directions that there was a risk of collision? Because if that were the case, then by the terms of this article it was the duty of the steamer to keep out of the way of the sailing vessel. The evidence on behalf of the steamer is, that she descried *The Heart of Oak* bearing about four points on the starboard bow, and that under these circumstances she apprehended there was no danger of collision, and, consequently, she did nothing till

immediately antecedent to the collision itself, when she stopped, and reversed her engines. Now, assuming the evidence on the part of the steamer to be true and correct, viz. that *The Heart of Oak* was four points on her starboard bow, were the vessels proceeding in such directions as to involve risk of collision? For if so, it was the duty of the steamer to keep out of the way. I have taken this case so far entirely on the evidence of those on board the steamer. On behalf of *The Heart of Oak* there is only the testimony of one individual, the rest having been unfortunately committed to the deep. But if I understand the evidence that he has given, it is totally different from that given by those on board the steamer. He says, he saw the light of *The Lady Jocelyn* from two to three points on the barque's lee bow. Now, if that were so, I can only repeat to you the question I put. Taking the evidence of the steamer, and supposing that she was seen from two to three points on the barque's lee bow, did the case fall within the fair meaning of this 15th article; and if it did, was not the steamer to blame? I confess I feel great difficulty in putting two such contradictory statements to you, but I have no means of reconciling them.

The next question will be, whether any blame is to be attributed to those on board *The Heart of Oak*? That there was very gross neglect on the part of the master, who is unfortunately gone, in sailing upon such a night as this, entirely regardless of those directions which command vessels to have lights burning, there can be no doubt whatever; and there is no semblance of an excuse for this very gross neglect. But then we have to consider whether this neglect to exhibit lights for some time antecedent to the collision was in any way the cause of the collision; whether it prevented the steamer seeing *The Heart of Oak* at an earlier period, and taking more active measures to avoid the collision. According to the evidence, it is left doubtful as to the precise time the lights were hoisted. The only clear evidence is, that it was after the steamer's lights were seen. That is the only fact I can fix on as to the time the lights were so exhibited. However that may be, I think it is admitted that those on board the steamer saw the lights of *The Heart of Oak* from a quarter of a mile to half a mile off antecedent to the collision. Looking at all the facts of the case, I put it to you, whether not hoisting the lights in due time, according to the directions given, prevented the steamer from taking measures to avoid this collision. This seems to me to be about the most important part of this case; but there is another part of the case which must be adverted to. What did *The Heart of Oak* do? According to the evidence, and according to the third paragraph of the petition, "*The Lady Jocelyn*, instead of keeping out of the way of *The Heart of Oak*, approached her, and caused danger of collision, whereupon the master of *The Heart of Oak* was called from below, and came on deck, and immediately began hailing *The Lady Jocelyn*, and by his order the helm of *The Heart of Oak* was ported; but *The Lady Jocelyn* ran into and struck *The Heart of Oak* on her port side," &c. Now, did she disobey the direction which is given by one of the subsequent rules, namely, by the 18th rule—"Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article," the 19th [which see above.]

I put it to you, then, in the first place, whether by porting her helm *The Heart of Oak* violated the 18th article; and, in the second place, whether there were any particular circumstances in the case which would justify her departing from that rule according to the directions given in the 19th article. These are the points for your consideration.

The Court and Trinity Masters retired, and on their return,

Dr. LUSHINGTON said—We certainly have had to steer our way through this very conflicting evidence, and it is not an easy matter to come to a safe conclusion, but we are of opinion that *The Lady Jocelyn* is to blame for this collision.

LORDS JUSTICES, Dec. 14, 1866.

Ex parte HARRISON, *re* HARRISON AND BAILLIE.

12 Jur. N.S. 994; L. R. 2 Ch. 195.

Bankruptcy Act, 1861, section 159—Trading with fictitious capital—Borrowed capital—Contracting debts without reasonable expectation of payment.

BANKRUPTCY. G.—*A trader drew bills on persons of no substance, and then got them discounted at a high rate of interest:—Held, that this was not trading with "fictitious capital," within the meaning of the 159th section of the Bankruptcy Act, 1861. Overdrawing a banker's current account does not amount, within the same section, to contracting a debt without reasonable expectation of payment.*

This was an appeal from an order of Mr. Commissioner Perry, suspending for two years the order of discharge of Mr. Harrison, a bankrupt, and refusing him protection.

Messrs. Harrison & Baillie carried on business at Waverton, near Chester, and in Liverpool, as manure manufacturers and merchants. Harrison resided at Liverpool, and managed the sales and financial part of the business; Baillie superintended the manufacture at Waverton. The firm had very little capital, and Harrison, in order to raise money for the purposes of the business, was in the habit of drawing bills upon persons of no substance, and getting them discounted by a Mr. Tuxford, at a very high rate of discount, averaging about 20l. per cent. per annum. This the commissioner held to be a trading with fictitious credit, within the meaning of the 159th section of the Bankruptcy Act, 1861.

The bankrupt had overdrawn his banking accounts with Messrs. Williams, of Chester, to the amount of 117l. 6s. 10d., and the commissioner was of opinion that this amounted to a contracting a debt without reasonable expectation of payment, within the 159th section of the act.

The learned commissioner, on both these grounds, made the order complained of. Baillie, the partner, had obtained his immediate discharge without opposition.

Bacon, Q.C., and *Yate Lee*, for the bankrupt, contended that the transactions with Tuxford amounted to nothing more than a trading with borrowed capital; and there was nothing in overdrawing the banking account, which might happen in the case of a trader every day.

De Gez, Q.C., and *E. Cutler*, for the assignees.

Sir G. J. TURNER, L.J.—The two points raised are—first, whether the bankrupt can be said to have traded by means of fictitious capital; and, secondly, whether the debt to the bankers was contracted without a reasonable or probable expectation of payment, within the meaning of the Bankruptcy Act, 1861.

With regard to the first point, I am far from saying that there might not be a case in which trading by means of accommodation bills would amount to a trading with fictitious capital. I refer to a case in which a sum of money is paid to persons to accept bills, and the bills are used for the purpose of carrying on the trade. But here the facts are, that the bankrupt discounted the bills with Tuxford, and carried on his trade by means of the money so obtained from Tuxford. There was no trading by means of the bills. In truth, what was done comes to nothing more than this—Tuxford agreed with the bankrupt to advance money upon the acceptances; but it was with the money, not with the bills, that the trade was carried on. I cannot think that this was trading with fictitious capital, within the meaning of the act.

As to the second point, this was merely a case of an overdrawn banking account. The money was not borrowed from the bankers upon the faith of

any representation made by the bankrupt. I do not think that this amounts to contracting a debt without a reasonable expectation of paying it.

Sir H. CAIRNS, L.J.—I am of the same opinion. So far as regards the debt with Messrs. Williams, it seems to me, that as soon as we understand the character of it, it is impossible to say that it was a debt contracted without a reasonable expectation of paying it, within the meaning of the statute.

As to the other point, this is, so far as I know, the first time this Court has been called upon to put a construction upon these words in the act of 1861. It seems to me rather difficult to understand what their meaning is. I have a strong opinion that they were intended to apply to a case in which a trader obtains the discount of accommodation bills upon a representation that those bills had their foundation upon a real transaction; but whatever be the meaning of those words, I have no doubt that the transactions which took place in the present case are not within those words. I have no doubt that Tuxford was the man of capital to whom this trader looked for the means to carry on his business. The money required might have been obtained from him by a loan; and what was actually done amounts indirectly to this. It may have been very censurable to carry on trade by means of borrowed capital; but that is not the offence contemplated by the statute.

KINDERSLEY, V.C., Nov. 3, 1866.

Re THE TRUST RELIEF ACT, AND Re DEVEREUX WALL'S WILL.

12 Jur. N.S. 995.

Charity—Bequest to a man and his assigns—Permanency of gift.

CHARITY. C.—*A testator left a certain sum to A. during his natural life, and his assigns, in trust to defray the expenses of a certain chapel:—Held, that this constituted a permanent gift, and not terminable at A.'s death.*

The question in this case was, whether a certain sum of 500*l.*, given by Mr. Devereux Wall's will to Mr. Hudson and *his assigns*, in trust for the benefit of a certain dissenting chapel, was a permanent gift, or merely to last during the life of Mr. Hudson.

Baily submitted the case.

Wood, on behalf of the chapel, contended that the word "*assigns*" was in this will to be considered as equivalent to "*executors*."

Wickens, for the Attorney General, took the same view.

Sir R. T. KINDERSLEY, V.C.—It appears to me, judging from the language used, that it was intended to make a permanent gift for the benefit of this charity. A sum of 500*l.* stock is first given beneficially to Mrs. Pickering, for her own use during her life; and after her death is, either permanently or during the life of Mr. Hudson, dedicated to the purposes of the charity. This stock is to be transferred to him, and held by him in trust for the charity for the term of his natural life; and then follows a second gift of 200*l.* to the same T. Hudson, in trust for and during his natural life, *and his assigns*, for the purpose of defraying the expenses of a certain place of worship immediately adjoining my premises. The purpose of the testator is clear any way, namely, to defray the expenses of this chapel. If it was intended that the benefit should last only during the life of Mr. Hudson, I do not think there would have been that direction for the transferring of the stock—a direction not contained in the gift to Mrs. Pickering. The word "*assigns*" was meant, I think, to shew that the trust was not confined exclusively to Mr. Hudson, but that after his enjoyment he might convey it to his legal personal representatives.

It is admitted that there was a place of worship there at that time; and it may be regarded as as permanent as any other dissenting chapel ordinarily is. The purpose of the gift is clear. If Mr. Hudson had had to bear any expenses in connexion with this chapel, it might have been that this was a gift to him to cover his personal expenses in his lifetime; but this has not been suggested. I think, therefore, that this was intended as a permanent gift for the benefit of this chapel, and that it was intended that he, while he lived, should be the trustee; and that there was an ulterior design that the benefit should be extended after his death.

LORD ROMILLY, M.R., July 27, 1866.

Re JOYCE'S ESTATE.

12 Jur. N.S. 1015; L. R. 2 Eq. 576.

Trustee Act, 1850—Bankruptcy Act, 1861, sect. 110—Assignee—Trustee.

TRUST AND TRUSTEE. C.—*After the appointment of assignees under a bankruptcy, the proceedings were suspended under the Bankruptcy Act, 1861, sect. 110, reserving the rights and jurisdiction of the assignees and of the Court. One of the assignees had gone abroad:—Held, that he was a trustee within the meaning of the Trustee Act, 1850.*

This was a petition under the Trustee Act, 1850, for an order vesting real estate of a bankrupt, one of whose assignees had resigned his office, and was out of the jurisdiction of the Court, in the remaining assignees. The bankrupt Charles Joyce was adjudicated a bankrupt in May, 1865, and in the following June, Astley, Oppenheim, and Cameron were appointed creditors' assignees of his estate. At the date of the bankruptcy, Joyce was entitled to certain lands in reversion in fee-simple expectant on the death of his wife. At a meeting of the creditors in August, 1865, it was resolved under the 110th section of the Bankruptcy Act, 1861, that proceedings in bankruptcy should be suspended, and that the estate should be wound up and administered by the assignees out of bankruptcy, in like manner (so far as the differences in circumstances could admit) as it would have been wound up if the proceedings in bankruptcy had not been suspended, but not so as to deprive the Court or the assignees or creditors of any jurisdiction or right which it or they possessed under the Bankrupt Law Consolidation Act, 1849, or the Bankruptcy Act, 1861. In November, 1865, Cameron, one of the assignees, resigned his office, and soon afterwards went to live in Australia. His resignation was accepted in May, 1866, at a meeting of the creditors called for the purpose under the 124th section of the Bankruptcy Act, 1861. In January, 1866, Joyce having obtained his discharge, the assignees sold him the reversion in the land; and before any conveyance was made, Joyce resold it to Richard Aston. The petition, the object of which was to get in the legal estate vested in Cameron by his appointment as assignee, was presented by Joyce and the two remaining assignees, Astley and Oppenheim.

Jessel, Q.C. and *Lawrence*, for the petitioners, contended that the assignees were trustees within the meaning of the Trustee Act, 1850.

Waller, for the sub-purchaser.

LORD ROMILLY, M.R., thought the assignee was a trustee within the meaning of the act, and that the order might be made.

Note for reference—Ince's Trustee Act, 80, 2nd ed.

IN THE COURT OF EXCHEQUER.

POLLOCK, C.B., BRAMWELL, CHANNELL, and PIGOTT, BB., Nov. 15, 25, 1865.

Nov. 15, 25, 1865.

GORDON AND ANOTHER v. THE VESTRY OF ST. JAMES,
WESTMINSTER.

80 J. P. 24.

Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120)—Drinking fountain—Sewers—Gully drain—Liability of vestry for damage by leakage of water from a parish drain out of repair—Negligence—Evidence.

LONDON, D.—*The defendants, in whom, by virtue of the Metropolis Local Management Act, 1855, all the drains and sewers in the parish, and the control and management of the same were vested, gave leave to the Metropolitan Free Drinking Fountains Association, to erect a drinking fountain near to the plaintiff's premises, and undertook to pay for the supply of water thereto. The waste water was carried off by a pipe which, by leave of the defendants and under the superintendence of their surveyor, was connected with a gully drain, which ran close to the wall of the plaintiff's cellars, and descended into the main sewer underneath the same. The fountain was opened in the beginning of 1862, and at the end of 1863 a quantity of water which had escaped from the gully drain came into the plaintiff's cellar and damaged wine which was stored there. On being opened it was found that the drain had leaked in consequence of a subsidence of the soil through which it passed; but no satisfactory opinion could be arrived at as to the cause of such sinking. A new pipe-barrel drain was then put in by the defendants, and no leakage had taken place since. The gully drain was forty or fifty years old, and was built in the manner in which drains of that description were then constructed. The defendants did not know of the state of the drain until the damage was done to the plaintiffs' stock, and had no means of ascertaining its condition, either in 1855 when it came into their hands, or since, except by opening it, which they did not do, as they were not aware of its being out of repair:—Held, that, under the above state of facts, there was no evidence of negligence on the part of the defendants, and therefore the plaintiffs could not recover the damage caused to their stock by the percolation, through the walls of their cellars, of the water which had escaped from the defective drain.*

This was an action by the plaintiffs, who are wine merchants carrying on business in Argyle Place and King Street, Regent Street, in the parish of St. James, Westminster, against the defendants, the vestry of the said parish, to recover damages for injury sustained by water coming into their wine cellars and spoiling their wine, under the circumstances hereinafter set out.

The trial took place in Trinity Term, 1864, at the Middlesex sittings, before Martin, B., and a special jury, when a verdict was found for the plaintiffs by consent, subject to a special case to be stated by a barrister for the opinion of the court above, as to the defendants' liability; the question of damages being at the same time referred to an assessor named by the Judge, who subsequently assessed them at 800*l.*

To the declaration, which it is needless to set out here, the defendants pleaded, not guilty (by statutes 25 and 26 Vict. c. 102, ss. 68, 69, 70, 106, 112, 116; 18 & 19 Vict. c. 120, ss. 68, 69, 70, 71, 72, 250, 251.) Notice of action was duly served on the vestry pursuant to the 25 & 26 Vict. c. 102, s. 106, more than one month before action brought. The defendants are a vestry duly constituted for the parish of St. James, Westminster, under the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), under which act and the Amendment Acts (19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104; 24 & 25 Vict. c. 61; and 25 & 26

Vict. c. 102), they act. Sections 68 and 69 of the original act vest the drains and sewers, except the main sewers, in them, and contain provisions for their maintenance and reparation. In August, 1861, the vestry gave permission to the Metropolitan Free Drinking Fountains Association to erect a drinking fountain on the north side of Argyle Place, nearly opposite to the plaintiff's premises. In September, 1861, the association accordingly erected the fountain, and carried off the surplus water by a waste pipe which they connected with a gully drain, which ran from a gully in Argyle Place, opposite to the plaintiff's house, close to their wine cellars, and then descended into a main sewer underneath their cellars. This connection of the waste pipe with the gully drain was made under the superintendence of the surveyor appointed by the vestry. The fountain was opened for the use of the public in April, 1862, and water supplied to it at the rate of fifteen gallons every hour, day and night, for which the vestry undertook to pay. More water was wasted than used, and the waste water passed through a waste pipe into the gully drain before mentioned. In September, 1863, a large quantity of water found its way into the cellars of the plaintiffs, and on examination it was found that the water came through the mortar of the wall of the cellars nearest to the gully drain. The water remained in the cellars several days, and caused damage to some of the wine there, the amount of which has been assessed at 800*l*. Soon after this damage was done, the gully drain was opened by order of the vestry, and was then found to be much out of repair; the earth beneath the drain, on which it had originally rested, having sunk, leaving the bottom of the drain unsupported, and so causing it to crack and become leaky. The consequence of this state of the drain was, that the water which flowed from the waste pipe of the fountain had escaped from the drain, and accumulated at the back of the wall of the plaintiff's cellars, and eventually forced its way through the mortar of the walls into the cellars, and thus caused the damage complained of. There was no leakage in the waste pipe of the fountain. The vestry substituted a new pipe barrel drain for the old brick drain, the bottom of which was so out of repair that it fell in while their servants were examining it, and since the new drain has been substituted there has been no escape of water into the plaintiffs' cellars. The gully drain was made before the plaintiffs' cellars were built. It was a brick drain, built in the manner, and of the materials, in and of which such drains were built forty or fifty years ago, when such drains were seldom made quite watertight. The wall of plaintiffs' cellars through which the water percolated, was built against the gully drain, and was on an average sixteen inches thick, faced on the inside with brick, and rough on the outside. It has not bulged or cracked, and was built of sufficient strength to resist any pressure to which cellars in such a position are usually exposed, and, but for the escape of water from the drain, no damage would have been sustained by the plaintiffs. The cellars have been occupied as wine cellars for forty years, and until the water found its way into them in September, 1863, they had always been perfectly dry and free from damp, and fit for use as wine cellars. The soil beneath the gully drain was made ground, composed of old bricks, bits of stone, and coals. The sinking of this soil from the bottom of the gully drain was the cause of its cracking and leaking. On behalf of the plaintiffs evidence was given before the arbitrator that the sinking of the soil arose from its not having been well and sufficiently rammed when the drain was made. On the part of the defendants evidence was adduced to show that the probability was, that the persons who built the walls of plaintiffs' cellar, while building it, removed part of the soil beneath the drain, loosened it, and so caused it to sink. The arbitrator stated that, at this distance of time, it was impossible to form any satisfactory opinion of the cause of the sinking of the soil.

When the plaintiffs became tenants of the cellars in 1855, they found them internally dry, and in good repair, and they did not know, and had no means of knowing, the condition or state of repair of the gully drain, or of the outside of their wall, or its position with reference to the drain.

When, in 1855, the sewers and drains became vested, under the 18 & 19 Vict. c. 120, in the vestry, no plans or other materials came into their possession from which they could ascertain the position and state of repair of this particular drain, and of the wall of the plaintiffs' cellar, unless they had opened the pavement and examined it. It is not usual so to examine drains and sewers, unless there is reason for supposing that they need repairs, as the opening of such drains causes inconvenience to the public traffic in the streets. The vestry had not examined or repaired this drain until September, 1863, after the water had escaped into the plaintiffs' cellar, as before that time they had no notice that it was out of repair.

The vestry have always employed competent surveyors, officers and workmen.

The question for the court is, whether the defendants, as the lawfully constituted vestry of the parish within which the said drain is situated, are, under the above-mentioned circumstances, liable to the plaintiffs for the damage sustained by them. If the court should be of opinion that the defendants are so liable, then the verdict is to stand, and to be entered for 800*l.*; but if the court should be of opinion that the defendants are not liable, then the verdict is to be entered for them.

The points made on behalf of the plaintiffs were: 1. Under the circumstances stated, the defendants are liable to the plaintiffs in damages for the injury done to the wine in their cellars by the entry of the water thereto in manner and from the causes stated. 2. That the defendants were guilty of negligence in permitting the Metropolitan Free Drinking Fountains Association, to erect their fountains so near to the plaintiffs' cellars, and in allowing them to carry their surplus water into the gully drain as stated in the case, without first taking proper measures to ascertain whether or not the said gully drain was a sufficient and proper gully, and in a proper state of repair to carry off such surplus water, and that they were liable in damages to the plaintiffs for the damage done to their stock, resulting from such negligence.

The points argued on behalf of the defendants were:—1. There is no duty imposed on the defendants as that stated in the several counts of the declaration, nor any facts stated in the case sufficient to raise such duty. 2. There is not any, or at all events any sufficient, evidence of any neglect of any duty on the part of the defendants. 3. Assuming the duty and breach of duty relied on, the plaintiffs contributed to the injury sustained by them by their own imprudence and neglect, and that the injury being only partially, if at all, caused by the neglect of the defendants, they are not liable. 4. Assuming neglect or misfeasance on the part of the officers of the defendants, defendants are not liable, inasmuch as it is found that the officers were proper and competent officers. 5. Assuming that the defendants by their neglect caused the injury complained of, still they are not liable, inasmuch as they are a corporation acting in trust for the public, and having no funds which they could lawfully apply to compensate the plaintiffs. 6. It would have been an illegal act on the part of the defendants to apply their funds to compensate the plaintiffs. 7. Assuming the permission given by the defendants to erect the drinking fountain to be an act beyond the authority given to them by the statute constituting them a vestry, it is not an act capable of being done by the vestry as such, or for which the corporate fund can in any way be touched.

Temple, Q.C., and *H. T. Cole*, arguing for the plaintiffs, contended that the defendants were liable, citing 18 & 19 Vict. c. 120, ss. 68 and 69; *Ruck v. Williams* (27 L. J. Ex. 887).

CHANNELL, B., referred to the case of *Fletcher v. Rylands* (29 J. P. 599), and the judgment of *BRAMWELL, B.*, therein.

Keane, Q.C., and *R. M. Harrison*, for the defendants, were not called upon to argue, but the Court reserved to them the right to be heard if it should become necessary.

Cur. adv. vult.

November 25. POLLOCK, C.B.—In the course of the argument in this case a few days ago, the court intimated their opinion, and indeed, their reasons for it, but they suggested that, instead of their giving judgment for the defendants, the plaintiffs should be nonsuited, and bring a fresh action; and certainly the court thought that they had disposed of the case. It turned out, however, that that arrangement would confer no benefit upon the plaintiffs, for there being in the present case a more special limitation than in the ordinary statute with regard to the commencement of actions, the plaintiffs would be too late to bring another action, and, therefore, *Mr. Temple*, on the part of the plaintiffs, after having made this discovery, declined to be nonsuited, and wished rather that the court should give judgment, when, if it were against him, he could take the case into a court of error. We think that our judgment should be for the defendants. I do not judge it to be necessary now to give any elaborate judgment beyond saying that, in this court, we have decided already that if there be no evidence of negligence the defendant is entitled to judgment. We think that there was, in the present case, no evidence of negligence on the part of the defendants, and, therefore, we think the plaintiffs are not entitled to recover. *Mr. Temple* may take the case to a court of error if he thinks fit.

CHANNELL, B.—I consider, if I were in a situation to draw the inference of negligence in the present case, that it would be concluded by a decision, though not an unanimous one, of this court in the case of *Fletcher v. Rylands (ubi sup.)*, during the last term. I am not sure that, if I were at liberty to reconsider the matter, I should not agree with the view of my brother BRAMWELL, who was the *dissentient* Judge in that case, but I feel bound by the opinion of the majority of the court, and that governs the present case, unless we could draw the inference of negligence, which I am unable to do.

PIGOTT, B.—I am of the same opinion. I thought at the time of the argument that there was some slight evidence of negligence; but, having since carefully read through the case, I cannot discover that there was any; and I therefore agree in the judgment of the court.

Judgment for the defendants.

IN THE QUEEN'S BENCH.

Nov. 27, 1865.

BATES, appellant, v. FINLAY, respondent.

30 J. P. 55.

Master and servant—Seamen's wages—Apprentice—Engagement as mate—Authority of master.

SHIPPING, A.—*F.*, an apprentice on board a ship, under articles which would expire on 20th December, was in a foreign port; and as the ship was, in the October previous, about to start homewards, was engaged by the master as third mate, at wages of 3*l.* a month. The ship did not arrive home till after the 20th December. *F.* having summoned the owner of the ship for wages as third mate from October:—Held, the justices ought only to allow wages from December, the time at which the apprenticeship expired, and up to which time the owner was entitled to *F.*'s services without payment.

Case stated under 20 & 21 Vict. c. 43.

Mr. Edward Bates, the now appellant, and then defendant, is a shipowner, and was summoned before the under-named justices for a sum of 33*l.* 9*s.* for balance of wages alleged to be due to Benjamin Atkinson Finlay, the then

plaintiff, and now respondent, as third mate on board the ship *Edward Percy*, partly belonging to the appellant and partly to other owners. It was admitted by the appellant that in the month of October, 1863, the respondent signed articles as third mate, at the request of the master of the *Edward Percy*, and the respondent proved that the shipping master told him the wages were 3*l.* a month, whereby the respondent claimed for fifteen months' wages, less 1*l.* 11*s.*, which had been paid to him.

It was admitted by the respondent that he was the apprentice of the appellant, and of the appellant only, for the term of seven years from the 20th December, 1858, or until he attained the age of twenty-one years, by virtue of the ordinary articles of apprenticeship, as sanctioned by the Board of Trade, and duly executed, and that while serving his apprenticeship the master had placed him on the ship's articles as third mate, and that the terms of apprenticeship expired during a voyage of the *Edward Percy*.

The appellant urged that inasmuch as he, the appellant, had made a specific contract with the respondent, the master could not by his authority as master only, annul such contract, and substitute another for it, and that the master had no right whatever during the term stated in the indentures of apprenticeship to make any contract or interfere with the respondent so as to vary his relation with his master during the continuance of the term of his apprenticeship without the express consent of the appellant.

The magistrates held that the appellant was bound by the act of the master, and that the respondent being placed on the ship's articles, as third mate, they could not recognise the indentures of apprenticeship, made an order for 32*l.* 16*s.* 10*d.*, but the appellant being dissatisfied therewith applied for and obtained this case.

The question, therefore, for the opinion of this court is whether, assuming the *bona fides* of the transaction, the above state of facts rendered the appellant liable to pay the 32*l.* 16*s.* 10*d.* If so, the order to stand, if not, to be quashed.

R. GLADSTONE.

W. J. LAMPORT.

The Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 188, enacts, that any seaman or apprentice, or any person duly authorized on his behalf, may sue in a summary manner before any two justices of the peace acting in or near to the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any person upon whom the claim is made is or resides, for any amount of wages due to such seaman or apprentice not exceeding fifty pounds over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable, and every order made by such justices in the matter shall be final.

Potter, for the appellant, contended that the master of the ship had no implied authority to convert the apprentice into a seaman, and thereby cause the master to pay wages for a period when the master was entitled to the apprentice's services for nothing. The agreement was, therefore, entirely void, and the justices ought to have dismissed the information.

Littler, for respondent, contended that as the apprenticeship was known to come to an end in the middle of the voyage, the master, at least while in a foreign port, had an implied authority to engage the apprentice as a third mate, and to bind the owner thereby. If the master had not so engaged the apprentice he would have required to engage another person as third mate, and to pay wages for the whole voyage; and if so, he must be taken to have had implied authority to engage this apprentice as he had done, and on the terms stated.

MELLOR, J.—I think that during the apprenticeship the owner of the ship had a right to the services of the apprentice, and that the master could not, by such an agreement as this, make the wages relate back to the beginning of the voyage. As, however, the apprenticeship came to an end during the voyage, I think the master had then power to engage the apprentice at wages for the rest of the voyage. The justices, therefore, ought only to have allowed wages

from that time. They have asked us only the question whether they were right in allowing the wages for the whole voyage, and we can only, therefore, remit the case with our opinion that they should only allow the wages from the time of the apprenticeship ceasing.

LUSH, J., concurred.

Remitted with opinion.

IN THE QUEEN'S BENCH.

Feb. 3, 1866.

SULLIVAN, appellant, v. RICHARDS, respondent.

30 J. P. 118.

Metropolitan Police Act—Possession of goods unlawfully obtained—Manual possession—2 & 3 Vict. c. 71, s. 24.

CRIMINAL LAW, C.—*On a steamer arriving at its destination, S., a passenger, told a porter to take up a box of his (but which was the property of R., another passenger) and carry it ashore, S. accompanying the porter. The porter being stopped, and S. charged under 2 & 3 Vict. c. 71, s. 24, with having in his possession the box unlawfully obtained:—Held, S. was properly convicted, and that he was in possession of the box by the hands of the porter accompanying him.*

Case stated under 20 & 21 Vict. c. 43.

On 14th August, 1865, the appellant was brought before me by a constable of the city, charged with having unlawfully in his possession, and conveying a box, a sailor's hammock or bed, and a bag containing wearing apparel belonging to the respondent, the same being reasonably suspected of being stolen or unlawfully obtained, and as the appellant did not give an account, to my satisfaction, how he came by the goods, I convicted him of a misdemeanour, as declared by the Metropolitan Police Act, 2 & 3 Vict. c. 71, s. 24, and adjudged him to be imprisoned in the city of London house of correction, at Holloway, for one calendar month, with hard labour, from which he was liberated on 17th August last, on duly entering into a recognizance to appear at this justice room, should my determination be affirmed.

The 2 & 3 Vict. c. 71, s. 24 (referred to in the powers which are given by 3 & 4 Vict. c. 84, s. 6, to the city justices, and by 11 & 12 Vict. c. 43, s. 34, to one such justice), is as follows:—Section 24 enacts, that every person who shall be brought before any of the said magistrates charged with having in his possession or conveying in any manner any thing which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account, to the satisfaction of such magistrate, how he came by the same, shall be deemed guilty of a misdemeanor, and shall be liable to a penalty of not more than five pounds, or in the discretion of the magistrate, may be imprisoned in any gaol or house of correction within the metropolitan police district, with or without hard labour, for any time not exceeding two calendar months.

The 26th section enacts that when any person shall be brought before any such magistrate charged with having or conveying anything stolen or unlawfully obtained, and shall declare that he received the same from some other person, or that he was employed as a carrier, agent, or servant to convey the same for some other person, such magistrate is hereby authorized and required to cause every such person, and also, if necessary, every former or pretended purchaser, or other person through whose possession the same shall have passed, to be brought before him and examined, and to examine witnesses upon oath touching the same, and if it shall appear to such magistrate that any person shall have

had possession of such thing, and had reasonable cause to believe the same to have been stolen or unlawfully obtained, every such person shall be deemed guilty of misdemeanour, and to have had possession of such thing at the time and place when and where the same shall have been found or seized, and the possession of a carrier, agent, or servant shall be deemed to be the possession of the person who shall have employed such other person to convey the same, and shall be liable to a penalty of not more than five pounds, or in the discretion of the magistrate may be imprisoned in any gaol or house of correction within the metropolitan police district, with or without hard labour, for any time not exceeding three calendar months.

The evidence given before me by five witnesses upon oath was as follows:—

Michael Richards, of 11, Regent's Road, Bow Common, seaman, stated:—On Wednesday last I left my box, bed, and bag, now produced, with a friend, to be sent up to London by the Alexandra Steamer. I next saw the box on board the Alexandra Steamer at Fresh Wharf on Saturday evening. I never authorized the prisoner to take charge of it for me; he is a stranger to me.

Henry Latter, of No. 25, Camberwell Square, Chelsea, chief mate on board the Alexandra Steamer, stated:—I received the box, bag, and bed produced on board the Alexandra on Saturday, at Gravesend, from two watermen, with directions that it was to be left on board till called for that evening at Fresh Wharf. A letter for the captain. Jesse Lukes came with it. When we got to Fresh Wharf I saw a porter, the witness Darby, taking the box and bedding ashore; it was lying amidships. I spoke to him, and he told me something, and he put it down again, and then I saw the prisoner, who was wearing a light coat a little a-head, and I told him the porter said he had ordered him to take it on shore. The prisoner denied that he had given it to the porter, and the porter persisted that he had. The prisoner was then given into custody for taking the things by false pretences. He was a passenger on board our boat from Gravesend. He is keeper of a lodging-house for sailors.

James Darby, of No. 5, New Church Court, Strand, porter, stated, I work at Fresh Wharf as a porter. I was there on Saturday, and the prisoner showed me the box, bedding, and bag, and said they were his, and I took them up, and he went on a-head, and I followed him on shore. On getting ashore the captain stopped me, and I took the things back on board. The prisoner had just got up the gangway, and was brought back by the constable, and I then said that the prisoner had told me to take them ashore. He denied having told me to take them. He was given into custody, and he said he would make me if he had the chance. Cross-examined by the prisoner: I was on the steamer. You told me to follow you.

John Brettle, of No. 4, Montague Street, Spitalfields, porter, stated, I was at Fresh Wharf, and saw the last witness spoken to by the prisoner, and he pointed out the box and other things as they stood amidships. It was the only chest to be taken out of the vessel. The last witness was going on shore with it, and was stopped.

Samuel Hambroke, constable of the Fresh Wharf, stated, I saw the captain speak to the porter, and the prisoner was ahead of him. I went to the prisoner, and told him what the porter said, and he said he knew nothing of it. I wanted him to go back, and then he said the same to the captain. The porter repeated his statement, and the prisoner denied it. The captain then gave the prisoner into custody for attempting to steal it. I do not know the prisoner. I have known the porter Darby as being at work at the wharf for seven years, and Brettle longer than that; they are allowed to go on board the steamers.

On the part of the appellant it was contended, first, that the appellant had not, in point of law, possession of the goods in question; and, secondly, if actual possession was not necessary, that there was not sufficient legal evidence that the porter, Darby, who had those goods, was the agent or servant of the appellant within the meaning of 2 & 3 Vict. c. 71, s. 26, before cited, and, therefore, that the appellant was not liable to be summarily convicted.

I was, however, of opinion, that reading sections 24 and 26 of the 2 & 3 Vict. c. 71, together, as well as by the general law, actual possession of the goods by the appellant was not necessary; that the possession by the porter Darby, who was conveying the goods at a short distance from and within sight of the appellant, was the possession of the appellant, and that the evidence showed that the porter was the agent or servant of the appellant for this purpose, who, indeed upon the facts, might have been tried for stealing the goods, accordingly I gave my determination against the appellant, in the manner before stated.

The questions of law arising on the above statute, for the opinion of the Court of Queen's Bench, therefore, are,

1st. Whether actual possession of the goods in question by the appellant was necessary.

2nd. If not, whether there was evidence to justify me in finding that the porter Darby was the agent, or servant of the appellant for the purpose of the 2 & 3 Vict. c. 71, s. 24? . W. S. HALE, Lord Mayor.

Poland, in support of the conviction, contended that the conviction was clearly right, on the ground that the appellant had at the time the possession by the hands of the porter of a thing reasonably suspected of being stolen or unlawfully obtained within the 24th section. (He was stopped.)

Jenkins for the appellant, contended that manual possession must have been meant, and that it is not enough if the thing was not in the personal possession of the party, but in the hands of another.

BLACKBURN, J.—Why are we to say that when a man delivers a parcel to a porter to carry for him, it is not in the possession of the person employing such porter? If the employer were indicted for stealing the property, would the porter not be a competent witness against him?

Per CURIAM,—

Conviction affirmed.

IN THE QUEEN'S BENCH.

Feb. 3, 1866.

FLOWERS, *appellant*; RAINE, *respondent*.

30 J. P. 135.

Thames Conservancy Act—Throwing rubbish into river—Liability of owner of vessel for act of crew.

WATER AND WATERWAYS. A.—By the *Thames Conservancy Act*, 1864, section 74, whoever throws rubbish into the river Thames, incurs a penalty of twenty pounds; and where such offence is committed out of a vessel, the master and the owner shall be liable, so that the master and owner be not both punished in respect of the same offence. One of the crew of a barge, in the owner's absence, threw mud into the river:—Held, the owner was liable, though the act was done in his absence, and without his knowledge or consent.

This is a case stated by us, the undersigned, two of Her Majesty's justices of the peace in and for the county of Essex, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court upon a question of law which arose before us as hereinafter stated.

At a petty sessions holden at Ilford, for the division of Beacontree, in the county of Essex, on the 24th day of June last, an information was preferred by George Raine (hereinafter called the respondent,) against William Flowers, (hereinafter called the appellant,) charging the appellant with having on the 1st day of June, one thousand eight hundred and sixty-five, at the parish of West Ham, in the said county, unlawfully thrown into the river Thames there

situate, thirty tons of mud from and out of a certain barge called the "Plug," contrary to the form of the statute in that case made and provided.

At the same petty sessions another information was preferred against the above-named appellant, charging him with having on the 13th day of June, 1865, at the said parish of West Ham, unlawfully thrown into the river Thames there situate, thirty tons of mud, from and out of a certain barge called the "Charlotte," contrary to the form of the statute in that case made and provided.

The respondent, George Raine, is the inspector of nuisances appointed under the Thames Conservancy Acts, and the appellant is the owner of the two barges above mentioned.

The respondent deposed that on the days stated in the said informations he saw several men in the employment of the appellant throw mud from the said barges into the river Thames, but that the appellant was not present, nor was he in any way interfering with the said barges.

The informations against the appellant were laid under the acts of parliament 20 & 21 Vict. c. 147, s. 102, and 27 & 28 Vict. c. 113, s. 74, being the Thames Conservancy Acts, 1857 and 1864, and the following is a copy of each of the said sections:—The 102nd section in the first mentioned act is, "every person who shall unload or throw into any part of the river Thames, or on any shore or ground below the high water-mark of the river Thames, any rubbish, earth, ashes, dirt, mud, soil, or other matter, or allow any offensive matter to flow into the river Thames, shall forfeit for every such offence any sum not exceeding twenty pounds."

The 74th section in the second mentioned act, so far as is material, is, "if any person, without lawful excuse, (the proof whereof shall lie upon him), does any of the following things, namely, unloads, throws, or puts or causes or suffers to fall any gravel or other substance which has been used as ballast, or any stones, earth, mud, ashes, or rubbish, or any refuse from gas works or other manufactories into the river Thames or on the shore thereof, he shall for every such offence be liable to a penalty not exceeding twenty pounds."

Where any offence against the enactment is committed from and out of a vessel, the master and the owner of the vessel shall be liable to be proceeded against and punished under this enactment, so that the master and the owner of the vessel be not both punished in respect of the same offence."

Under the last of the above sections we convicted the appellant, William Flowers, as the owner of the said barges, in the penalty of ten pounds and costs for each of the offences charged in the said informations respectively, but the appellant being dissatisfied with our determination as being erroneous in point of law, we have, on his application, stated the foregoing case for the opinion of the Court of Queen's Bench, the question being:—

Whether under the said acts of parliament, appellant, as owner of the barges, can be convicted of the offences charged in the information, which were committed by persons in his employ at a time when the appellant, as such owner, was not present. If the Court should be of opinion that the said conviction was legally and properly made, then the said conviction is to stand, but if the Court should be of opinion otherwise, then the said informations are to be dismissed.

JNO. GURNEY FRY.

NATH. POWELL.

J. Brown, for respondent, contended that the sole question was, whether the owner of the barge could be convicted of an offence when the act was committed by persons in his employment, and during his absence. The act plainly puts the offence on the owner, and makes him responsible for what is done on board his barge, and it resolves itself chiefly into a pecuniary penalty. The case of the master being absent when the act was committed by the servant was expressly contemplated by the legislature, and hence the enactment at the end of the 74th section.

Coleridge, Q.C., for the appellant, contended that the enactment was

not intended to overrule the general law, which clearly settles that a master is not to be responsible for the criminal acts of his servant.

BLACKBURN, J.—I think the legislature plainly intended to make the owner of the vessel liable for the penalty, though the act was committed by his servant in his absence.

MELLOR, J., concurred.

Conviction affirmed.

IN THE QUEEN'S BENCH.

Jan. 11, 1886.

HUNTER v. SHARP.

80 J. P. 149.

Libel—Imputation of quackery—Justification—Particulars.

LIBEL AND SLANDER. I.—*In an action for libel imputing quackery and puffery, the court will not order the defendant, who pleads a justification, to give a list of his witnesses, or of the instances by which the alleged libel will at the trial be justified and proved.*

This was an action by the plaintiff, Dr. Hunter, against the printer of the *Pall Mall Gazette*, to recover damages for an alleged libel published under the form of a leading article, which was as follows:

Imposters and Dupes.—The modern system of easy advertising, and the facilities of the penny post, have many advantages, but they have also their attendant evils of no little weight. One of these evils is nothing less than a curse upon English society. Occasional exposures in the law courts and the newspapers have made us familiar with the advertising practices of a certain class of medical impostors, and with the misery they inflict upon their unhappy dupes. And now a series of recent proceedings in the Marylebone police office has revealed the existence of ramifications of the detestable system in question, for which few ordinary readers will have been prepared. Persons who turn over the pages of the cheap newspapers in search of the curiosities of advertising, will have noticed the frequent recurrence of a whole column purporting to give a consecutive series of extracts from a medical work on consumption by a person signing himself "Robert Hunter, M.D." If they have taken the trouble to read its uninviting paragraphs they will have found that they are a long rigmarole of some scientific declamation professing to expound to the non-professional invalid the causes and symptoms of disease of the lungs, and to prove that nobody knows how to cure it except this same Dr. Hunter, whose method is one of inhalation. On the face of all this there is nothing more than the puffery of the dealers in the various pills, potions, ointments, and liniments, who rejoice in the profusion of testimonials from innumerable correspondents, who bless the day that they first made their acquaintance. That any reputable physician would thus advertise for patients is, of course, out of the question; but, although these advertisements are free from the mysterious hints and suggestions, and the scarcely veiled offensive phraseology of the basest class of medical puffs, one is led to suspect the existence of very serious malpractices by observing the length and frequency of these recommendations of Dr. Hunter and his inhalations. When a man finds it worth his while to insert a very costly advertisement in several papers, and to go on with it from day to day or week to week, it is clear that his patients must be dupes of a very different class from the simple people who buy pills by the gross, and potions by the gallon. Nor need there be any actual difficulty in putting a stop to such advertisements by act of parliament. It should be an

indictable offence for any man to call himself a physician, surgeon, apothecary, or dentist, unless empowered to practise by the colleges or societies recognized by the law of the land. The assumption of all foreign medical degrees should be absolutely forbidden under the same penalties, whether claimed by English subjects or foreigners. English subjects are forbidden to assume any foreign title of rank without the permission of the crown. But what would be the evil of permitting some foolish gentleman to call himself "count" or "baron" compared with the mischief done by scoundrels who utter this base forged coin, and claim to be respected as qualified on the strength of some diploma obtained in Canada or New York.

Pleas.—1. Not guilty: 2. A general justification that the libel was true.

A summons had been applied for at judge's chambers, for an order to strike out the plea of justification, or to compel the defendant to give particulars. The judge refused to make the order.

H. Williams, now moved for a rule to the same effect, and contended that the article imputed that the plaintiff assumed a false degree or diploma, that there are ramifications of imposture, and that his patients are dupes, &c. The defendant ought to give a list of instances of these charges. The plaintiff cannot know what he is charged with, and ought to have information of specific acts: *Hickinbotham v. Leech* (10 M. & W. 363).

COCKBURN, C.J.—I am of opinion that the scope of the alleged libel, which this plea justified, was professional malpractice or quackery, whereas the other matter referred to was altogether unprofessional. The charge justified was founded upon the published letters of the plaintiff himself, which it was open to any one to criticise and comment upon. It was true the hearing at the police court was alluded to, but only as having incidentally revealed the system of quackery denounced. That system was the advertising of particular modes of cure, under the auspices and with the apparent authority of a medical degree obtained abroad, but which would be naturally supposed to have been conferred by some British college, and which thus was used to convey a sanction or authority which might not really belong to it; and further that the mode of cure thus published, and put before the world by every species of puffery, was purely illusory, and that in short, the whole system was one of mere puffery. Now, a public journal had a right to comment upon public actions of this kind, especially if they partook of the character of puffery. It was clear that this, at all events, was the scope of the alleged libel, and, therefore, the scope of the plea. There was no reference to any other matter; if there were, it would have been otherwise. The meaning of the libel and of the plea was this: "You the plaintiff, professing to describe yourself as a "doctor," represent yourself publicly as possessed of a perfect cure for consumption, or pulmonary complaints, which in reality is mere nonsense. You are taking people's money for what is doing them no good. Your pretended "degree" conveys the idea of a British degree, whereas it is not so. Your thus advertising for patients is unprofessional, and a course which no respectable physicians adopt. And in short, the whole thing is quackery, and in this way you are an imposter and a quack." Now, that being the substance and scope of the libel, is also the substance and scope of the plea, and it is perfectly intelligible and sufficiently explicit. No other matter could be open to the defendant to plead under the plea. That being so, the plea was fairly allowable, and no "particulars" were required. The plaintiff must well enough know what it meant. The plea might be proved, either by scientific evidence upon the subject, showing that the mode of proof described in the plaintiff's letters, was purely illusory, or by calling persons who had adopted this plan of inhalation, and had found themselves no better or rather worse. On the other hand, it would be open to the plaintiff to call as witnesses the persons he had cured of consumption, and thus falsify the plea. Any other matter than this would be excluded at the trial.

BLACKBURN, J.—The scope of the plea is the same as the scope of the libel, which was, in effect, that the plaintiff was one of those who called themselves

"doctors" or "physicians," which would imply that they were so by British diploma or degree; when, in point of fact, they were only so by some foreign diploma or certificate, which might be of little or no value, and that his letters amounted to quackery and puffery.

LUSH, J.—I am of the same opinion. As I read the libel, this was its scope, and the plea could not be carried further.

Rule refused.

IN THE QUEEN'S BENCH.

November 8, 1865.

DODD, *appellant*, v. CHURCHWARDENS AND OVERSEERS OF BILSTON, *respondents*.

30 J.P. 165.

Poor rate—Rateable value—Local act authorizing composition—Deductions from rate.

RATES AND RATING. B.—*A local act enabled owners of small tenements to compound for the rates and to pay one half only:—Held, that such owners, when so rated, could claim such deductions only as the tenant himself could claim, irrespective of the local act.*

This was an appeal against a rate duly made and allowed on 24th May, 1864, and confirmed by the justices in special sessions on the 12th August, 1864.

The following is an extract from the rate book of the assessment, which was the subject of the appeal:—

No.	Names of Occupiers.	Names of Owners.	Description of Property Rated.	Name or Situation of Property.	Gross Estimated Rental.	Rateable Value.	Composition on Rate at 1s. 4d. in the Pound.
1112	William Millward Thomas Simms	Richard Dodd and John Southam	House.	Lunts	£ s. d. 7 16 3 6 11 3	£ s. d. 6 5 0 6 5 0	s. d. 7 8

The appeal was heard at the Staffordshire Epiphany quarter sessions, 1865, when the court found that the gross estimated rental of each of the houses, was 6*l.* 10*s.*, and that their rateable value was 4*l.* 13*s.* 7*d.* each, and reduced the rate accordingly, subject as to a further reduction of the rateable value to the opinion of the court of Queen's Bench upon the following case:—

1. The appellants are the owners of the houses which are the subject of the above assessment, and which are let each at 2*s.* 6*d.* per week, giving an annual rental of 6*l.* 10*s.* Starting from this sum, it is to be taken that the rateable value is in the present case correctly arrived at, by deducting in the first place, from the gross rental of 6*l.* 10*s.* a sum sufficient to cover rates and taxes, and then by deducting from the remainder so left, the sum of 1*l.* 13*s.* 5*d.*, to meet the repairs and other deductions allowed by the Parochial Assessment Act.

2. It is to be taken that the sum to be deducted for rates and taxes in respect of houses which are not within the provisions of the composition act hereinafter mentioned, is one fifth of the gross rental.

3. By that act which was passed in the 10 & 11 Vict. and which is entitled "An Act for better assessing the Poors Rates, Highway Rates, County and

Police, and other Parochial and local Rates, on small Tenements, in the several Townships of Wolverhampton, Bilston, Willenhall, and Wednesfield, in the County of Stafford," it is enacted that the owner of any tenement within the several townships of Wolverhampton, Bilston, Willenhall, and Wednesfield, being the union of Wolverhampton, in the parish of Wolverhampton, in the county of Stafford, which may be assessed to the poor rate and other rates mentioned in the act at any annual sum under 6*l.* 10*s.* rateable value, which first annual sum of 6*l.* 10*s.* shall be ascertained according to the provisions of an act passed in the 6 & 7 Will. 4, c. 96, entitled, "An Act to regulate Parochial Assessments," shall thereafter be rated, and pay such several poor rate, highway rate, county and police rate, and the local rates aforesaid, in respect of such tenements, instead of the actual occupiers thereof; and it is further enacted, that in all cases where any owner shall have been or shall be liable to be rated in pursuance of this act, in respect of any such tenements as aforesaid, it shall be lawful for such owner to give notice to the officer authorized to make or collect any such rate, of his intention to compound for the same by payment of a reduced rate, whether such tenement be occupied or not, and that in every such case, every owner shall thenceforth, until he shall give like notice for determining such composition, be liable to pay one half of such rate only, and all such compositions shall be entered in the rate book of such officers, and such owners shall be thenceforth rated accordingly.

4. The houses, which are the subject of this appeal, are within the provisions of this act, and are in composition, the owners paying the rates, but compounding for and paying in respect of them only one-half of the sum which would be payable in respect of the said houses if they were out of composition.

5. The act above mentioned is to be taken as part of the case.

6. The appellants contend, that although these houses are in composition, they are entitled to the same deduction for rates and taxes as is allowed in respect of other property which is not in composition, and that the following statement and figures correctly represent the amount of rateable value, and the mode in which it is arrived at.

	£	s.	d.
Gross rental	6	10	0
One-fifth deduction for rates and taxes	1	6	0
<hr/>			
Gross estimated rental according to Parochial Assessment Act	5	4	0
Deductions for repairs	1	3	5
<hr/>			
	4	0	7

7. The respondents contend that inasmuch as houses in composition only pay half rates and taxes, the owners of such houses are only entitled to one half of the deduction, being the sum actually paid by them, and that the proper deduction in respect of such houses therefore is only one-tenth of the gross rental, and the following statement and figures correctly represent the rateable value, and the mode in which it is arrived at.

	£	s.	d.
Gross rental	6	10	0
One-tenth deduction for rates and taxes	0	13	0
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Gross estimated rental according to Parochial Assessment Act	5	17	0
Deductions for repairs, &c.	1	3	5
<hr/>			
	4	13	7

The question for the opinion of the court is, whether the owners of the houses, the subject of this appeal, are entitled to the same amount of deduction for rates and taxes in respect of such property as is allowed to the

occupiers of property which is not in composition. If the court shall be of opinion that they are not so entitled the rateable value of each of the houses is to stand as reduced by the court of quarter sessions, viz., at 4l. 13s. 7d. If the court shall be of opinion that they are entitled to the same amount of deduction, then the rateable value of each of the houses is to be reduced by a further deduction of thirteen shillings.

Hill, in support of the order of sessions, contended that the appellants were not entitled to the deduction claimed, for this was a usual tenant's rate.

Keane, Q.C., and *Macmahon*, for the appellant, were not heard.

COCKBURN, C.J.—The Parochial Assessment Act was passed before the local act, and I think must be construed quite irrespectively of that act. There is nothing in the Parochial Assessment Act which would sanction the argument of the respondents. The landlord must be taken to be in the place of the tenant, and will be taken to be rated at what the tenant would have been rated, if there had been no composition, and not at what the landlord actually pays. Therefore, the rate must be amended by a further deduction of thirteen shillings.

BLACKBURN, J.—I also think that the rateable value must be ascertained solely by means of the Parochial Assessment Act, which says, that the net annual value of the hereditaments shall be the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes. Now the Wolverhampton local act says, that in all cases where any owner shall be liable to be rated in pursuance of that act, in respect of a small tenement, it shall be lawful for the owner to give notice to the officers authorized to collect any such rate, of his intention to compound for the same by payment of a reduced rate, whether such tenement be occupied or not, and that in every such case every such owner shall thenceforth, until he shall give like notice for determining such composition, be liable to pay one half of such rate only. Now that composition does not become an element of rateable value at all, and it is not to be a different rate, merely because the landlord has claimed to pay the composition.

MELLOR and SHEE, JJ., concurred.

Rate amended.

IN THE QUEEN'S BENCH.

Nov. 15, 1865.

HUGHES, *appellant*, v. CHURCHWARDENS, ETC. OF BILSTON,
respondents.

30 J. P. 166.

Poor rate—Deduction of water rate—Parochial Assessment Act.

RATES AND RATING. B.—Under a local act, the inhabitants of B. were supplied with water, it being optional with the tenants to take it, and sometimes the landlords paid the rate:—Held, the sum paid for such water rate was not in the nature of an expense necessary to keep the premises in a state to command the rent, and was not a deduction from the gross rental in estimating the net rateable value.

This was an appeal against a poor rate duly made and allowed and confirmed by the justices in special sessions, on the 24th day of May, 1864.

The following is an extract from the rate book of the assessment, which was the subject of this appeal:—

No.	Name of Occupier.	Names of Owners.	Description of Property Rated.	Name and Situation of Property.	Gross Estimated Rental.	Rateable Value.
					£ s. d.	£ s. d.
2781	Isaac Hughes.	Richard Dodd and John Southam.	House.	New Villages.	11 5 0	9 0 0

This appeal was heard at the Staffordshire Epiphany quarter sessions, 1865, when the court found that the gross estimated rental was 9*l.* 2*s.*, and that in order to arrive at the net rateable value, the appellant was entitled to a deduction of the following sums as yearly outgoings, which the overseers ought to allow under section 1 of the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, viz.:

	£	s.	d.
Repairs and insurance at one-sixth of rental ...	1	16	4
Poor rates	1	8	8
Sewer rates	0	4	5
Highway rate	0	3	4
Town improvement rate	0	8	10
Water rent	0	11	4

4 12 11

And in accordance with such finding the court reduced the gross estimated rental to 9*l.* 2*s.* and the net rateable value to 4*l.* 9*s.* 1*d.*, subject as to the last of the above deductions of 11*s.* 4*d.* for water rent, to the opinion of the court of Queen's Bench upon the following case:—

The township of Bilston is supplied with water partly from pumps, and partly from works constructed by a company incorporated as the Dudley Water Works Company, under an act 4 Will. 4, c. 42, and it was entirely in the option of owners or occupiers to accept or refuse the water supplied under that act.

By the Bilston Improvement Act, 1850 (13 & 14 Vict. c. 96), the Bilston commissioners had power to purchase the works of the Dudley Water Works Company within Bilston, and to hold the works so purchased in the same manner and with the same powers in all respects as if the same had been constructed, made or purchased by the commissioners under the powers and for the purposes of the Bilston Improvement Act, and they were compellable, at the request of the owner or occupier of any house or part of a house in any street in which any water pipe of the commissioners should be laid, or of any person who, under the provisions of any act incorporated with the Bilston Improvement Act, should be entitled to demand the supply of water for domestic purposes, to furnish such owner or occupier or other person a sufficient supply of water for their domestic uses at certain rates.

Under section 76 the commissioners have power to levy a water works rate for the purpose of purchasing, making, and maintaining water works, but no such rate has in fact ever been made or levied. In the year 1853, the commissioners purchased from the Dudley Water Works Company all the plant and mains of the company within the township of Bilston, and since that time have supplied water to all persons desirous of accepting it at a regular scale of prices, and the following is a copy of the one at present in force.

The Bilston Improvement Act, 1850.

Water rents.

Notice is hereby given.

That the Bilston township commissioners and local board of health, have

found it necessary to revise the scale of charges, and that the following will be the quarterly payments for water consumers after the 25th December, 1863:—

Charges for domestic consumption.

Owner's composition, payable whether occupied or not.

Tenements rated under 6*l.*, to pay quarterly 2*s.*; under 7*l.*, to pay 2*s.* 6*d.*; under 8*l.*, to pay 2*s.* 9*d.*; under 9*l.*, to pay 3*s.*; and under 10*l.*, to pay 3*s.* 4*d.*

Occupiers' charges.

Premises rated at 11*l.*, to pay quarterly 3*s.* 10*d.* (and so on in gradations up to 50*l.* to pay quarterly 13*s.* 9*d.*)

Charges for trade purposes by special arrangement.

By order of the board,

R. H. HARPER,
Clerk.

Commissioners' offices,

Bilston, 18th November, 1863.

The water is supplied by pipes from the mains to the houses, and when the water rent is in arrear or unpaid after notice the supply is cut off and withdrawn. About one-half of the inhabited houses are supplied with water from these water works, and pay rent for the same to commissioners, and as to these it is a matter of arrangement between the landlord and tenant, to which of the two the water is supplied, and which of the two pays the water rent. The inhabitants of those houses to whom there is no supply from the waterworks procure their water from their own wells or other sources. In the present instance the water is supplied from the waterworks; the landlord pays the water rent, and the occupier has nothing to do with it.

The appellant contends that this payment for water is a deduction to which he is entitled under the Parochial Assessment Act, as being an expense necessary to maintain the premises in a state to command such rent.

The respondents contend that inasmuch as it is optional with the owner and occupier of the house whether they will take their supply of water from the commissioners, or obtain it from other sources, it is not a necessary expense or outgoing which they ought to allow as a deduction from the rateable value.

If the court shall be of opinion that the deduction ought to be allowed, the rate is to stand as reduced, viz., at 4*l.* 9*s.* 1*d.* If on the contrary, an addition of 11*s.* 4*d.* is to be made to the sum to which the rateable value was reduced by the court of quarter sessions.

Macmahon, (with him Keane, Q.C.) for the appellant, contended that the water rate ought to be deducted, because it was an expense necessary to maintain the premises in a state to command the rent. Therefore, it came within the express words of the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, s. 1. The quarter sessions have found as a fact that the appellant is entitled to a water rent of 11*s.* 4*d.*, that is, because it is a necessary expense.

MELLOR, J.—Suppose the tenant do not pay the water rent, and the water is cut off, would he be still entitled? If, instead of a water pipe, he erected a pump, in order to get water, would he be entitled to deduct the expense of the pump? He buys the water for his own use as he buys other things.

LUSH, J.—Does it differ from gas? Suppose the landlord paid a sum for gas, would that be a deduction?

Macmahon.—It has been held that the sewer rate may be deducted, which is a similar case. *R. v. Dare* (34 L. J. M.C. 17). There is no reason why a pump might not be deducted.

COCKBURN, C.J.—If the pump be part of the premises, then the rent might be increased in respect of it, but it is not a deduction in the proper sense.

Macmahon.—The rent would be all the lower if there were not this payment.

A. S. Hill, for the respondents, was not heard.

COCKBURN, C.J.—I think it quite clear that this deduction ought not to be made. It is neither a tenant's tax, nor of the nature of an expense necessary to maintain the premises in a state to command such rent. It has nothing to do with the repair of the premises. It is merely a payment for the purchase of water, just as gas or food or any other commodity may be purchased. The order of quarter sessions was therefore wrong, and must be altered.

MELLOR, and SHEE, JJ., concurred.

LUSH, J.—I also think the expense of the water supply ought not to be deducted. The supply of water has no more to do with the necessary expense of keeping the premises in repair than the supply of gas or bread to the inmates, or any other such matter would be.

Judgment for respondents.

IN THE QUEEN'S BENCH.

Nov. 15, 1865.

COUSINS, *appellant*; STOCKBRIDGE, *respondent*.

30 J. P. 166.

Towns Police Act—Hackney carriage—License for omnibus—Local Act—Incorporating general act—10 & 11 Vict. c. 89, s. 38.

HACKNEY CARRIAGE.—*A local improvement act enacted that the provisions of the Towns Police Act as to hackney carriages should be extended to all stage coaches, omnibuses, and carriages of every description plying for hire, or conveying persons for hire within the borough. The 38th section of the Towns Police Act contains a proviso exempting stage coaches from the necessity of a license from the local board:—Held, that the proviso of the 38th section was incorporated into and overrode the local act, and that omnibuses required no license from the local board.*

Case stated under 20 & 21 Vict. c. 43.

On the 7th April instant, an information against the appellant in this case, for that he on the 25th March last, at the borough of Cardiff, being the proprietor of an omnibus conveying persons for hire within the said borough, did unlawfully permit the same to ply for hire without having obtained a license for that purpose, was duly heard and determined by us the undersigned, two of Her Majesty's justices of the peace for the borough of Cardiff, and we convicted the said appellant, and imposed a penalty.

The said appellant being dissatisfied with our determination, as being erroneous in point of law, duly applied to us to state a case for the opinion of the Court of Queen's Bench, pursuant to the statute 20 & 21 Vict. c. 43. We therefore state the following case.

The said borough comprises the parishes of St. John and St. Mary, and is the district of the Cardiff local board of health.

Under the provisions of the Towns Police Clauses Act, 1847, with respect to hackney carriages, the said local board have power to license such number of hackney coaches or carriages of any kind or description adapted to the carriage of persons, as they think fit.

The 38th section of that act defines what are to be considered hackney coaches, and contains this proviso: "Provided always, that no stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares, and duly licensed for that purpose, and having the proper numbered plates required by law to be placed on such stage coaches, shall be deemed to be a hackney carriage within the meaning of this act."

By section 3 of the Cardiff Borough Act, 1862, the provisions of the Towns Police Clauses Act, 1847, with respect to hackney carriages, are extended to all stages coaches, omnibuses, and carriages of every description adapted to the carriage of persons, and which shall ply for hire or convey persons for hire within the said borough.

By the 45th section of the Towns Police Clauses Act, 1847, the proprietor of a carriage permitting the same to be used as a hackney carriage plying for hire within the prescribed distance, without having obtained a license for such carriage, is rendered liable to a penalty not exceeding 40s.

It appeared that the omnibus in question, in this case, was drawn by two horses, and used in plying for hire within the limits of the town of Cardiff and the district of the said board of health, viz., from the Angel Hotel, situate in Angle Street, in the parish of St. John's, to the Bute Docks, in the parish of St. Mary, in the said town of Cardiff, and back, a distance of one-and-a-half miles, or thereabouts, and travelling at a rate of more than five miles an hour, and carried passengers at separate fares. That the appellant had obtained for it an inland revenue license, (a copy of which accompanies this case,) as a stage carriage under the 2 & 3 Will. 4. c. 120, and that it bore the proper numbered plates required by law to be placed on such stage coaches. It was contended on the appellant's behalf that he was not liable to the penalty, inasmuch as the above recited proviso of the 38th section of the Towns Police Clauses Act, 1847, applied to his case, and that the enactment of the Cardiff Borough Act, 1862, above referred to, was to be read as subject to that proviso.

We were of opinion in the first place that this omnibus was not a stage carriage within the meaning of the proviso, which we considered was intended only to apply to such carriages as are required by the said act of 2 & 3 Will. 4. c. 120, to be licensed, and are defined by the 5th section of that act to be carriages used or employed for the purpose of conveying passengers for hire, to or from any place in Great Britain, and which shall travel at the rate of more than four miles an hour.

This definition seemed to us to point to a more extended employment than that of the appellant's carriage, viz., between different towns, and not between the limits of one place or town only.

But in the next place, assuming this omnibus to be such a stage carriage, it seemed to us that the 3rd section of the Cardiff Borough Act, 1862, which expressly mentions stage coaches, was intended to override the proviso, and that included the appellant's omnibus.

We were strengthened in this view by the case of *Buckle v. Wrightson* (3 Cox's Magistrates' Cases, Q.B. 153), in which the Court of Queen's Bench expressed an opinion that the provisions of the Towns Police Clauses Act were not superseded by the enactment with reference to the inland revenue, the former being evidently intended for police purposes, which were not the objects of the Revenue Acts.

The question for the opinion of the Court is, whether the appellant's omnibus on the facts above stated is to be considered a stage carriage within the meaning of the proviso of the Towns Police Clauses Act, 1847; and if so, whether the said appellant having an inland revenue license for his omnibus as a stage carriage, was liable under the said Towns Police Clauses Act, 1847, and the Cardiff Borough Act, 1862, to a penalty for permitting his said omnibus to be used as aforesaid without having obtained a license from the Cardiff Local Board of Health.

Given under our hands at Cardiff this 24th April, 1865.

R. O. JONES.

WM. ALEXANDER.

Bowen, for the respondent, contended that the conviction was right. This omnibus was not a stage coach within the meaning of the Towns Police Act. But if it was, then the Cardiff Borough Act expressly overrode that enactment, and extended the necessity of licenses to omnibuses.

Giffard, for the appellant, contended that the proviso of the Towns Police Act, section 38, was imported into the local act as well as the other part, and stage coaches were expressly excepted from the license. This was apparent from the word in the 3rd section of the local act, which said the "provisions" and not the "provision," as if pointing to the whole series of sections. There is nothing to show the intention of the legislature to split the 38th section into two parts, and incorporate the former part without the proviso at the end.

COCKBURN, C.J.—I am of opinion that this conviction is bad, for that an omnibus is not within the act of parliament. I agree that the Cardiff Borough Act is not merely an incorporating act, for there are many substantive enactments in it; but it is nothing but an incorporating act, so far as relates to hackney carriages. The general act may be incorporated in that respect, and thereby the provisions of that act, from the 38th and subsequent sections, would be transferred to the local act. The substance of what has been done by the local act is to incorporate all those provisions applicable to hackney carriages, whether these are in the form of stage coaches or omnibuses; but those provisions are accompanied with the express exception that stage coaches, and therefore omnibuses, are not within the meaning of hackney carriages. The conviction therefore is bad.

MELLOR, J.—I also think the proviso of the 38th section goes with the rest of the section into the incorporating act, and, therefore, the local authorities have no power to license stage coaches used for hire at separate fares. If it had been so intended, there would, no doubt, have been an express provision.

SHEE, and LUSH, JJ., concurred.

Judgment for appellant.

IN THE QUEEN'S BENCH.

April 25, 1866.

REG. v. BLANSHARD.

30 J. P. 280.

Public Health Act—Local board—Neglect of chairman to deliver voting papers—Prosecution by one not grieved—11 & 12 Vict. c. 63, s. 133.

LOCAL GOVERNMENT. A.—*A chairman of a local board of health was charged under 11 & 12 Vict. c. 63, s. 28, with neglecting to deliver the voting papers to the local board, and L. was the prosecutor, who, though a member of the board, had not been a candidate at the election; and the persons returned at such election were properly elected. L. had not obtained the consent of the Attorney-General or local board to prosecute:—Held, that as L. was not a party grieved, the justices had no jurisdiction.*

This was a rule calling on the prosecutor to shew cause why a certain conviction under the hands and seals of the Reverend Charles Sheffield, clerk, and Sir Robert Sheffield, baronet, two of Her Majesty's justices of the peace in and for the parts of Lindsay, in the county of Lincoln, whereby N. Blanshard was convicted, for that he did on the 3rd April, 1865, at the parish of Winterton, in the said parts, at the next meeting after the last election of members of the local board for the district of Winterton, being the chairman of the said local board, unlawfully neglect to deliver the nomination and voting papers which he had received, to the said local board at such meeting, contrary to the Public Health Act, 1848, and adjudging him for his said offence to forfeit the sum of 1l. 1s. 6d. and costs, should not be quashed for the insufficiency thereof.

The following were stated to be the points intended to be argued on behalf of the defendant on the hearing of this case, viz :

That the justices had no jurisdiction, the informant not being a party grieved within the meaning of the 11 & 12 Vict. c. 63, s. 133.

That the conviction and the information on which it was founded, included more offences than one, contrary to the 11 and 12 Vict. c. 43, s. 10.

That the offence alleged in the conviction, is not an offence against the Public Health Act, 1848.

That the offence alleged is not an offence punishable on summary conviction.

The affidavit of Nicholas Blanshard set forth as follows :—

On the day of, and immediately after the election mentioned in the conviction, and before the holding of the meeting of the local board of health for Winterton aforesaid, held next after the said election, I handed the draft certificate of election, and all the nomination and voting papers I had received, to Alfred Spencer, clerk to Henry Liversidge, the clerk to the said local board, and directed the said Alfred Spencer to take them to the office of the clerk to the said local board, to be dealt with in the usual manner. I also gave direction to the said A. Spencer to prepare the formal certificate of election, which he did, and on the same day I signed the said certificate, and handed it over to the said Alfred Spencer, and from the time of my so handing the nomination and voting papers, and certificate of election over as aforesaid, the said certificate and nomination, and voting papers, have never been in my possession, but in the possession of the said clerk to the local board.

The other affidavits set forth as follows :—

On the day of, and immediately after the said election, and before the said next meeting of the local board of health for Winterton aforesaid, I received the said certificate, nomination and voting papers from the deponent, Nicholas Blanshard, and took them to the office of the deponent, Henry Liversidge, the clerk of the said local board, where they remained until the meeting of the said local board held next after the said election.

On the day after the day of election, I duly affixed the said certificate of election in all the usual places in the parish.

The said certificate was produced at the first meeting of the board. That the nomination and voting papers were placed in a bag together with other papers belonging to the said local board, and were taken by the said Alfred Spencer to the first meeting of the said board held next after the said election, and were placed upon the table at the said meeting in the said bag, but neither Lucas Marshall Bennett nor any other member of the board asked to see such nomination or voting papers, or mentioned them; consequently they were not taken out of the bag.

Both before and after the said meeting the said certificate and nomination and voting papers were open to public inspection at the office of the clerk of the board, and remained so open for a space of six months after the said election, and the voting papers were inspected there in the month of June last on two or three occasions by the said Lucas M. Bennett, a surgeon.

The said Lucas M. Bennett induced Thomas Stubbings, a working carpenter, to accompany him to inspect the voting papers, and the said Thomas Stubbings, without a coat on, and with his shirt sleeves turned up, did go to the office of the said clerk of the board, and inspected the voting papers.

We were severally present at the meeting of the said local board held next after the said election from the beginning to the end thereof, and no one any time during the said meeting asked to see the said nomination or voting papers, or any of them, and that the said certificate of election was produced.

At the hearing of the complaint mentioned in the said summons, the said Lucas Marshall Bennett appeared as the complainant, and in answer to the questions of the said Henry Liversidge, who acted as attorney for the said

Nicholas Blanshard at the said hearing, admitted, as the fact was, that the persons who were returned by the said Nicholas Blanshard as having been elected members of the said local board at the said election were duly and properly elected, and were the proper persons to be so returned.

The said Lucas M. Bennett was not a candidate at the said election.

At the said hearing the said Henry Liversidge, as the attorney for the said Nicholas Blanshard, objected to the jurisdiction of the justices, on the ground that the complainant, the said Lucas M. Bennett, was not a party grieved within the meaning of the Public Health Act, 1848, and had not obtained the consent of Her Majesty's Attorney-General to the making or prosecution of the said complaint, but the said justices overruled the objection, and no evidence whatever was given that the said Lucas M. Bennett was in any way aggrieved by the said alleged neglect of the said Nicholas Blanshard to deliver the said nomination and voting papers, nor was any evidence whatever given that the said Lucas M. Bennett was authorized by or had obtained the consent of the said local board of Winterton, being the local board of health in whose district the alleged offence was committed, or the consent in writing of Her Majesty's Attorney-General, to make or prosecute the said complaint, or to take proceedings for the recovery of the penalty incurred by the said Nicholas Blanchard by reason of the said alleged neglect, the same not being a penalty directed to be paid to the churchwardens and overseers of the poor or either of them; and we are severally informed and believe that the said Lucas M. Bennett was not a party grieved by the said alleged neglect within the meaning of the Public Health Act, 1848, and that he was not authorized by and had not obtained the consent of the said local board, or the consent either by writing or otherwise of Her Majesty's Attorney-General to make or prosecute the said complaint or to take proceedings for the recovery of the said penalty.

The Public Health Act, 11 & 12 Vict. c. 63, s. 27, enacts that the chairman of the local board shall cause to be made a list containing the names of the candidates, together with (in case of a contest) the number of votes given for each, and the names of the persons elected, and shall sign and certify the same, and shall deliver such list, together with the nomination and voting paper which he shall have received to the local board of health at their first or next meeting (as the case may be), who shall cause the same to be deposited in their office, and the same shall, during office hours thereat, be kept open to public inspection, together with all other documents relating to the election, for six months after the election shall have taken place, without fee or reward.

The 28th section enacts that if the said chairman or other person charged with taking, collecting, or returning the votes at any such election as aforesaid shall neglect or refuse to comply with any of the provisions of this act in that behalf, he shall be liable for every such offence to a penalty not exceeding 50*l*.

By section 133 no proceeding for the recovery of a penalty incurred under the provisions of this act shall be had or taken by any person other than by a party grieved, or the local board, or the churchwardens and overseers, without the consent of the Attorney-General.

No counsel appeared to show cause.

Cave, in support of the rule, contended that the conviction was wrong, on the ground that there had been no proper prosecutor. M. Bennett, who prosecuted, was not grieved any more than any other of Her Majesty's subjects, and he had not got the authority mentioned in the 133rd section. In *Boyce v. Higgins* (14 C. B. 1), it was held that a ratepayer in the district was not grieved where a member of a local board had voted in a matter wherein he had an interest.

Per Curiam (Blackburn, J., and Shee, J.)—We think you have said enough.

Rule absolute.

IN THE QUEEN'S BENCH.

Jan. 30, 1866.

REG. v. RAND.

REG. v. JUSTICES OF BRADFORD.

30 J.P. 293.

Justice of the peace—Interest—Bias—Mortgagee of rates—Certificate of reservoir being completed.

MAGISTERIAL LAW.—*By a local statute justices had power to certify the completion of a reservoir, and its capacity to hold a certain quantity of water, whereupon the corporation of B. were to get certain pecuniary advantages. Two justices so certifying were trustees of a provident society, which had lent money to the corporation, and which was charged on the corporation funds; thus the security would be improved by the granting of the certificate, otherwise the justices had no pecuniary interest:—Held, the justices were not disqualified by this circumstance, for a mere possibility of bias in the judges does not, like a pecuniary interest, avoid a decision of justices.*

This was a *certiorari* to remove a certificate of justices, dated 18th April, 1865, whereby it was stated that the Doe Park Reservoir at Bradford was completed, into this Court to be quashed.

The facts appeared from the following affidavit: I am owner of the Hewenden mill, on the banks of the Hewenden or Harden Beck, and am as such greatly interested in the Hewenden and Doe Park Compensation Reservoirs, and in the same being made complete, and of the capacity respectively required by the acts authorizing their construction. I am also deeply interested in the safety of the said reservoirs, and have consequently watched with anxiety the progress made in the necessary works by the said corporation. It has been notorious that the said reservoir at Doe Park was in a dangerous state, and that in March, 1864, Her Majesty's Secretary of State for the Home Department instructed Robert Rawlinson, Esq., C.E., to view the same, which he did soon afterwards, and made his report thereon, dated 7th May, 1864, which report was subsequently presented to parliament and printed. I beg to refer to the said report, and pray that the same, so far as it relates to the state of the reservoir at Doe Park, may be considered as set forth in this my affidavit. That since Mr. Rawlinson made his said report, the said corporation have made several attempts to complete the said reservoir at Doe Park, and have trenched, cut, and disturbed the embankment frequently, and I say it is still incomplete and unsafe in consequence of the leaky state of the works.

A notice, dated the 30th January last, signed Joseph Rayner, town clerk of the said borough of Bradford, of which the following is a copy, was served upon me, by and on behalf of the said corporation.

To Messrs. Abram England, Jno. Anderson, and all others whom it may concern, being owners, lessees, or occupiers of mills on the Hewenden or Harden Beck.

Take notice that applications will be made by or on behalf of the mayor, aldermen, and burgesses of the borough of Bradford, in the West Riding of the county of York, to two of Her Majesty's justices of the peace in and for the said West Riding, at the court house in Bradford aforesaid, on Thursday, the 16th February next, at eleven o'clock in the forenoon, for a certificate by two such justices, pursuant to the power or authority contained in the 51st section of the Bradford Waterworks Act, 1854, that a certain reservoir by the said act authorized to be constructed near Doe Park at the confluence of the Denholme and Carperley Becks, in the township of Thornton, and parish of Bradford, has been completed and filled with water, and that such reservoir is

capable of containing 110,000,000 gallons of water at least. And take further notice that notice of such intended application is hereby given to you to the intent that you may, if you think fit, be heard thereupon before the said justices. Dated this 30th January, 1865. Signed Joseph Rayner, town clerk of the said borough of Bradford.

Being fully convinced that the said reservoir near the Doe Park was not at that time complete, nor capable of containing 110,000,000 gallons of water, I and Joseph Whitley, of Harden Beck, in the township of Wilsden, in the said parish of Bradford, corn miller, with other mill owners and mill occupiers on the banks of the said Hewenden or Harden Beck, instructed Messrs. Weatherhead and Burr, of Bingley aforesaid, as our solicitors, to oppose the granting of the said application at the time and place mentioned in the said notice, and they accordingly did so, and after receiving evidence on the part of the said corporation, and in support of the said application, and also on the part of the said mill owners and mill occupiers against the same application on that day, and also on the 18th of the same month, to which last-mentioned day the said application was adjourned from the said 16th February last, the justices assembled on the said 18th February last to hear the said application, and further adjourned the hearing thereof until the 18th April last, with the view, as stated, of testing the stability of the said embankment, on which said last-mentioned day the case having been further heard and further evidence adduced on both sides, William Rand, William Peel, George Anderton, Henry William Ripley, and John Hollings, being a majority of Her Majesty's justices of the peace assembled on the occasion of the said adjourned hearing, granted a certificate under their hands.

The following justices acted on the occasion of the hearing of the application on the said 16th February last, viz.: Joshua Pollard, Jno. Rand, Timothy Horsfall, George Anderton, William Pollard, John Hollings, William Peel, William Rand, George Wood, and Henry William Ripley, Esq., and the same gentlemen, with the exception of William Pollard, John Rand, and George Wood, Esqrs., attended and acted as justices on the occasion of the resumed application on the 18th of April last.

I am informed and believe that four of the said justices, viz.: W. Rand, John Hollings, Henry W. Ripley, and W. Peel, Esqrs., were all formerly aldermen of the said borough. The same justices and John Rand, Esq., were incompetent also to act as justices on the hearing of the said application on the following grounds; that is to say, that the said Henry W. Ripley was at the time a mortgagee of the rates of the said borough conjointly with Titus Salt, Esq., also a magistrate for the said West Riding of the county of York, but who did not attend on the hearing of the said application. The said John Rand was also at the said time a mortgagee of the rates of the said borough conjointly with Charles Hardy, William Murgatroyd, and Alfred Harris, Esqrs., and they and all the justices who made and signed the said certificate were, I am informed and believe, ratepayers of the said borough of Bradford. The said William Rand was, I believe, one of the original proprietors of the Bradford Waterworks Company, the shares and interest in which were sold to the said corporation at a large profit. The said William Rand is, as I am informed and believe, a large owner of property in the said borough of Bradford, is a large ratepayer and burgess thereof, and on the occasion of the hearing of the said application he exhibited a strong bias in favour of the said corporation. The said Henry William Ripley was, as I am informed and believe, also an original proprietor in the said waterworks, and is a large owner of property in the said borough of Bradford, and a large ratepayer and burgess thereof. The said William Peel is also, as I am informed and believe, a large owner of property in the said borough of Bradford, a large ratepayer and a burgess. The said John Hollings is also, as I am informed and believe, a large owner of property in the said borough, a large ratepayer and a burgess. The said George Anderton is, as I am informed and

believe, a director of the Lancashire and Yorkshire Railway Company, in which company he holds a large number of shares. The said company has a large property in the borough of Bradford aforesaid, and pays heavy rates, and also are, as I am informed and believe, supplied with large quantities of water by the corporation, a reduction in the price of which is a great object to the company. A large pecuniary saving, at least 5*l.* a day, is saved to the corporation by the granting of such certificate, and such justices are interested in this, and as it is necessarily reduces the said level within the said borough.

No objection was made on the occasion of the said hearing, on the 16th February last, to any of the said justices acting in the matter of the said application, by reason that I and my solicitors were not aware at that time of the incompetency of any of the said justices to act as such in the said matter, in which they were respectively interested as aforesaid, but on the occasion of the resumed application on the said 18th April last, I and my said solicitors having obtained information that the said five justices hereinbefore lastly named were interested as aforesaid in the matter, and consequently disqualified and incompetent to act as such justices on the question of the said certificate, before any evidence was adduced by either party, the said justices were informed on my behalf and on behalf of the other parties opposing the said application, that we did object to the acting of those justices so interested as aforesaid, and that we should dispute the validity of any certificate granted by them or in the application for which they had taken part, but the majority of the said justices determined to proceed with the inquiry notwithstanding the said objection, and in the result gave and made the certificate hereinbefore mentioned.

The said Bradford Corporation Waterworks Act, 1854, provides (by section 46) that save as therein otherwise provided, no justice of the peace shall be disqualified or disabled to act as such justice in any matter referring to that act or any act or acts incorporated therewith, by reason of being a ratepayer in the borough, or a member of the council, or of any committee thereof; but the said application was not made under the said act, but under the provisions of the said Bradford Waterworks Act, 1854, which is not incorporated with the said Bradford Corporation Waterworks Act, 1854, nor does the said 46th section of the Bradford Corporation Waterworks Act enable justices interested otherwise than as ratepayers in the borough, members of the council, or of any committee thereof to act in matters in which they are interested.

The said embankment, after the said 16th February last, still continued to leak, and in fact the leakage increased considerably between that day and the said 18th day of April last, and the same still increases to a great and alarming extent; and the mill owners and mill occupiers on the banks of the said Hewenden or Harden Beck, as well as persons residing in the neighbourhood, and Thomas Hawksley, of George Street, Westminster, C.E., who had viewed the said embankment and works on behalf of the said mill owners and mill occupiers, believe that the said reservoir is in a dangerous state, that it is not complete, and that in consequence of the great and increasing leakage, the said reservoir is not capable of holding the requisite quantity of water.

The mortgage on the water rates referred to as executed in favour of one of the justices, was executed as a security for 1,000*l.* advanced by the provident society of the independent churches of the West Riding of Yorkshire, in favour of him, as one of the trustees of the society, and they had no personal interest.

Cleasby, Q.C., who was in support of the rule, admitted that the 46th section of the statute 17 & 18 Vict. c. cxxix, cured all objections to the interest of justices as ratepayers of the borough; but the other objection as to the justices being mortgagees of the borough fund would be insisted in.

Mellish, Q.C., and *Kemplay*, shewed cause, and contended that as the justices had no direct pecuniary interest, but were bare trustees, the interest

was too remote to affect their judicial acts. *R. v. Dean of Rochester* (17 Q.B. 1; *Ex parte Pettitman* (4 B. & S. 921, n).

Cleasby, Q.C., and *Maule*, in support of the rule, contended that the amount of interest was not the test, but the existence of any probability of bias: *R. v. Hertfordshire Justices* (6 Q.B. 753).

Cur. adv. vult.

BLACKBURN, J.—In this case, by the Bradford Waterworks Act, 1859, the waterworks company were empowered to take the water of certain streams, but it was enacted that they should not take those flowing into the Harden Beck, without the assent of the mill owners on that beck, until it had been certified by justices that a reservoir, called Doe Park reservoir, had been completed and filled with water, the company being required to give ten days notice to the mill owners, before applying for the certificate, to the intent that they might oppose the granting of it. By an act of the same session, the municipal corporation of Bradford were empowered to purchase the Bradford waterworks for the benefit of the borough, and they did so. Afterwards the municipal corporation duly gave notice of their intention to apply for the certificate of the justices. It was opposed, but the justices, after hearing evidence, and making an elaborate inquiry, decided in favour of the corporation, and granted their certificate. A rule was obtained for a *certiorari* to bring up this certificate to be quashed on the ground that the justices who granted it were interested. All the objections were disposed of during the argument except the following. On the affidavits on both sides, it appeared that a hospital and a friendly society had invested part of their funds in bonds of the Bradford corporation charging the borough fund, and that those bonds were taken in the name of trustees, and that two of the justices in question were one of them amongst the trustees of the society, and the other amongst the trustees of the hospital. Neither of them had, nor by any possibility could have, any pecuniary beneficial interest in these bonds, but no doubt the security of their *cestui que trusts* would be improved by anything improving the borough fund, and anything improving the waterworks after they became the property of the corporation would produce that effect. The question which we have to determine was whether this disqualifies the justices from acting in what was certainly a judicial inquiry, and we think it does not. There is no doubt that any direct pecuniary interest, however small in the subject of inquiry, does disqualify a person from acting as a judge in the matter, and if by any possibility these gentlemen, though mere trustees, could have been liable to costs, or to any other pecuniary loss or gain, in consequence of their being so, we should think the question different from what is, for that might be held an interest. But the only way in which these facts could affect their impartiality would be that they might have a tendency to favour those for whom they were trustees, and that is an objection not in the nature of interest, but of a challenge to the favour. Wherever there is a real likelihood that the judge would, from kindred or any other cause, be likely to have a bias in favour of one of the parties, it would be very wrong in him to act, and we are not to be understood to say, that where there is a real bias of this sort, this court would not interfere, but in the present case there is no ground for doubting that the justices acted perfectly *bonâ fide*, and the only question is, whether in strict law, under such circumstances, the certificate of such justices is void, as it would be if they had a pecuniary interest. And we think that *R. v. Dean of Rochester* (17 Q.B. 1) is an authority that circumstances from which a suspicion of favour may arise do not produce the same effect as a pecuniary interest. And as the decision in that case was on demurrer to a plea, and might have been taken into error, the authority is one on which we ought to act. We think, therefore, that the rule should be discharged.

Rule discharged.

IN THE QUEEN'S BENCH.

May 2, 1866.

STEWART, *appellant*; FELL, *respondent*.

30 J.P. 294.

Game—Lord of manor—Prescription—Gamekeeper—Bonâ fide claim of right.

MAGISTERIAL LAW. C.—*S. being summoned before justices for trespassing in pursuit of game, bonâ fide set up a claim of right, that as gamekeeper of the lord of the manor, of which the place in question was a customary tenement, he had for forty years and upwards without challenge pursued the game there for the lord's benefit:—Held, as the claim of right was not impossible in point of law, the justices ought to have waived their jurisdiction.*

Case stated under 20 & 21 Vict. c. 43.

At a petty sessions holden at Shap, in and for the division of West Ward, in the county of Westmoreland, on the 16th October, 1865, an information preferred by John Fell, hereinafter called the respondent, against Donald Stewart, hereinafter called the appellant, under section 30 of the Game Act, 1 & 2 Will. 4, c. 32, charging for that he the said appellant did within three calendar months then last past, to wit, on the 28th August, 1865, at the parish of Shap, in the said county, unlawfully commit a certain trespass by being in the daytime of the same day upon a certain close of land in the possession and occupation of Thomas Fishwick there, in search of game there, without the license or consent of the owner of the land so trespassed upon, or of any person having the right of killing the game on such land, or of any other person having any right to authorize the said appellant to enter or be upon such land for the purpose aforesaid, contrary to the statute in such case made and provided, whereby and by force of the said statute the said appellant had forfeited a sum of money not exceeding 2l., to be applied as the statutes in that behalf made and provided directed, was heard and determined by us the said justices whose names are undersigned, the said parties respectively being then present. And upon such hearing the appellant was convicted before us the said undersigned of the said offence, and we adjudged him, the said appellant, for his said offence, to forfeit and pay the sum of 2s. 6d., to be paid and applied according to law, and also to pay to the said respondent, the informant, the sum of 19s. 6d. for his costs in that behalf; and if the said several sums should not be paid forthwith, we adjudged the said appellant to be imprisoned in the common gaol at Appleby, in the said county, and there kept to hard labour for the space of seven days, unless the said several sums, and the costs and charges of conveying the said appellant to the common gaol, should be sooner paid. And whereas the appellant being dissatisfied with our determination, &c., we hereby state and sign the following case:

Upon the hearing of the information it was denied on behalf of the appellant that he did unlawfully commit a trespass as therein alleged, but admitted that he was upon the land in question in search of game at the time alleged with the authority and consent and as the gamekeeper of the Earl of Lonsdale, who claimed to have the right of killing game upon such land, and to authorize the said appellant to enter or be upon the said land for the purpose of killing game there.

John Fell, sworn.—The information is true.

Richard Hindson, sworn.—The land is ancient enclosed land, and is occupied by me, and belongs to the Rev. John Tinkler, of Land Beech Rectory, near Cambridge, and that part trespassed upon, I think, would never be enfranchised.

Cross-examined.—I don't know when the land was inclosed. I know

Mr. Tinkler pays lord's rent. He pays 2l. 11s. 3d. customary rent. That is the full amount of rent. The land shot upon is covered by that rent as well as other land.

On behalf of the appellant it was asserted that the Earl of Lonsdale, for whom the appellant acts in the capacity of gamekeeper, was lord of the manor of Thornwaite, of which the land in question was held as an ancient customary estate of inheritance, according to the custom of the manor of Thornwaite, and that as such lord, coupled with the forty years' usage of shooting by his gamekeeper over the land in question which he intended to give in evidence, he had a right to claim and did claim a prescriptive right of shooting over the same, and that the appellant, at the time of committing the alleged trespass, was upon the said land as his lordship's gamekeeper, and with his lordship's authority; but no right of forest, free chase, or free warren, or any other franchise, to kill or pursue or search for game over the land in question was set up by the appellant, and it was contended by the appellant that such claim of prescriptive right ousted the jurisdiction of the magistrates.

The following evidence was adduced by the appellant:—

Thomas Coward: I am Lord Lonsdale's gamekeeper at Shap. I came on 5th November, 1819. I have known this close ever since I came. I have shot over this close forty years back every year, and without any one's permission. I was never discharged. I went over the land when I thought fit. Colonel Lowther and other friends of Lord Lonsdale have shot over it with me. The land is in the manor of Thornwaite, which is in Lord ——. I know the appellant, who is Lord Lonsdale's keeper in this manor.

Richard Hindson, re-called: I discharged MacCrone, then Lord Lonsdale's gamekeeper, from shooting on the land about six or seven years ago, but I don't know whether he attended to the discharge. I never saw him after.

We, however, being of opinion that no reasonable *prima facie* evidence of a *bona fide* claim on the part of Lord Lonsdale derived to the appellant to kill or search for game on the land in question under the circumstances before mentioned, against the will of the owner of the said close or the occupier thereof, was established on the part of the appellant, whereby to oust our jurisdiction, convicted the appellant in manner before stated.

If the Court should be of opinion that the said conviction was legally made, then the conviction is to stand; but if the Court should be of opinion that the conviction was not legally made, then the said conviction to be quashed.

W. RICE MARKHAM,
JOHN JAMESON,
JOHN P. SISSON.

Mellish, Q.C., for the appellant, contended that whether or not the right set up by the appellant could be established by evidence or not, still it was not an impossible right in point of law; and if so, the justices ought not to have convicted, but should have stayed their hands. (He was stopped).

Manisty, Q.C., for the respondent, admitted that he could not maintain that the right claimed by the appellant was impossible in point of law.

BLACKBURN, J.—I think we cannot say that this was a claim of an impossible right, and therefore the conviction must be quashed.

SHEE and LUSH, JJ., concurred.

Judgment for appellant.

IN THE QUEEN'S BENCH.

April 21, 1866.

ALDRIDGE, *appellant*; WHITING, *respondent*.

30 J. P. 309.

Bye-laws—Local Harbour Act—Appointment of meter—Validity.

BY-LAWS.—*Under a local Harbour Act the corporation of P. had power to make bye-laws regulating their officers in the affairs of the wharf, and for regulating porters, carmen, &c. By a bye-law, if any other than the meters appointed by the corporation weighed coals, &c. unladen from the wharf, he shall incur a penalty of 40s.:—Held, the bye-law was too extensive, inasmuch as it compelled third parties buying and selling to accept the corporation meter for weighing of goods.*

At a petty sessions holden at Portsmouth, in and for the borough of Portsmouth, on the 20th February, 1865, before us, the undersigned, Bonham William Carter and Lewis Maitland, esquires, two of Her Majesty's justices of the peace in and for the said borough, an information preferred by Edmund Whiting, hereinafter called the respondent, against Henry Aldridge, hereinafter called the appellant, under a certain bye law, rule, order, and regulation purporting to be made by the mayor, aldermen, and burgesses of the said borough of Portsmouth, pursuant to and by virtue of the power and authority given to them by the 61st section of a certain act of parliament, made and passed in the second and third years of the reign of Her present Majesty, Queen Victoria, entitled "An Act for enlarging the Town Quay of the Borough of Portsmouth, and for improving that Portion of the Harbour of Portsmouth, called The Camber." The said information charged that the said appellant, not being one of the meters appointed by the council of the said borough, did unlawfully measure and weigh a certain quantity of coals, to wit, one ton of coals then and there being in bulk, and then and there unladen and landed upon a certain wharf and quay of the mayor, aldermen, and burgesses of the said borough, to wit, upon the Outer Camber Quay, in the said borough, contrary to the bye law, rule, order, and regulation made by the said mayor, aldermen, and burgesses in that behalf, whereby he, the said Henry Aldridge, for so offending as aforesaid, being his first offence, had forfeited 40s. The said information was heard and determined by us, the said parties and their attornies respectively being then present, and upon such hearing we convicted the said appellant, and fined him in the sum of 40s., and 11s. costs, and in default of payment and of sufficient goods whereon to levy the same by distress we directed that he should be imprisoned for fourteen days in the common gaol of the said borough. And whereas the appellant being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law did, pursuant to section 2 of the statute 20 & 21 Vict. c. 43, apply to us in writing within three days after the said determination to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion thereon of Her Majesty's court of Queen's Bench at Westminster.

Now, therefore, we the said justices, in compliance with the said application of the appellant, and the provisions of the statute aforesaid, do hereby state and sign such case as aforesaid as follows:—

At the hearing of the said information, the aforesaid act of parliament was produced, the 61st section of which enacts (*inter alia*) as follows:—And be it further enacted, that the said mayor, aldermen, and burgesses shall have full power and authority from time to time to make such bye laws, rules, orders, and regulations as to the said mayor, aldermen, and burgesses shall seem right and proper for regulating all officers, servants, agents, and workmen to be employed in or about the affairs or business of the said quays, wharfs, or other works of this act authorized, and for lighting the same, and for the convenience

of persons walking upon, or landing, or embarking therefrom, or shipping or landing goods, merchandise, or other commodities at or from the same, and the nature of the goods, merchandise, or other commodities, articles, matters, or things which may or may not be shipped or landed, and the mode and time of shipping and landing the same, &c. &c.; and for the governing and regulating porters, carters, carmen, and others carrying goods, or using or driving horses, waggons, carts, drays, trucks, or other carriages for conveying passengers, goods, merchandise, or other commodities, articles, matters, or things to or from the said quay or wharf for the convenience of the persons using or resorting to the same, or otherwise in regard to the several works to be made under and by virtue of this act; and power is given to the said mayor, aldermen, and burgesses to impose a penalty not exceeding 5*l.* for breach of any of the said bye-laws, &c.; and it is directed that such bye-laws, &c. shall be under the common seal of the said mayor, aldermen, and burgesses, and shall be binding upon and be observed by persons using or in any wise concerned in the said works, and shall be sufficient in any court of law or equity to justify all persons who shall act under the same. Then follows a proviso that no such bye-law, &c. shall be of any force until the same or a copy thereof shall have been sent, sealed with the seal of the borough, to one of Her Majesty's principal secretaries of state, and shall have been affixed on the outer door of the town hall, or in some other public place within the said borough, and until Her Majesty, with the advice of Her privy council, shall allow the same bye-laws.

A bye-law under the common seal of the said borough was afterwards made at a quarterly meeting of the council of the said borough, held on the 2nd February, 1846, of which the following is a copy.

That if any person or persons, other than meters appointed by the council of this borough, shall from and after the 1st day of August, 1846, measure or weigh any coals, culm, or corn in bulk, which may be laden or unladen, landed or shipped upon or from the wharfs or quays of the mayor, aldermen, and burgesses, or elsewhere upon the banks or shores of the said borough, such person or persons so offending, shall, upon conviction thereof, forfeit and pay for the first offence 40*s.*, and for the second or any subsequent offence 5*l.*

This bye-law, under the common seal of the said borough, was alleged to have been confirmed and allowed by order of Her Majesty in council on the 19th day of May, 1846.

By the 102nd section of the aforesaid act of parliament, it is enacted as follows:—

And be it further enacted, that in all cases of prosecution for offences against bye-laws, rules, or orders of the said mayor, or aldermen and burgesses, the production of a written or printed paper purporting to be the bye-laws, rules, or orders of the said mayor, aldermen, and burgesses, and authenticated by having the common seal of the said mayor, aldermen, and burgesses affixed thereto, shall be evidence of the existence of such bye-laws, rules or orders; and it shall be sufficient to prove that a printed paper or painted board containing a copy of such of the bye-laws, rules, or orders as shall inflict or impose the fine or penalty sought to be recovered, hath been affixed and published in manner by this act directed; and in case of its being afterwards displaced or damaged, hath been replaced or repaired as the case may require as soon as conveniently might be, unless proof shall be adduced by the defendant that such printed paper or painted board does not contain a copy of such of those bye-laws, rules or orders, as aforesaid, or hath not been duly affixed and generally continued in manner by this act directed.

At the hearing of the information the aforesaid bye-law, under the common seal of the said borough, and also the allowance thereof, purporting to be under the seal of the privy council, was produced before us and proved to have been received from the custody of the town clerk of the said borough; and it was also proved that on the 30th January last there was a printed copy of the bye-law posted about the quay in conspicuous places.

Mr. Field, the attorney for the appellant, objected that the bye-law did not prove itself, although produced by the town clerk, and that no sufficient evidence was given that the seal on the allowance thereof was the seal of the privy council, which did not prove itself, but we overruled the objection. Evidence was then given before us by the respondent, and we found, as facts in the case, that the mayor, aldermen, and burgesses of the said borough appointed coal meters under the authority of the said bye-law, but that the appellant was not one of such meters; also that on the 25th of January last there was a collier called the *Eliza Packer*, berthed at the Outer Camber Quay, belonging to the said mayor, aldermen, and burgesses, and within the limits of the Camber Act, and that she commenced discharging on the 26th of January and finished on the 2nd of February last. That before commencing discharging the cargo of the *Eliza Packer*, or subsequently, no application was made for a corporation meter. That on the 30th of January last there was a printed copy of the bye-law pasted about the quay in conspicuous places, and that distinct notice of the bye-law was personally given to the defendant, and that on the same day the vessel being then in the outer quay, the appellant was on board weighing coals. That the coals were weighed, put in bags, and carried on men's backs to the carts alongside, and that no meter appointed by the corporation was on board the *Eliza Packer*. It was also proved on the part of the appellant, that he was general servant of Mr. Foster, the owner of the *Eliza Packer*, who, in the capacity of a master, directed the appellant to weigh the coals in question, and that he so weighed them as such servant. It was also proved that the whole cargo of coals had been sold by Mr. Foster to a company at Portsea, called the Equitable Coal Company, whose agent was present to see that they were fairly weighed; and that the said cargo was taken away by the Equitable Coal Company, and it was admitted that if a cargo of coals consigned to a coal merchant was taken direct from the ship to his stores, no obligation would exist to employ a corporation meter.

The corporation meters charge the owner of a ship 6*d.* per ton, for the metage of coal or culm.

The corporation were entitled to certain dues on the said cargo of the *Eliza Packer*, but it was admitted that such dues had been duly accounted for and paid without the intervention of any corporation meter.

Mr. Field, for the appellant, contended that under the 61st section the corporation had no power to make any such bye-law, as in effect it imposed a tax upon ship owners; that if it had been intended that the corporation should have power to appoint meters to mete out coals, it would have been so expressed. That there was nothing in the act to prevent a shipowner or any other person employing his own servant to mete out coals, which he had sold, nor to prevent a servant obeying the commands of his master by doing so, or imposing on him a penalty for obeying them.

He also contended that even if the bye-law was a valid one, it did not affect the present case in which the whole cargo had been sold to the Equitable Coal Company, and removed by them.

He also contended that the allowance of the said bye-law by Her Majesty, with the advice of Her privy council, had not been legally proved, but the principal point in contention was as to the power of the corporation to make the said bye-law, and it is wished by all parties that such question should be determined.

We were of opinion that under the 61st section, the mayor, aldermen, and burgesses were authorized to make such a bye-law as hereinbefore set forth, and, therefore, convicted the appellant as hereinbefore mentioned.

We, therefore, request the opinion of Her Majesty's court of Queen's Bench, as to whether we were correct in our determination upon the said questions of law.

First. Does the 61st section of the said act of parliament authorize the making of the aforesaid bye-law?

Secondly. If it does, does the present case come within its operation?

Thirdly. Was such bye-law sufficiently proved before, and properly received in evidence by, us?

And upon the decision on these points, the conviction is to be either confirmed or quashed as the court of Queen's Bench may direct.

Given under our hands this 8th day of November, 1865, at Portsmouth, in the borough of Portsmouth.

B. W. CARTER.

L. MAITLAND.

Coleridge Q.C., and *Bere*, for the respondent, contended that the conviction was right, and that the 61st section did authorize the corporation to appoint meters, which was obviously necessary in the interest of all parties.

BLACKBURN, J.—I do not find anything in the statute which shows that the meter appointed by the corporation was to act exclusively of all other meters. It might be very useful that there should be such officer in all cases where the corporation were concerned, and the corporation might accept him as acting for them; but is there anything to make third parties accept this meter as binding them?

Coleridge.—There is nothing expressly to that effect, but the reason of the enactment is wide enough to meet that case.

BLACKBURN, J.—It is a great interference with the exercise of trade to be obliged to have a meter thrust on one, and who is to conclusively determine as between vendors and vendee what are the measures. There must be express words or clear language to make out that. The corporation have a right to employ a meter for themselves, but can they insist on others doing so? I think this bye-law is too extensive, and it cannot be maintained.

SHEE and LUSH, JJ. concurred.

Judgment for appellant.

IN THE QUEEN'S BENCH.

May 2, 1866.

CARTER, *appellant*; HIGHWAY BOARD OF WAREHAM, *respondents*.

30 J.P. 341.

Highway District Act—Precept to overseers—Exemption from highway rate.

HIGHWAYS, D.—*In the parish of W., an estate called B., was exempt from highway rate on the ground that the owner was liable to repair the roads thereon ratione tenuræ, but B. was included in the poor rate of the parish of W. An order forming a highway district in 1862, included "the parish of W." in the district, and no mention was made of B. as a separate highway parish. The highway board made a precept for a contribution on the "waywarden of the parish of W., B. Farm excepted." No separate waywarden had ever been appointed for B.:—Held, under 25 & 26 Vict. c. 61, s. 33, the precept should have been made on the overseers of the parish of W.*

This is a special case stated for the opinion of Her Majesty's court of Queen's Bench, under the provisions of the act of 20 & 21 Vict. c. 43, intituled An Act to improve the Administration of the Law, so far as respects Summary Proceedings before Justices of the Peace.

Dorset, } This was a complaint preferred by the highway board of the
to wit, } district of Wareham, in the county of Dorset, against John Waldron
Carter, the waywarden of the highway parish of Wool, in the said district, for

that he, being the waywarden of the parish of Wool, in the said county, in the said highway district, had been duly served with a copy of an order made by the said highway district board, in the month of November, one thousand eight hunder and sixty-four, upon him, the waywarden of the said parish, " Bovington excepted," to pay to Reginald Thornton, Esq., the treasurer of the said board on their behalf, towards the repairs of the highways of the said parish of Wool, except Bovington Farm, in the said parish, and such other expenses as are chargeable by the said board on the said parish, except as aforesaid, the sum of five pounds, on the 6th day of December, one thousand eight hundred and sixty-four, and that the said waywarden had not complied with the said order of the said board, and had not paid to the said Reginald Thornton the said sum of five pounds, or any part thereof, but therein had made default. And after hearing the parties, and the evidence adduced by them, the undersigned, being two of Her Majesty's justices of the peace in and for the said county of Dorset, did thereupon order the said John Waldron Carter to pay to the said Reginald Thornton, the treasurer of the said board, forthwith, the said sum of five pounds, and also to pay to the said board the sum of six shillings for their costs in this behalf. And the said John Waldron Carter alleging that he is dissatisfied with the said determination, as being erroneous in point of law, did, within three days thereafter, apply to us, the said justices, to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of Her Majesty's court of Queen's Bench. Wherefore, we the justices aforesaid, in compliance with the said request, and in pursuance of the statute in such case made and provided, do hereby state and sign the following case for the opinion of the said court :—

Mr. Frampton is the owner of an estate in the poor law parish of Wool, in the county of Dorset, called " Bovington," consisting of a farm which he lets, and the woods and heaths which he keeps in his own hands. On the passing of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), the surveyors of the highways of the parish of Wool assessed the predecessor of Mr. Frampton to the highway rate in respect of the woods and heaths kept in hand, and in his then occupation, and also his tenant in respect of his occupation of Bovington Farm under section 27 of that act. Mr. Frampton's predecessor and his tenant feeling themselves aggrieved by such highway rate, appealed under section 33, against the same on the ground that they were exempt from payment of highway rates, and liable to repair the public highways on the said farm, woods, and heaths, *ratione tenuræ*. The appeals were tried at the quarter sessions, held in and for the county of Dorset, and the court allowed both appeals, each party paying their own costs. The respondents to the appeal applied to the court for a special case to be stated for the opinion of the court of Queen's Bench, under the 5 & 6 Will. 4, c. 50, s. 108, but the court refused to grant a case. Mr. Frampton and his tenant have since the determination of the said appeal, at their own costs and charges, kept the public highways on Bovington Farm, woods, and heaths, in repair, and up to the present time have never been assessed to the highway rates of the parish of Wool, in respect of such farm, woods and heaths.

Bovington Farm, woods, and heaths, is a district comprised in the poor law parish of Wool, and before the passing of the Highway Act, 1862, the district is admitted to have been exempt from highway rates *ratione tenuræ*.

A surveyor of the highways has never been appointed for the district of Bovington Farm, woods, and heaths, either previous to or subsequent to the passing of the Highway Act, 1862.

Bovington Farm, woods, and heaths, so far as the same are by law rateable to the relief of the poor, have always been and are now rated and rateable to the relief of the poor of the poor law parish of Wool.

When the Highway Act, 1862 (25 & 26 Vict. c. 61), came into operation, the county of Dorset was, by a final order made at the general quarter sessions held at Dorchester, the 6th of March, 1863, divided into highway districts, and

that order named Wool as a parish amongst other parishes included in the Wareham highway district, but did not designate it as a highway parish, nor is any mention made on the order of Bovington Farm, woods or heaths as being excluded from that district or included as a separate highway parish. A copy of the final order of Quarter sessions is hereto annexed, and is to be taken as part of this case.

By the Highway Act, 1864, intituled, "An Act to amend the Act for the better Management of the Highways in England," it is enacted, by section 33, as follows:—"For the purpose of obtaining payment from the several highway parishes within the district of the sums to be contributed by them, the highway board shall order precepts to be issued to the waywardens or overseers of the said parishes according to the provisions hereinafter contained, stating the sum to be contributed by each parish, and requiring the officer to whom the precept is addressed, within a time to be limited by the precept, to pay the sum therein mentioned to the treasurer of the board."

"Where a highway parish is not a parish separately maintaining its own poor, or where in any highway parish it has for a period of not less than seven years immediately preceding the passing of the 'Highway Act, 1862,' been the custom of the surveyor of highways for such parish to levy a highway rate in respect of property not subject by law to be assessed to poor rates, the precept of the highway board shall be addressed to the waywarden of the parish, and in all other cases it shall be addressed to the overseers.

"Where the precept is addressed to a waywarden he shall pay the sum thereby required out of a separate rate, and such separate rate shall, in the case of a parish in which for such period aforesaid it has been the custom of the surveyor of highways to levy a highway rate in respect of property not subject by law to be assessed to poor rate, be assessed on and levied from the persons and in respect of the property on, from, and in respect of which the same has been assessed and levied during such period as aforesaid, and in all other cases such rate shall be assessed on and levied from the persons and in respect of property on, from, and in respect of which a poor rate would be assessable and leviable if the parish of which he is waywarden were a place separately maintaining its own poor.

"Where the precept is addressed to the overseers they shall pay the sum thereby required out of a poor rate to be levied by them, or out of any monies in their hands applicable to the relief of the poor.

"All sums of money payable in pursuance of the precepts of a highway board, shall, whether they are payable or not by the overseer of the poor, be subject to all charges to which ordinary highway rates are subject by law."

The highway board of the district of Wareham made an order on the waywarden of the parish of Wool, which order is in the following terms:—

"The highway board of the district of Wareham, in the county of Dorset.

"To the waywarden of the parish of Wool, in the county of Dorset, Bovington Farm excepted."

"In pursuance of the powers in that behalf conferred upon the highway board of the district of Wareham, in the county of Dorset, in and by an act of the 25th and 26th years of the reign of Her Majesty Queen Victoria, intituled 'An Act for the better Management of Highways in England,' you are hereby ordered and directed to pay to Reginald Thornton, the treasurer of the said highway board, at the Dorchester Bank, in Wareham aforesaid, on behalf of the said board, the sum of 5*l.*, on or before the 6th day of December next ensuing, towards the district fund of the said highway board, and towards the expenses of maintaining and keeping in repair the highways of your said parish, except Bovington Farm, and all other expenses in relation to such highways, and to take the receipt of the said Reginald Thornton, indorsed upon this precept, for the payment of the said sum or sums.

"Given under our hands at a meeting of the highway board of the said

district, held at the Town Hall, in Wareham aforesaid, on the first day of November, one thousand eight hundred and sixty-four.

" J. H. CALCRAFT	{	Presiding Chairman
" STEPHEN BENNETT,		of the Meeting.
" CORNELIUS YEARSLEY,		Members of the
		Highway Board.

" Countersigned—J. T. *pro.* C. O. BARTLETT,

" Clerk to the Highway Board."

At the hearing of the said complaint, and on the close of the complainant's case, the said John Waldron Carter, the waywarden of the parish of Wool, was heard in the matter of the said complaint, and objected to our jurisdiction to make any order upon him as waywarden of the said highway parish of Wool, Bovington Farm excepted, to pay the said sum of 5*l.* mentioned in the said order to the said Reginald Thornton, the treasurer of the said highway board, because Bovington Farm, woods, and heaths aforesaid form part and parcel of the highway parish of Wool, and because as such highway parish of Wool is co-extensive with the poor law parish of Wool, the said order of the said highway board was not lawfully made upon him as waywarden of the said parish of Wool, Bovington Farm excepted, but ought to have been made upon the overseers of the poor of the poor law parish of Wool, and to have directed the overseers to pay the said sum of 5*l.* out of a poor rate of the said poor law parish, or out of any monies in their hands applicable to the relief of the poor of the said parish.

We, the said justices, were however of opinion that the said order was properly and lawfully made by the said highway board upon the waywarden of the parish of Wool, in the county of Dorset, Bovington Farm excepted, inasmuch as Bovington was not within the highway parish of Wool, and we, the said justices, did so determine, and did order the said John Waldron Carter to pay the said sum of 5*l.* to the said Reginald Thornton, and also to pay to the said highway board the sum of six shillings for their costs in this behalf as aforesaid.

The question upon which the opinion of the said Court is desired is, whether the said justices upon the above statement of facts came to a correct decision in point of law; and if not, what should be done by us the said justices in the premises.

MILES RODGETT.
NATH. BOND.

Foot, for the appellant, contended that the order was bad, inasmuch as the precept of the highway board ought to have been issued to the overseers of Wool, instead of to the waywarden of that parish; and that in any case the present order must be invalid, inasmuch as the precept on which it was founded, professed to be made on the waywarden of a highway parish which was not included in the order of quarter sessions under which the highway district was formed. The highway parish described in the order of quarter sessions is the parish of "Wool," and not the parish of "Wool, Bovington Farm excepted," and consequently a precept issued to the waywarden of "Wool, Bovington Farm excepted," must necessarily be bad on the ground of misdescription. Moreover there are but two cases in which the precept can be issued to the waywarden, viz. first, where the highway parish is not a parish separately maintaining its own poor; and secondly, where for seven years preceding the passing of the "Highway Act, 1862," it has been the custom to levy a highway rate in respect of property not subject to be assessed to poor rates. In all other cases it must be addressed to the overseers. In the present instance, the case does not fall under either of the first two descriptions, and, therefore, must necessarily fall within the third. The highway parish of Wool is co-extensive with the poor law parish of Wool. It is a parish separately maintaining its own poor, and consequently is one with respect to which the precept of the highway board must be addressed to the overseers, and not to the waywarden.

The fact that Bovington Farm is not liable to be rated to the highway rate is immaterial, so far as the present question is concerned, inasmuch as it has already been decided in *R. v. Heath* (1 L. R. Q.B. 86; 30 J. P. 182), that a party entitled to exemption from highway rates still retains his right to exemption, and that he may claim a reduction on that account in the amount of the poor rate to which he would otherwise be liable if he were not entitled to this exemption. (He was then stopped, and the case was adjourned in order to allow the respondents to instruct counsel.)

No one appeared to support the order.

Per Curiam,—(BLACKBURN, J., SHEE, J., and LUSH, J.)

Judgment for the appellant.

IN THE QUEEN'S BENCH.

May 2, 1866.

RAYNOR, *appellant*; HORNE, *respondent*.

30 J. P. 501.

Cattle Plague—Several Offences—One herd of cattle—Penalty.

ANIMALS. A.—An order in council said it should not be lawful to bring or send any animal from one place to another after a certain date; and every person offending, for every such offence, should forfeit a sum not exceeding 20l. R. drove nine cows in one herd within a prohibited place:—Held, that R. had only committed one offence with respect to the whole nine cattle, and did not incur a separate penalty for each cow.

Case stated pursuant to section 2 of the statute 20 & 21 Vict. c. 43, for the opinion of the Court of Queen's Bench.

At a petty sessions holden at the Town Hall, in Mansfield, in and for the petty sessional division of Mansfield, in the county of Nottingham, on the 11th day of January, 1866, before us, the undersigned, Francis Hall and Walter Need, Esqrs., two of Her Majesty's justices of the peace in and for the said county, John Raynor, the above-named appellant, was charged in and by a certain information preferred by John Isaac Horne, hereinafter called the respondent, under sections 4 and 8 of the act 11 & 12 Vict. c. 107, and clauses 18 and 22 of a certain order of the Lords of Her Majesty's most Honourable Privy Council, dated the 23rd day of November, 1865, and made in pursuance of the several acts of parliament therein mentioned, for that Sir Edward Samuel Walker, Knight, and Walter Need, Esq., two of Her Majesty's justices of the peace for the said county of Nottingham, acting in and for the petty sessional division of Mansfield, in the said county of Nottingham, being the local authority, as defined by the aforesaid order in council, at a petty sessions holden at the Town Hall, in Mansfield, in and for the said petty sessional division of the said county of Nottingham, on the 7th day of December, 1865, did, by authority of the aforesaid order, by notice under their hands, published in a certain newspaper, circulated within the jurisdiction, and also by notices under their hands, published in certain newspapers circulating within the counties bordering upon the county within which the said Mansfield petty sessional division is situate, declare that with a view to prevent the spreading of the disorder designated the cattle plague, it is expedient until the 1st day of March, 1866, that cows, heifers, bulls, bullocks, oxen, calves, sheep, lambs, goats, and swine, shall not be brought from any other part of Great Britain into any place whatever within Mansfield petty

sessional division, and that after the publication of the said notice it should not be lawful for any person to bring or send any such animal as aforesaid from any place in Great Britain beyond the limits of the Mansfield petty sessional division, and that every person offending therein should, for every offence forfeit any sum not exceeding 20*l.*, and a copy of such notice was forthwith sent to the clerk of Her Majesty's Privy Council and published by him in the *London Gazette*, of the 12th day of December, 1865. And for that on the 2nd day of January, 1866, at the parish of Mansfield, being a place within the said county of Nottingham, and within the said petty sessional division of Mansfield, the said appellant did unlawfully bring one heifer from the town and county of the town of Nottingham, being a place beyond the limits of the Mansfield petty sessional division aforesaid, into the said parish of Mansfield, being a place within such petty sessional division, contrary to the said notice, the said order in council, and the statutes in that case made and provided.

The said parties respectively being then present, the said charge was by us duly heard, and upon such hearing the said appellant was duly convicted before us, of the said offence, and we adjudged him to forfeit and pay the sum of 20*l.*, to include costs to be paid according to law; and if the said sum was not paid forthwith, we ordered that the same be levied by distress and sale of the goods and chattels of the appellant, and in default of sufficient distress we adjudged the appellant to be imprisoned in the house of correction at Southwell, in the said county, for the space of two calendar months, unless the said sum and all costs and charges of the said distress should be sooner paid.

And at the said petty sessions holden at the same time and place eight other separate and distinct informations were preferred by the said respondent, under the said act of the 11 & 12 Vict. c. 107, and the said order in council, each of which said eight informations respectively charged the said appellant on the said 2nd day of January, 1860, with the same offence in all respects as was charged against him in and by the said first information hereinbefore mentioned, and the said parties being respectively then present, the said last-mentioned eight several charges were gone into, and to each of the said charges the said appellant pleaded that he had been convicted before. We overruled the said plea in each case; and the eight several charges were by us duly heard, and upon such hearings the said appellant was duly convicted before us of each of the said eight offences, and we adjudged him in each case to forfeit and pay the sum of 10*l.*, including costs to be paid according to law, and if the said several sums were not paid forthwith, we ordered the same to be levied by distress and sale of the goods and chattels of the said appellant, and in default of sufficient distress we adjudged the said appellant to be imprisoned consecutively on each of the said eight convictions in the house of correction at Southwell, in the said county, for the space of fourteen days, unless the said several sums, and all costs and charges of the said distress should be sooner paid.

And whereas the said appellant has pleaded *autrefois convict* to each of the said eight informations, and being dissatisfied with our determinations upon the hearings of the said eight informations as being erroneous in point of law, but hath, pursuant to section 2 of the statute 20 & 21 Vict. c. 43, applied to us in writing within three days after the said determinations to state and sign a case setting forth the facts and the grounds of such our determination for the opinion thereon of Her Majesty's Court of Queen's Bench at Westminster, now, therefore, we the said justices in compliance with the said application of the said appellant, and the provisions of the statute aforesaid, do hereby state and sign such case as aforesaid as follows:—

At the petty sessions held as aforesaid, the said nine informations came on to be heard in their order. In support of the first information copies of the said order in council, and notice of justices of the peace were put in, which

copies are hereunto annexed, and are to be taken as part of this case, and it was proved on the part of the informant, the respondent in this appeal, that on 2nd day of January, 1866, at the parish of Mansfield, in the county of Nottingham, the said appellant did unlawfully bring six heifers and three cows, altogether and at the same time, in a Great Northern Railway truck, by the Midland Railway, from the town and county of the town of Nottingham, being a place beyond the limits of the Mansfield petty sessional division aforesaid, into the said parish of Mansfield, being a place within such petty sessional division.

Upon the hearing of the other eight informations the same evidence in all respects was adduced as was given on behalf of the informant in support of the first information; to the second and subsequent information the defendant pleaded respectively *autrefois convict*, and contended that the facts disclosed upon the first information constituted one offence only in law. We, however, being of opinion that after publication of the notices above-mentioned it was a separate offence against the said 18th clause of the said order in council to bring any one animal of the description named therein from any place in Great Britain beyond such jurisdiction into any place within such jurisdiction, and that to bring six heifers and three cows, although all were brought at the same time, constituted nine separate and distinct offences against such order, and for each of which offences the defendant was liable in each case to forfeit a sum not exceeding 20*l.* and costs, gave our determination against the said appellant in the manner before stated.

It is agreed that this case is stated by us at the appellant's request in respect of the conviction upon the second information only, and that the convictions upon the other seven informations are to abide the judgment of the court of Queen's Bench upon this case, that is to say, they are respectively to be affirmed or quashed accordingly, as the said court shall order the second conviction to be affirmed or quashed.

The question of law arising on the above statement, therefore, is as follows, viz.:

Was the bringing the six heifers and three cows on the said 2nd day of January, 1866, from Nottingham to Mansfield, nine offences or one offence only in point of law, whereupon the opinion of the court of Queen's Bench is asked upon the said question of law, whether or not we, the said justices, were correct in our determination aforesaid, and as to what further should be done or ordered by the said court in the premises.

Given under our hands the 8th day of March, 1866, at the Town Hall, Mansfield, in the county of Nottingham aforesaid.

FRAS. HALL.
WALTER NEED.

The 18th section of the order in council enacts, that whenever any local authority declares by notice, &c. it shall not be lawful for any person to bring or send any such animal or description thereof, except in accordance with such conditions aforesaid, from any place in Great Britain beyond such jurisdiction into any place within such jurisdiction, &c.; provided always that nothing contained in this clause of this order shall make it unlawful for any person to send or carry any such animals by railway through such jurisdiction, and provided also that nothing contained in this clause of this order shall make it unlawful for any person to bring or send with the license of any two justices, &c. any such animals from any land or premises in his own occupation and beyond such jurisdiction, to any other land or premises in his own occupation within such jurisdiction. The 22nd clause of the same order provided that every person offending against this order shall, in pursuance of the said act, for every such offence, forfeit any sum not exceeding twenty pounds, which the justices before whom he or she shall be convicted of such offence, may think fit to impose.

Bristowe, for the respondent, contended that the appellant was rightly

convicted, for the offences were several, and not joint. The object was to prevent the spread of disorders among cattle, and it is not likely that if one offence should be committed by driving one heifer within a prohibited district, that the offence would be the same if there should be a drove of cattle. The 18th section clearly treats the driving of each heifer as a distinct and separate offence—*Attorney-General v. Maclean* (1 H. & C. 750); *R. v. Scott* (33 L. J. 80, Q.B.).

Mellor, for the appellant, contended that the general rule was, that one offence was only committed, though there may be several acts or repetitions of acts involved—*Cripps v. Durden* (Cowp. 540); *Collins v. Hopwood* (15 M. & W. 459).

BLACKBURN, J.—I think in this case the justices were mistaken in the conclusion to which they came, and that one offence only was committed, and, therefore, only one penalty should have been imposed. The 11 & 12 Vict. c. 107, gives power to the privy council to make orders and regulations as to the removal of infected cattle, and such orders, when made, are put on the same footing as an act of parliament. The orders in council make it unlawful for any person to bring or send any such animal from one place to another, and by another section a penalty not exceeding 20*l.* is imposed for every such offence. The question is, whether, in the present case, one offence or nine offences have been committed. There is no doubt that the respondent has transgressed the order in council at least once. Now on a view of the language of the two sections of the order in council, it is by no means easy to say what the person who drew those orders had in his mind at the time, and whether he intended to put the penalty on each head of cattle, or on the driving a whole herd. The general rule is, that one offence only is committed when such language is used. Thus if a person drove away a whole herd of cattle with a felonious intent to steal, there would be but one larceny, though several cattle. In the same way I think that there was but one offence with respect to several animals driven in a herd, and at the same time. It has been suggested that if one offence only is committed, persons might drive a lucrative trade by paying the maximum penalty, and driving a large herd at one time. The later orders, however, cure that; and though certainly the language might have been much clearer than it is, still I think upon the whole that it was meant only to impose one penalty, though several cattle may have been driven together at the same time.

SHEE, J., concurred.

Judgment for appellant.

IN THE COURT OF EXCHEQUER.

MARTIN, CHANNELL, and PIGGOTT, BB., Feb. 9, 1866.

WRIGHT v. DEELEY AND OTHERS.

30 J. P. 631; 4 H. & C. 209.

Principle applied, *Huckle v. Wilson*, 1877, 2 C.P. D. 410; 26 W. R. 98 (C.P. D.). Approved, *Walker v. General Mutual Building Society*, 1887, 36 Ch. D. 777; 57 L. T. 574 (C. A.). Referred to, *Davies v. Second Chatham Permanent Benefit Building Society*, 1889, 61 L. T. 680; (Q.B. D.). See *Sibun v. Pearce*, 1890, 44 Ch. D. 354; 62 L. T. 388 (Ch. D.): affirmed, 1890, 44 Ch. D. 364; 63 L. T. 123; 38 W. R. 658 (C. A.).

Benefit Building Society—Withdrawal of shares—Priority of payment—Dispute on the construction of a rule—Arbitration—Action—10 Geo. 4, c. 56—4 & 5 Will. 4, c. 40—6 & 7 Will. 4, c. 32.

BUILDING SOCIETY. H.—Among the rules of a building society, was one

which provided "that any member who shall be desirous of withdrawing from this society any share or shares, shall be allowed to do so on giving two months' notice in writing of such his or her intention to the secretary," subject to certain deductions for expenses, "provided always, that the deductions hereinbefore mentioned shall not extend to widows and children of deceased members, and who shall always have a priority in cases of withdrawal." Another rule provided, "that the board of management for the time being, or the major part of them, shall determine all disputes which may arise respecting the construction of these rules, or of any of the clauses, matters, or things herein contained; and also of any additions, alterations, or amendments which shall or may hereafter arise between the board and any member of this society, or persons claiming on account of a member; and in the event of their decision being unsatisfactory, then to be referred to arbitration." The plaintiff being a member of the society gave notice to the secretary, that he wished to withdraw the amount of his shares. Previously to his giving such notice, other members had also given similar notices, and as their notices expired, they were paid the sums of money due to them, in consequence of which there was not sufficient money at the society's bankers to meet the plaintiff's claim. The defendants alleged that they had the right to pay claims in the order in which they fell due, which the plaintiff disputed, and refused to refer the matter to arbitration, but brought his action for the sum due to him:—Held, that this was a matter arising between the board of management and a member of the society as such, and that the plaintiff, therefore, was bound to submit to arbitration, and was precluded from bringing an action.

The question in this case arose upon a plea and demurrer to a declaration.

This cause was tried at the Surrey Summer Assizes, 1865, when a verdict was taken for the plaintiff for 62l., subject to a special case, which set out the following facts:—The plaintiff is a tradesman at Poplar, in the county of Middlesex, and the defendants are the trustees of the Third Poplar and Limehouse Benefit Building Society, established in November, 1863, under the provisions of the 6 & 7 Will. 4, c. 32. The rules and regulations for the government of the society, were duly made by the members thereof, and on the 12th of the said month duly certified and enrolled, pursuant to the statutes in that behalf. Among those rules the following are material to this case:

18. "That any member who shall be desirous of withdrawing from this society any share or shares shall be allowed to do so on giving two months' notice in writing, according to form 2, at the end hereof, of such his or her intention to the secretary, subject to the payment of all fines then due, and to the deduction of 5s. per share during the first five years of the society, and 2s. 6d. per share for the next five years, as a proportionate share of the expenses incurred. Provided always, that the deduction hereinbefore mentioned shall not extend to widows and children of deceased members, and who shall always have a priority in cases of withdrawal."

14. "That the board of management for the time being, or the major part of them, shall determine all disputes which may arise respecting the construction of these rules, or of any of the clauses, matters or things herein contained; and also of any additions, alterations, or amendments which shall or may hereafter arise between the board and any member of this society, or persons claiming on account of a member; and in the event of their decision being unsatisfactory, then to be referred to arbitration, as set forth in the next rule."

15. "That at the first appropriation meeting of the members, after the enrolment of these rules, five arbitrators shall be elected, none of the said arbitrators being beneficially interested, either directly or indirectly, in the funds of the society; and in each case of dispute referred to them, the names of the arbitrators shall be written on pieces of paper, and placed in a box or

glass, and the three whose names are first drawn by the complaining party, or some one appointed by him, her, or them, shall be the arbitrators to decide the matter in dispute, and their decision shall be final and binding on all parties."

On the 10th March, 1863, the plaintiff became the holder of four shares in the society, and continued the holder thereof until the 10th of April, 1865. The plaintiff duly paid to the society the whole amount of the subscriptions and fines, and other monies which became due and payable from time to time in respect of the said shares up to the 10th April, 1865. The total amount so paid by him is 63*l.* 15*s.* 2*d.*, and after allowing for all deductions for which he is liable, such subscriptions amount to 62*l.* and that amount, it is admitted, is now due to him in respect of such subscriptions, if he is entitled to recover in this action. On the 10th April, 1865, the plaintiff duly gave the secretary notice that he was desirous of withdrawing his subscriptions on his shares from the funds of the association. The plaintiff's name was thereupon erased and removed from the register of members and other books of the society, and he thereupon ceased to act as a member thereof. At different times between the 1st November, 1864, and the 9th day of April, 1865, twenty-five members of the society gave to the secretary two months' notice in writing of their intention to withdraw from the society their respective shares and subscriptions, which subscriptions, after making all deductions to be made in that behalf under the said rules, amounted to 594*l.* 15*s.* Before the 10th June, 1865, eight of the twenty-five members who gave the notice were paid the amount of their respective subscriptions, viz., 233*l.* These eight members were paid in rotation, according to the time when they gave their notices. On the 20th June, 1865, another of the said twenty-five members (he having given his notice prior to the other notices by the members who had not been paid) was paid his subscriptions, amounting to 41*l.* 5*s.* Except as aforesaid, at the commencement of this action, no part of the said sum of 594*l.* 15*s.* was paid. Under another of the said rules, on the 21st of December, 1864, the sum of 200*l.* was duly appropriated and awarded by the then directors of the society to Mr. Deeley, then and continually since a member of the society. On the 24th of February, 1865, the further sum of 200*l.* was duly appropriated and awarded by the then managers of the society to Mr. Wood, then and continually since a member of the society. These persons, to whom the appropriations had been made, were entitled to have them paid to them in accordance with the rules of the society, subject to the question whether the plaintiff was not first entitled to have paid to him the amount of his subscriptions. The two sums of money appropriated and awarded were actually payable to the said members at the time this action was brought, but no particular sums of money were specifically set apart for such payments. The sum of 200*l.* awarded to Mr. Deeley has been at the society's bankers ready to be paid to him. The other sum of 200*l.* appropriated to Mr. Wood was duly paid by the society under such appropriation on the 10th October, 1865. At the time of the commencement of this action the society had at their bankers the sum of 254*l.* 18*s.* 10*d.*, which includes the 200*l.* appropriated to Mr. Deeley. The matters in dispute in this action have not been referred to arbitration under the rule before set out, but the defendants and the board of management have always been ready and willing to submit them to arbitration. The society called the plaintiff's attention to the rule requiring arbitration on the 24th June, 1865. This present action was commenced two days afterwards. The plaintiff, before action, applied to the society for the amount of his claim, but they declined to pay it at that time, upon the ground that they had, under the circumstances, no money in hand which they could apply in payment of his claim.

J. Brown, Q.C. (Digby, with him), for the plaintiff, cited 6 & 7 Will. 4, c. 32, s. 4; 10 Geo. 4, c. 56, ss. 8 and 27; Cutbill v. Kingdom, 1 Exch. 494;

Morrison v. Glover (4 Exch. 430); *Farmer v. Giles* (5 H. & N. 753); *Kelsale v. Tyler* (11 Exch. 513).

Eyre Lloyd appeared for the defendants, and referred to *Farmer v. Smith* (4 H. & N. 196), but was not called upon to argue.

MARTIN, B.—I am of opinion that our judgment ought to be for the defendants. The declaration sets forth that the defendants are trustees of a building society, conducted under certain rules enrolled pursuant to the 6 & 7 Will. 4, c. 32. This statute recites that "certain societies, commonly called building societies, have been established in different parts of the kingdom, principally among the industrious classes, for the purpose of raising, by small periodical subscriptions, a fund to assist the members thereof in obtaining small freehold or leasehold property, and it is expedient to afford protection and encouragement to such societies, and the property obtained therewith." The statute then goes on to enact that any number of persons may form themselves into societies for the purpose of raising, by subscription among the members, in shares not exceeding the value of 150*l.* each, a stock or fund for the purpose of enabling each member to receive the amount of his share to erect or purchase one or more dwelling-houses. The statute then proceeds, by the 4th section, to incorporate the Friendly Societies Act, 10 Geo. 4, c. 56, and the provisions of the 4 & 5 Will. 4, c. 40, as to enrolment of rules. The rules of this society form part of this case. There is nothing in them at variance with the provisions of these acts, or the general law of the realm, and, in addition they have been certified by the barrister appointed to certify the rules of these societies. I apprehend, therefore, that these rules are binding on every member of the society. The declaration proceeds to state that the defendants, as such trustees, are possessed of the monies and property of the society; it then sets out the 18th rule, and avers that the plaintiff became a member of the society, and paid a sum of money for subscriptions in respect of shares; that he gave notice of his intention to withdraw from the society, and have the amount of his shares subject to certain deductions, yet he has not been allowed to withdraw from the said society, and has not been paid the amount of his shares. The first question is, whether there is any cause of action shown on the face of the declaration, and whether it is not bad upon demurrer? I think it is, though it is not necessary to decide that point, for I am clearly of opinion that the plea affords a complete defence to the action. The plea commences with a repetition of the statements in the declaration as to the defendants being a benefit building society. It then sets out the 14th rule, which provides that the board of management shall determine all disputes which may arise respecting the construction of the rules, or of any of the clauses, matters, or things therein contained, and in the event of their decision being unsatisfactory, the dispute is to be referred to arbitration in manner provided by the next rule. The facts are, that the plaintiff gave the defendants notice of his desire to withdraw from the society, and, this withdrawal being assented to, it is conceded that he is entitled to receive back his subscriptions on shares, subject to certain deductions. But the defendants contend that they have a right to regulate the time when the money is to be paid, and that, as previous notices of withdrawals had been given by other members, they became entitled to priority of payment. Now, although the 14th rule is not well expressed, it is clear that this claim is a dispute respecting the construction of a rule; and that it was intended that the board of management should determine whether, upon the true construction of the 18th rule, the plaintiff is entitled to receive the money, and the defendants are bound to pay it; or whether, on the other hand, the defendants are not at liberty to take into consideration all the circumstances, and defer the payment if other members have a right of priority. Without saying whether the defendants' construction of the 18th rule is right or wrong, I think that this claim is a dispute between the board of management and a member of the society respecting the construction of a rule, and that, in

the event of the decision of the board being unsatisfactory, the matter must be referred to arbitration. The plea proceeds to set out the 15th rule, and avers that the plaintiff is a member of the society, and subject to the rules, and that the present claim is a dispute between the board of management of the society and the plaintiff, as such member, respecting certain matters and things contained in the said rules, and which, by the rules and the statutes, ought to be decided by the board of management, subject to an appeal to arbitration. In my opinion all these averments have been proved. The plea then goes on to aver that the defendants have done all things necessary, and all conditions have been performed to entitle them to have the dispute so decided, but the plaintiff has refused to submit the dispute to the board of arbitrators. It is clear that the plaintiff has so refused, and, therefore, in my judgment, every averment in the plea is fully made out. It is argued that the 14th rule is not in compliance with the requisition of the 27th section of the 10 Geo. 4, c. 56, but there is no foundation for that argument. The plaintiff has himself agreed that certain matters in dispute between him and the board of management shall not be the subject of an action in a court of law, and after the decision of the House of Lords in *Scott v. Avery* (5 H.L. Cases, 811) it is clear that this action is not maintainable. I have read the judgment of the Lord Chief Justice and my Brothers Crompton and Cresswell, and I concur with them. According to the statement in this case, twenty-five members have given notice of their intention to withdraw from the society, consequently if this action were maintainable, the society would be liable to twenty-five actions.

CHANNELL, B.—I also am of opinion that the defendants are entitled to our judgment. I very much doubt whether the declaration is good upon the face of it; but it becomes unnecessary to decide that point, because I am clearly of opinion that all the material portions of the plea are fully proved.

PIGOTT, B., concurred.

Judgment for the defendants.

IN THE COURT OF EXCHEQUER.

KELLY, C.B., BRAMWELL, CHANNELL, and PIGOTT, BB., Nov. 7, 1866.

DUNN v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

30 J. P. 760.

Negligence—Railway company—Trespass of servant—Private road—Foot-path—Misdirection.

NEGLIGENCE. A.—*A servant of a railway company while in the execution of his duty as such, committed a trespass by driving his waggon along a private road. While going along that road, he did not leave room between his waggon and the wall for a foot passenger to pass. In consequence the waggon, in turning out of the private road into a public road, crushed the plaintiff's husband against the wall and killed him. In leaving the case to the jury, the Judge did not ask them in so many words to consider whether the accident was or was not inevitable:—Held, that it was the duty of the driver of the waggon to see that there was room for any possible foot passenger to pass between his waggon and the wall, more especially as he was a trespasser, and as he did not do so he was guilty of negligence:—Held, also, that a Judge is not bound to call the attention of the jury to every possible ground of defence, and, therefore, he was not guilty of misdirection by omitting to do so.*

This was an action brought by the plaintiff, the widow and executrix of one Charles Dunn, under Lord Campbell's Act, to recover damages from the defendants, by reason of the death of her husband, which was caused, as she alleged, by the negligence of one of their servants, for which they were responsible.

The cause was tried at the last Summer Assizes at Stafford, before Keating, J. It then appeared that the person through whose alleged negligence the deceased met with his death, was employed by the defendants, the railway company, as a carter or waggoner, to go to a certain place, and convey away, for transit by their railway, two crates of china. Having arrived at the spot where the crates were to be taken up, and having loaded them in his waggon, the defendants' waggoner, instead of returning by the regular road, the one by which he had arrived, took a shorter cut through a gap in a wall, across a marl bank, and through a private road into the public road. On one side, the off side, at least of the private road there was a wall, and in going down the private road, the defendants' waggoner did not leave sufficient room between his waggon and the wall for a foot passenger to pass. At the point of junction between this private road and the public road, the deceased, who it appeared had turned in from the public road to cross the private road, was jammed in between the wall and the off side of the waggon, and was thereby killed. It was proved that the waggoner was not driving recklessly, but was leading his wheel horse by the head on the near side in order to turn the waggon properly into the public road, which ran at right angles to the private road. The accident happened about five o'clock in the afternoon of the 23rd of November, 1865. Owing to the state of the light, and the position of the waggoner, it was impossible for him to have seen the deceased, but the accident would not have happened, had the waggon been further from the wall on the off side of the private road. The jury found a verdict for the plaintiff with damages 400*l*. The learned Judge who tried the case reserved leave to the defendants to move the court above to enter a nonsuit.

Huddleston, Q.C. (with him *Dowdeswell*), now moved accordingly for a nonsuit, or for a new trial, on the ground of a misdirection, and that the verdict was against the evidence. He contended that there was no negligence on the part of the waggoner, who could not have supposed that anyone, with his eyes open, would have attempted to pass between the waggon and the wall, and that by so doing the deceased was guilty of contributory negligence. He alleged, as misdirection, firstly, that the Judge in leaving to the jury the question whether the death was caused by the negligence of the defendants' servant, without contributory negligence on the part of the deceased, put the question, "was the waggoner guilty of negligence under all the circumstances, part of such circumstances being that he was a trespasser?" Secondly, that the learned Judge did not leave it to the jury to say whether it was or was not an inevitable accident.

KELLY, C.B.—We are all of opinion that there should be no rule in this case. It seems to me that this is one of the plainest of cases. Under any circumstances the driver was bound to take care that he left room between his waggon and the wall for any possible foot passenger, and in this case he was doubly bound to do so, as being a trespasser, he had no right to assume that nobody would attempt to pass by. If there was not sufficient width in the road for a waggon and a foot passenger to pass, then he ought to have ascertained beyond doubt that the road was clear before he proceeded. In whatever way this case is regarded, the driver was guilty of negligence. There was nothing in the deceased's conduct amounting to contributory negligence; he was where he had a right to be, and where he might expect to find room for him. There was also ample evidence on which the jury might find the verdict they eventually gave. There was no misdirection. The learned Judge rightly told the jury that they were to take all the circumstances of the case into their consideration, and one of those circumstances was the fact that the waggoner, in being on the private road, was a trespasser. It is not the duty of a Judge to call the attention of the jury to every possible ground of defence, he has only to lay the case fairly before them. I am, therefore, of opinion that the rule should not be granted on either of the points.

The other learned Judges concurred.

IN THE COURT OF EXCHEQUER.

Nov. 7, 1866.

WHITEHOUSE v. THE MIDLAND RAILWAY COMPANY.

30 J. P. 760.

Railway company—Negligence—Porter—Breach of bye-law—Contributory negligence—Train in motion.

CARRIERS. B.—*A traveller on a railway, disobeying the bye-laws of the company, by getting into a carriage in motion, although under the direction of one of the company's porters, cannot recover from the company any compensation for an accident caused to him by his so doing:—Semble, (per Bramwell, B.,) that if the property of the company had in any way been injured in consequence of the traveller acting as he did, the company might have sued him for damages.*

This was an action against the defendants, the Midland Railway Company, by the plaintiff, a commercial traveller, for an injury alleged to have been caused to him by the negligence of a servant of the company for which they were liable.

This case was tried at the last Summer Assizes, for Stafford, before Keating, J. The plaintiff, on the 20th of August, took a ticket at Wakefield for Sheffield, and proceeded on his journey. On arriving at the Masborough Junction, it is necessary for Sheffield passengers to change trains. On this occasion, it appeared that the train from Wakefield was rather late, and the plaintiff, accompanied by one of the defendants' station porters, who was carrying his luggage, hastened to the Sheffield platform, arriving there just as the Sheffield train was starting and in motion. The porter at once opened a door of one of the carriages, and told the plaintiff to look sharp and jump in. In attempting to do so, the plaintiff in some way or another lost his balance, fell backwards on the platform, and was dragged some few yards, receiving the injuries for which he now brought this action. By the bye-laws of the company the porters are forbidden to open the door of a carriage in motion; and passengers are also forbidden to leave or enter a carriage in motion. At the trial it was objected that the porter was not acting in execution of his duty, as he was disobeying the orders given to him, and that the company were, therefore, not liable for any accident which might happen through his acts; also that the plaintiff by disobeying the bye-laws, and entering a carriage in motion, was guilty of contributory negligence. The plaintiff was nonsuited, but leave was reserved to him to move to set the nonsuit aside, and enter the verdict for himself.

Powell, Q.C., now moved accordingly.

KELLY, C.B.—This accident is entirely the result of the plaintiff's own fault. Is a passenger bound to do all that a porter tells him? Surely he should use his common sense, and not jump into a carriage in motion merely because one of the company's porters opens the door, and tells him to get in. I think there should be no rule in this case.

BRAMWELL, B.—I am entirely of the same opinion. If the plaintiff in falling had done any damage to the property of the company, it is clear to my mind that they could have maintained an action against him.

CHANNELL and PIGOTT, BB., concurred.

Rule refused.

IN THE COURT OF EXCHEQUER.

KELLY, C.B., BRAMWELL, CHANNELL, and PIGOTT, BB., Nov. 7, 1866.

MERCER v. GOUCH.

30 J. P. 777.

Malicious prosecution—Action—Notice—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 113.

PRACTICE. A.—*A private individual prosecuted another for felony, and on the hearing before the justices, the charge was dismissed:—Held, that the prosecutor was not entitled to a months' notice of an action for a malicious prosecution, under section 113 of the 24 & 25 Vict. c. 96. That section applies only to magistrates, police officers, and other ejusdem generis.*

The declaration in this case set forth that the defendant falsely and maliciously, without reasonable and probable cause, appeared before a justice of the peace, and there charged the plaintiff with having feloniously stolen certain goods, to wit, a gate, and upon such charge procured the said justice to issue his summons commanding the plaintiff to appear before him and certain other justices at a time and place therein named, to be dealt with according to law; and such summons was duly served upon the plaintiff, and upon the plaintiff duly appearing before the said justices according to the exigency of the said summons, falsely and maliciously, and without reasonable and probable cause, preferred and prosecuted the said charge of felony against the plaintiff before the said justices; and the said justices having heard the said charge, dismissed the same, and discharged the plaintiff from the said charge, whereby the said prosecution was determined. Then followed an allegation of damage to the plaintiff, and a claim for damages. There were other counts in trespass and in trover. To the first count, the defendant pleaded, not guilty (by statute 24 & 25 Vict. c. 96, s. 113). The pleas to the other counts are immaterial to the present point.

The case was tried before Byles, J., at the last Dorsetshire Summer Assizes, when a verdict was found for the plaintiff on the first count, with 6d. damages, and for the defendant on the other counts. The defendant was the prosecutor in a case in which he charged the plaintiff with having stolen a gate. The learned judge reserved leave for the defendant to move to enter a nonsuit on the first count, on the ground that no notice of action had been given him by the plaintiff prior to the action being brought.

The 24 & 25 Vict. c. 96, s. 113, enacts, that "all actions and prosecutions to be commenced against any person for anything done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and not otherwise, and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action."

Stock, Q.C., now moved pursuant to leave reserved, contending that the proceeding of the defendant against the plaintiff for larceny was an act done in pursuance of the statute.

KELLY, C.B.—It is unnecessary in this case to refer at length to authorities. The meaning of the provision of the act of parliament clearly is, that if any individual in the position, for instance, of a magistrate or a police officer, falls into some error whilst acting in pursuance of the statute, he shall have a month's notice of action given to him before any action is commenced against him in respect of it. But the enactment has no applica-

tion to the ordinary case of a private individual prosecuting another for a felony. Such a person is liable to an action for a malicious prosecution, without the safeguard of notice provided by the section of the statute in question.

BRAMWELL, CHANNELL, and PIGOTT, BB., concurred.

Rule refused.

IN THE QUEEN'S BENCH.

June 13, 1866.

BAILEY v. EDWARDS.

30 J. P. 790.

Surety—Giving time to principal—Discharge of surety—Equitable defence.

PRINCIPAL AND SURETY. B.—*E. accepted bills for the accommodation of P., who became insolvent, and then by agreement with his creditors, (including B.) time was given to P. by B., without any notice being given to E., whose acceptances were held by B.:—Held, in an action by B. against E., that E. had a good equitable defence, inasmuch as time had been given to P. without his consent.*

The doctrine holds both at law and in equity that if the creditor does any act to alter the position of the surety, such surety is discharged.

The first count of declaration was upon a bill of exchange drawn by John Price, accepted by the defendants, indorsed by John Price to certain persons designated by the name and style of T. P. and D. Price, and by them indorsed to the plaintiffs.

There were also counts for interest, and upon an account stated.

The defendant pleaded pleas traversing the acceptance and indorsements. There were also pleas of never indebted and payment, and then came the 6th plea, which was as follows:—"And for a 6th plea to the first count for defence on equitable grounds, the defendant says that there never was any value or consideration for the acceptance of the said bill of exchange by the defendant, or for the making or indorsement thereof by the said John Price, or for the said John Price, or for the said T. P. and D. Price, holding the same. And that at the time of the indorsement of the bill by the said T. P. and D. Price to the plaintiffs, the defendant and the said John Price were merely sureties on the said bill for the said T. P. and D. Price to the plaintiffs, for any value given or to be given by the plaintiffs to the said T. P. and D. Price for the said bill, whereof the plaintiffs had notice when the said bill was first indorsed to them, and they took the said bill from the said T. P. and D. Price on the terms that the defendant and the said John Price should be liable to them on the said bill as sureties only for the said T. P. and D. Price; and after the indorsement of the said bill to the plaintiffs, and whilst they were the holders thereof, and after the said bill had become due, to wit, on the 17th of November, 1858, by an indenture then made between T. P. and D. Price, by their names of Thomas Prothero Price and David Price of the first part, and the said Thomas Prothero Price of the second part, Thomas Greatrex, Charles Lyne, and William Murrey Chapp of the third part, the plaintiffs, and one William Williams of the fourth part, John Parry de Winton, David Evans, John Evans, and William de Winton of the fifth part, and the several persons whose names and seals were thereunder set in the first schedule thereunder written, being creditors of the said Thomas Prothero Price and David Price of the sixth part, and the several persons

whose names and seals were thereunto subscribed and set in the second schedule thereunder written, being separate creditors of the said Thomas Prothero Price of the seventh part. After reciting according to the facts, a petition and proceeding for arrangement between the said Thomas Prothero Price and David Price, and their creditors under the Bankrupt Law Consolidation Act, 1849, it was proposed and agreed by the parties thereto, that certain collieries and works of the said T. P. and D. Price should be carried on under inspection for a certain time therein mentioned, and that the plaintiffs and the said W. Williams should be paid a certain sum, to wit, 8,700*l.* in full, and a certain composition on the residue of their debt, in manner therein mentioned, they thereby engaging not to enforce claims against any parties to the bills in their hands, who, as between themselves and the said T. P. and D. Price, were not then liable on such bills; and it was thereby provided that the right of the plaintiffs and the said W. Williams should in no way be prejudiced in the event of certain proposals made by the said T. P. and D. Price not being carried into effect; and the defendant further says, that the said deed was executed by the said T. P. and D. Price, and by the plaintiffs, and the said W. Williams, and by divers other creditors of the said T. P. and D. Price, and that the said bill in the first count mentioned was one of the bills referred to in the said deed, and was then in the hands of the plaintiffs and the said W. Williams, and the defendant was then a party to the said bill, who was not liable to the said T. P. and D. Price thereon, and that the said proposals of the said T. P. and D. Price in the said deed mentioned have been fully carried into effect, and that the said deed was made and entered into between the plaintiffs and the said T. P. and D. Price, without the consent of the defendant.

At the trial which took place before Blackburn, J., at the sittings at Westminster during the Hilary Term, 1863, the facts, which are fully set out in the judgment of this court, were proved and a verdict was entered for the defendant, with leave to the plaintiffs to move.

A rule *nisi* was subsequently obtained, pursuant to the leave reserved, calling upon the defendant to shew cause why the verdict should not be set aside and a verdict entered for the plaintiffs, for 12*l.* 6*s.* 10*d.*, on the ground that the substance of the 6th plea was not proved. The court to have power to make such amendments, if any, as they might think that the judge should have made at *nisi prius*.

Gibbons shewed cause against the rule.

Coleridge, Q.C., and Gray, Q.C., supported the rule.

Cur. adv. vult.

BLACKBURN, J.—In this case the plaintiffs sued as indorsees of a bill of exchange accepted by the defendant. The defendant pleaded as a defence on equitable grounds, that he was surety for Messrs. Price, the indorsers of the bill, and that the plaintiffs had discharged him by giving time to Messrs. Price by a composition deed. At the trial before me a verdict was directed for the defendant on this plea, with leave to move to enter the verdict for the plaintiffs, on the facts proved and admitted at the trial. Power was reserved to amend the plea if necessary, so that the question is, whether the facts proved and admitted constituted a defence in equity, and is independent of the form of the plea actually pleaded. It was at the trial admitted that in 1858, the plaintiffs, without the assent or knowledge of the defendant, executed a deed, on the effect of which the question principally depends; that deed was between the Messrs. Price, carrying on business as coal masters, under the firm of T. P. and D. Price, of the first part; T. P. Price alone of the second part, some trustees of the third part; the persons forming the firm of Bailey, Greatrex and Co., bankers (the present plaintiffs), of the fourth part; another firm of bankers, Wilkins and Co., of the fifth part, the several creditors of Messrs. Price, who should execute the deed of the sixth part, and

the separate creditors of T. P. Price, of the seventh part. It recited that T. P. and D. Price having stopped payment, and presented their petition to the court of Bankruptcy had made a proposal which, as modified, had been assented to by the creditors and the commissioner, and was intended to be carried into effect by the deed. This modified proposal is then set forth in the deed. The following are the parts of it material to the present question. The proposal was that T. P. and D. Price, the petitioners, should carry on their business under inspectorship for the benefit of all their creditors, that Bailey, Greatrex, and Co. (the now plaintiffs); who, it was recited, held various securities for their debt, should be paid in full the sum of 8,700*l.* (being the amount of bills discounted for T. P. and D. Price, in respect of some matters specified,) by applying the proceeds of the sale of some property over which Bailey, Greatrex, and Co. held security in part payment of the 8,700*l.*, and that the residue of the sum of 8,700*l.* and 10*s.* in the pound on the rest of their debt, should be paid to Bailey, Greatrex, and Co., by eight annual instalments, the first to be made, &c. We are of opinion that the rule must be discharged, as the effect of this deed is, 'under the circumstances, to discharge the defendant in equity. The principles upon which the courts of equity have proceeded, appears to be this. A surety has, as such, a variety of rights, amongst others, he has the right in equity to call upon the creditor to enforce all his, the creditor's, remedies against the principal debtor, for the surety's benefit, and at the surety's risk and expense: *Wright v. Simpson*, (6 *Ves.* 714). No doubt a court of equity would put the surety under terms to give indemnity to the creditor before it would enforce this right, and consequently the right which the surety has is of very little practical value, and is seldom, if ever, exercised. Still the surety has this right, and if the creditor wilfully deprives the surety of the right, he so far alters the surety's position. Lord Eldon, in his judgment in *Samuell v. Hawarth* (3 *Mer.* 272), says, "that where time is given by virtue of a positive contract between the creditor and the principal, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract." Whether, if the matter were *res integra* it might not have been better to confine the surety's right in such cases to compensation in damages for this injury, which is generally only nominal, it is not now open to us to consider. A long series of decisions, many of which may be found collected in the notes to *Rees v. Berrington*, (3 *White & Tudors, L. C.* 822, 2nd ed.) have settled that such an alteration in the position of a surety discharges him, even though the delay may be shewn to be for his benefit. Lord Eldon, in *Samuell v. Hawarth*, gives as the reason for this apparent harshness, that the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit." The principal has been imported from the courts of equity into those of law, and is clearly stated by Williams, J., in *Strong v. Foster*, (17 *C. B.* 201.) He there says, p. 219, "What I understand by a giving of time in such a case is this: the surety has a right at any moment to go to the creditor, and say, I have reason to suspect the principal debtor to be insolvent; therefore I call upon you to sue him or to permit me to sue him. If the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue him, he thereby discharges the surety. The case then falls within the general doctrine as to principal and surety which equally obtains at law and in equity, that, if the creditor do any act to alter the position of the surety he thereby discharges him. There is, however, another point to be noticed here. The bill of exchange on which this action is brought is a written contract, and conclusively shews, both at law and in equity, that the contract of the defendant to the plaintiffs was as principal, and not as surety; and moreover the plaintiffs had no notice at the time when

they took the bill that the defendant was other than an acceptor for value. There are authorities, amongst others *Strong v. Foster* (17 C. B. 201) tending to shew that, in order to enable a surety to raise at law a defence on the ground that time has been given to the principal, it is necessary to shew that the original contract between the plaintiff and the defendant was that of creditor and surety. How this may be at law we are not called on to decide. We are determining this case as a court of equity. It was decided in this court in *Pooley v. Harradine* (7 E. & B. 431), on an equitable plea, that the equity on which the court should act "does not depend on any contract with the creditor, but on its being inequitable in him knowingly to prejudice the rights of the surety against the principal." By this judgment we are bound, even if we did not agree with it as we do. In *Pooley v. Harradine* the plea alleged that the creditor at the time when he became holder of the bills, as well as when he gave time, had notice of the relationship of principal and surety between the defendant and his creditor, and the decision did not go further; but it had previously been determined by Sir J. Leach, M.R., that even though the relationship of principal and surety was created by an arrangement between them after the parties had become liable to the creditor as joint debtors, the creditor by giving time to the principal, with notice of this arrangement, discharged the surety, and this decision was affirmed by Lord Brougham and by the House of Lords: *Oakeley v. Pasheller* (4 Cl. & F. 207). Now in the present case the plaintiffs, when they executed the deed, had notice that some of the parties to the bills in their hands were not primarily liable to the Messrs. Price on those bills. They entered into the deed, making stipulations with regard to such parties, and taking their chance as to who they should turn out to be. We think that if the effect of the deed was to alter the position of the parties who should turn out to be sureties, it was as wilfully done and as inequitable as if they had express notice who these parties were. The question, therefore, as it seems to us, comes round to this, whether the effect of the deed is to give time to Messrs. Price and Co., so that it would discharge ordinary sureties of whom the plaintiffs then had notice. The plaintiffs and Messrs. Price did not intend to discharge the sureties. On the contrary, they have by an express proviso agreed that in the event which has happened of the proposal not being carried fully into effect, the sureties should be liable then as if the deed had never been made. But during the two years which elapsed before the Messrs. Price made default, the plaintiffs could not, without a breach of faith and of contract on their part, have sued Messrs. Price, and if the surety had called on them to sue they would have been bound to refuse. It is quite true that where the contract by which the creditor binds himself to the principal debtor not to sue him for a time is so worded as to show that it was intended only to apply to suits for the benefit of the creditor, and to except from its operation suits at the instance of sureties, and on their behalf, no alteration in the position of the surety is produced, and he is not discharged. And it seems established that if in the contract for giving time there is an unqualified reservation of remedies against sureties, the contract is to be construed as allowing the surety to retain all his remedies over against the principal debtor, and as it is said in *Price v. Barker* (4 E. & B. 760), "that the covenant not to sue is to operate only so far as the rights of the surety may not be affected." In the deed now before us, the creditors generally have stipulated for a right to have immediate recourse against sureties, but from this there is an exception of those mentioned in the proposal. And on reference to the proposal we find that Bailey, Greatrex, & Co. expressly bound themselves not to sue the parties to the bills who stood in the position of sureties, for a period which turned out to be two years, and we find nothing to show any intention to preserve for those sureties during that time their right to call upon Bailey, Greatrex, & Co. to sue Messrs. Price if so advised. We think, therefore, that an equitable defence is made out, and consequently that the rule must be discharged.

BAIL COURT.

BLACKBURN, SHEE, JJ., Nov. 22, 1866.

REG. v. GROVES AND OTHERS.

30 J. P. 792.

Corporation (Municipal)—Election—Notice of town clerk—Time for sending in nomination papers.

ELECTION LAW. B.—By section 5 of the 22 Vict. c. 35 ("The Municipal Corporations Act, 1859,") the town clerk is required, seven days at least before the day fixed for the election of any councillor to publish a notice in the form contained in schedule B. This form has the following paragraph: "5. That all nomination papers must be delivered to the town clerk on or before the day of next." By section 6 the burgesses may nominate in writing certain candidates, which nomination is to be "sent to the town clerk at least two whole days (Sunday excluded) before the day of election."

At the last general municipal election the town clerk published his notice as required by section 5, and directed that the nomination papers should be sent in by the 28th October, the election taking place on the following 1st of November. Certain nomination papers were accordingly sent in by that day, but others containing the names of other candidates were not sent in until the 29th, these latter he refused to accept, and he published the list of candidates, omitting those whose names appeared only in the last-mentioned lists, who, therefore, had no opportunity of being elected:—Held, that the town clerk was wrong, and that he had no right to require the nomination papers to be sent in for a longer period than two whole days at least before the day of election.

This was a rule calling upon the defendants to show cause why a *quo warranto* information should not be filed for exercising the office of the town councillors of Warwick.

By section 4 of the 22 Vict. c. 35 (an Act to amend the Law relating to Municipal Elections) it is enacted that "seven days at least before the day fixed for the election of any councillor or councillors, the town clerk shall prepare, sign, and publish a notice in the form contained in schedule B. to this act annexed, or to the like effect, by causing the same," &c.

By section 6 it is enacted that, "at any election of councillors to be held for any borough or ward, any person entitled to vote may nominate for the office of councillor himself (if duly qualified), or any other person or persons so qualified (not exceeding the number of persons to be elected for the borough or ward, as the case may be), and every such nomination shall be in writing . . . and shall be sent to the town clerk at least two whole days (Sunday excluded), before the day of election; and the town clerk shall, at least one whole day (Sunday excluded), before the said day of election, cause the christian names and surnames of the persons so nominated, with such statement of their respective places of abode and descriptions, and with the name of the party nominating them, respectively to be printed and placed on the door of the town hall, and in some other conspicuous parts of the borough or ward in which such election is to be held."

In the schedule (B.) referred to in section 5, which is a form in which the town clerk is to give public notice of the intended election, there is the following paragraph:—

"5. That all nomination papers must be delivered to the town clerk on or before the day of next."

It appeared that in the present case the town clerk, on the 22nd of October, gave the notice as required by the 5th section, but he directed in such notice that the nomination papers should be sent in by the 28th (which was a Sunday).

Thursday, the 1st of November, was the day of election. Some nomination papers were delivered to the town clerk on the day mentioned in his notice, but other nomination papers containing the names of other candidates were not delivered to him until Monday, the 29th of October, and those he refused to accept, and he published the list of candidates without naming those who were included in the latter lists only, and who consequently had no opportunity of being elected.

Field, Q.C., now showed cause, and contended that under the words of the 6th section the town clerk had a discretion in appointing the length of time for sending in the nominations, so that it should not be less than two days before the day of election; that if the statute had intended otherwise it would not have said "at least two whole days;" that the town clerk would be required to use a wise discretion, and it did not seem inconvenient or embarrassing to require a longer time by a day or two for sending in the nomination papers.

Hayes, Serjeant, and *Willes*, appeared in support of the rule, and argued that although the parties nominating would be in time in sending in the nomination papers, leaving only two clear days to the election, and might indeed send them in before, yet it was not for the town clerk to prescribe that a longer period than two clear days should intervene between the delivering of the nomination papers, and the day of election; that the town clerk would be thus restricting the time of the burgesses in making their selection of candidates.

BLACKBURN, J.—I am clearly of opinion that the town clerk was wrong in requiring the nomination papers to be sent in by the 28th of October, for if he has the discretion contended for, he might require any length of time to intervene between the delivery of the nomination papers and the election. The rule must be made absolute.

SHEE, J., concurred.

Rule absolute.

IN THE QUEEN'S BENCH.

May 31, 1866.

COWLES v. POTTS.

30 J. P. 804.

Slander—Privileged Communication—Question for jury—Malice.

LIBEL AND SLANDER. E.—*C. was a trustee of a local charity, and there being a movement to turn him out, he asked A., who employed him as bailiff, to get signatures to a protest on his behalf. A. went to P. to get his signature, but P. declined, and on being pressed by A. for his reasons, P. said that he would not keep a big rogue like C. in the trust, for that C. had left the parish under discreditable circumstances, and without settling with his creditors, of whom P. was one. P. also told A. he was surprised A. kept on such a man as P. with his (A.'s) son. All this arose out of the request made to P. for his signature. In consequence of what was thus said, A. dismissed C. from his post as bailiff, whereon C. sued P. for slander, alleging this special damage:—Held, that what P. said in the circumstances was a privileged communication, and that everything being pertinent to the discussion he was entitled to a verdict.*

This was an action for slander.

The declaration alleged that the defendant falsely and maliciously spoke of the plaintiff the words following, that is to say, "I will never sign to keep a big rogue like Robert Cowles in the trust" (meaning a certain trust called Buckman's Charity, in the parish of, &c., whereof the plaintiff at the time the defendant spoke and published the above false and defamatory words was a trustee), "as he has robbed me of two pounds. I will not vote to keep such a

rogue and swindling thief like Robert Cowles in the trust" (meaning the said trust). "You will find him to be a big rogue before long." Whereby the plaintiff lost his situation as farm bailiff in the employ of Charles Cooper, &c.

Plea not guilty.

At the trial, at the Suffolk Summer Assizes, 1864, before Channell, B., it appeared from the evidence on the part of the plaintiff, that the plaintiff was a trustee of a charity, called Buckman's Charity, and was also farm bailiff to Mr. Cooper, a farmer at Kessengland. Some attempts had been made to remove the plaintiff from the trust, and as he was unwilling to resign, he requested Mr. Cooper to obtain signatures from the inhabitants to protest against his being turned out. In consequence of this request of the plaintiff, Mr. Cooper applied to the defendant to sign the protest. This the defendant refused to do, whereupon Cooper asked for his reasons for so refusing, when he said that he would not keep a big rogue like the plaintiff in the trust. Cooper further pressed him to explain the reason for his opinion, and he then said that the plaintiff had left the parish under discreditable circumstances, and without settling with his creditors, including the defendant. Cooper further stated that in consequence of what the defendant told him he dismissed the plaintiff. The defendant gave much the same account of the above conversation, but added that towards the end of it he told Cooper that he was surprised that he kept such a man on with his son.

The learned Judge asked the jury whether the special damage resulted from the words spoken; what was the amount of damages to be given to the plaintiff; and also whether there was malice. He reserved for the court the question whether the words were privileged or not. The jury found that the dismissal was in consequence of what the defendant said, and assessed the damages at 10*l.*, but they also found that there was no malice. The verdict was thereupon entered for the plaintiff.

A rule *nisi* was subsequently obtained, calling upon the plaintiff to shew cause why the verdict entered for him should not be set aside, and a verdict entered for the defendant, on the ground that the Judge ought to have held that the words were privileged.

O'Malley, Q.C., and *Bulwer, Q.C.*, showed cause, and contended that the verdict ought to stand. This was a case where, even assuming the occasion to be privileged, the defendant went much further than the occasion, and introduced irrelevant matter; *Fryer v. Kinnersley* (15 C. B. N.S. 422). It is not material that the jury negatived the finding of malice, for that was obviously the result of some compromise among themselves: *Milne v. Marwood* (15 C. B. 778), *Martin v. Strong* (5 A. & E. 535), *Fairman v. Ives* (5 B. & Ald. 643), *Robertson v. MacDougall* (4 Bing. 670), *Godson v. Horne* (1 B. & B. 137), *Somerville v. Hawkins* (10 C. B. 583), *Wenman v. Ash* (13 C. B. 886), *Wright v. Woodgate* (2 Cr. M. & R. 573), *Tuson v. Evans* (12 A. & E. 733), *Starkie on Libel*, 87.

Keane, Q.C., and *Newton*, in support of the rule, contended that as the jury had negatived malice, and this was clearly a privileged communication, the verdict must be for the defendant. The sole questions were, was this a privileged occasion, and was the defendant abusing the occasion? Whether the defendant acted maliciously or not, was not a question for the jury: *Cooke v. Wildes* (5 E. & B. 328), *Toogood v. Spyring* (1 C. M. & R. 181).

Cur. adv. vult.

BLACKBURN, J.—In this case the action was for words spoken to one Charles Cooper, imputing to the plaintiff that he was a rogue, in consequence of which the plaintiff lost his situation as servant to Cooper. Plea not guilty. On the trial before my brother Channell, it appeared that the plaintiff was a trustee of some local charity; that it had been proposed to remove him from that trust, and that Cooper, to whom plaintiff was then farm bailiff, at the request and

instance of the plaintiff was canvassing for signatures to a protest against his being turned out of the trust; Cooper requested the defendant to sign this protest, and he having refused to do so, was pressed to give his reasons, and gave them, namely, that he would not keep a big rogue like the plaintiff in the trust; being further pressed, he explained the reasons for this opinion, which were that plaintiff had left the parish under discreditable circumstances, and without settling with his creditors, including the defendant, so that it was plain that the words were used in a sense disparaging to the plaintiff, but not actionable without special damage. Cooper gave evidence that he in consequence of these words dismissed the plaintiff, not wishing, as he said, to have him near his son, a boy of about 18. At the close of the plaintiff's case, the defendant's counsel submitted that there was no case, as the words were privileged by the occasion. The learned Judge said that he should reserve the questions for the court above, and in the meantime, leave to the jury the two questions, whether the special damage did result from the words spoken, and the amount of damages, and also (in case the court should think the words privileged by the occasion), whether there was malice. The defendant's counsel then called witnesses, and amongst others the defendant himself, whose account of the conversation with Cooper did not materially differ from that given by the plaintiff's witnesses, except the defendant stated that towards the end of the conversation, he told Cooper that he (the defendant) was surprised that he kept such a man as the plaintiff on with his son. The jury found that the dismissal was in consequence of the slander uttered by the defendant, and assessed the damage at 10*l.*; but they negatived malice. The verdict was then entered for the plaintiff, with leave to move to enter a verdict for the defendant, if the judge ought to have held that the words were privileged. A rule *nisi* was obtained accordingly, which was argued before my brothers Mellor, and Shee, and myself during last term. During the argument a doubt occurred to some of us, whether the words, which, according to the defendant's own account, he had spoken as to his surprise that Cooper should keep the plaintiff near his son, were not so disjointed from the discussion about the trusteeship as not to be privileged, whatever might be the case with regard to the other words; but on reference to the learned Judge, we are informed that the whole of what was said about the plaintiff's character, was said with reference to the discussion, whether it was proper that he should be continued as a trustee of the charity; and that the question reserved to the court was whether, that being the case, words imputing roguery to the plaintiff were *primâ facie* privileged or not. The intemperance of the defendant's expression, and the assertion on his part, that the roguery of the plaintiff was so great, that he was not fit to be near young Cooper, were left to the jury as evidence of malice; but that being negatived, the question reserved is, whether the occasion excused language strongly disparaging the plaintiff's character for honesty; but *bonâ fide* spoken with reference to the discussion whether it was proper to take steps to retain him as trustee of the charity. No motion has been made to set aside the finding as to malice as against evidence, nor would the court, according to its usual practice, have granted a rule on that ground where the damages were so small. We are now to take it as decided that the words were *bonâ fide* spoken with reference to the propriety of taking steps to retain the plaintiff in his trusteeship, that discussion having been brought on by the plaintiff himself causing the defendant to be canvassed for that purpose. The principle on which it depends whether words or writing, *primâ facie* actionable, are justified by the occasion on which they are published, so as to put the plaintiff on proof of actual malice, has been laid down in *Toogood v. Spyring* (1 Cr. M. & R. 181), by Parke, B., in the following terms: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his own interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from the unauthorized communication,

and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits." This exposition of the law has always been approved of, the difficulty felt being in the application of the rule to the particular case; and in the more recent decisions, such as *Whiteley v. Adams* (15 C. B. N.S. 392), the tendency has been to extend the limits of the moral duty or reasonable exigency which authorizes the publication of defamatory matter. But we think that the present case falls strictly within the limits as laid down in *Toogood v. Spyring*. When the defendant was requested to join in taking steps to retain the plaintiff in his trusteeship, or to state the reasons why he so refused, we think that there was a duty towards those who were concerned in trusteeship, and an interest of his own, making it a reasonable occasion, warranting his statement of that which he believed, so far as it was pertinent to the fitness of the plaintiff for that office. And this was still more clearly the case when we find that the defendant was canvassed at the instance of the plaintiff himself. Under such circumstances the plaintiff cannot, as we think, complain of any statement honestly made, if pertinent to the question whether the plaintiff was fit to be trusted, and every statement relating to honesty and previous conduct in business, was pertinent to such a question. If the defendant had made statements injurious to the plaintiff's character, on some matter not in any way connected with the subject of his fitness to be a trustee, as if, for instance, there had been a statement made that he had beaten his wife, that would have been wholly unwarranted by the occasion, and would consequently not have been privileged. But all the words of which evidence was given in this case, were relevant to the question whether the plaintiff was fit to be trusted or not; and that being so, we think that according to the decision of this court in *Cook v. Wildes* (5 E. & B. 328), of which we approve, the intemperance of the defendant's language, and the unnecessary force of his expressions formed evidence of malice which it was proper to leave to the jury, but did not take away the privilege, the jury having negatived malice. We think, therefore, that the rule must be absolute to enter the verdict for the defendant.

Rule absolute.

IN THE QUEEN'S BENCH.

Jan. 15, 1866.

PAGE AND ANOTHER v. DEFRIES AND ANOTHER.

7 B. & S. 137.

Liability of master for act of servant.

MASTER AND SERVANT. E.—*The defendants sent a barge under the management of their lighterman to a wharf for the purpose of being loaded; he was unable to get up to it in consequence of a barge belonging to the plaintiffs lying in the way without any one in charge of it; the foreman of the wharf told him to shove the other barge away as it had no business there, and to bring his alongside; he then moved the plaintiffs' barge from the wharf, and made it fast to a pile in the river. When the tide went down the plaintiffs' barge settled upon a projection in the bed of the river, and was injured:—Held, that the defendants were responsible, as the lighterman, in doing the act complained of, was acting as their servant.*

Lamb v. Lady Elizabeth Palk (9 C. & P. 621) overruled.

This was an action brought to recover damages for injury done to a barge

of the plaintiffs by reason of the alleged carelessness and negligence of the defendants' servant.

The defendants pleaded not guilty, and a denial that the person alleged to be the servant of defendants was at the time of committing the acts complained of acting as their servant.

Issue.—On the trial, before Blackburn, J., at the Sittings at Guildhall, after Michaelmas Term, 1865, it appeared that the defendants, who were wharfingers and lightermen at Wapping, sent a barge under the management of one of their lightermen to New Inn Wharf, Ratcliffe, on the river Thames, for the purpose of receiving a load of mill stones from that wharf. The wharf was so situated that barges could get up to it to receive their loads only at certain states of the tide. When the defendants' lighterman arrived at the wharf he was unable to get up to it in consequence of the plaintiffs' barge lying in the way without any one in charge of it. He waited off until the next morning, when the foreman of the wharf told him to shove the other barge away as it had no business there, and to bring his alongside: he then untied the other barge from a ring on the wharf to which it was fastened, and made it fast to a pile a little farther out in the river, and so left it. When the tide went down the plaintiffs' barge settled upon a projection in the bed of the river, and was injured.

It was contended for the defendants that when their lighterman removed the plaintiffs' barge he was not acting as their servant, but under the authority of the foreman of the owners of the wharf, and therefore they were not liable; and *Lamb v. Lady Elizabeth Palk* (9 C. & P. 629) was cited.

The learned Judge ruled in opposition to that case; and a verdict was given for the plaintiffs, damages 40l.

Digby Seymour now moved for a rule nisi for a new trial on the ground of misdirection.—In *Lamb v. Lady Elizabeth Palk* (9 C. & P. 629) the plaintiff's van was unloading at the back entrance of his premises, and his gig standing behind it, when the defendant's coachman with a carriage and pair of horses came up from a mews into the street, and the carriage, being unable to pass the van for want of room, was obstructed for five minutes; the defendant's coachman then got off his box and took hold of the head of the horse in the van, in order to remove the van; this caused the van to move, and a packing case, which a person was taking from the van, fell down on the shafts of the plaintiff's gig and broke them: it was held by Gurney, B., after consulting the other Barons of the Exchequer, that the defendant was not responsible for the damage done, as the coachman was not acting in the employ of the defendant at the time the matter occurred. This case is cited in *Manley Smith on Master and Servant*, p. 193, 2nd ed., and *Addison on Torts*, 2nd ed., pp. 324-5. [BLACKBURN, J.—At the trial I thought *Lamb v. Lady Elizabeth Palk* (9 C. & P. 629) was not law, or was misreported. MELLOR, J.—That case is in point, but is not law. BLACKBURN, J.—My own strong opinion being confirmed by my learned brothers, the rule must be refused.]

Per Curiam. (BLACKBURN, MELLOR and LUSH, JJ.)

Rule refused.

IN THE QUEEN'S BENCH.

Jan. 31, 1866.

CARTWRIGHT AND OTHERS v. FORMAN.

7 B. & S. 243.

Lease of colliery—Covenant for supply of coals to lessor—Plea—"Coals worked out."

MINES AND MINERALS. C.—*Declaration on a covenant in a lease of a colliery, by which the owners for the time being were entitled to as many coals at the*

pit's mouth as should be consumed in any one dwelling-house, to be agreed upon by the majority of them. Plea, that the whole of the coals comprised in the demise were worked out in the fair and proper course of working the mines. The lease was for the term of twenty-eight years from the 30th September, 1847, at the royalty of one-eighth of the minerals produced, and contained a proviso that if the minerals should be fully and fairly gotten before the expiration of the term the lessees might determine it on giving twelve months' notice. It appeared that some coal remained in the pit, but it could not be practically worked without costing more than it was worth:—Held, that the covenant was absolute, and therefore the plea was no answer.

The declaration stated that by an indenture, bearing date the 30th September, A.D. 1847, being a lease of certain mines, veins, beds, or strata of coal and ironstone, marl, clay, and land and premises, by the plaintiffs, as owners thereof, to the defendant for a term of twenty-eight years, still subsisting and undetermined, the defendant covenanted with the plaintiffs and one *Eilza Cartwright*, in her lifetime, now deceased, and that the owners of the premises for the time being should be entitled to have and receive, and be suffered and permitted to take, as many coals at the pit's mouth as should be consumed in any one dwelling-house, to be agreed upon by the majority of them, and to be occupied by some or one of them with the offices belonging thereto, without paying anything for the same. It then averred that the plaintiffs did all things on their part, and all things existed and happened, necessary to entitle them to have the covenant performed by the defendant, and to sue for the breach thereof, and the time for the performance thereof had elapsed: stating as a breach that the defendant did not nor would suffer or permit or allow the owners of the premises for the time being to have, receive, or take as many coals at the pit's mouth as were required to be or were consumed in any one dwelling-house agreed upon, and occupied with the offices belonging thereto or otherwise howsoever, pursuant to the covenant, but wholly neglected and refused so to do, and exonerated and discharged the owners from agreeing upon any such dwelling-house.

Plea.—That the alleged covenant was in the words following, “And lastly, it is hereby agreed that the owners of the said premises for the time being shall be entitled to as many coals at the pit's mouth as shall be consumed in any one dwelling-house to be agreed upon by the majority of them, and to be occupied by some or one of them with the offices belonging thereto, without paying anything for the same, but no mine rent shall be reckoned or paid upon or for such coals:” and that before the alleged breach the whole of the coals comprised in the demise were worked out in the fair and proper course of working the mine.

Issue thereon.

On the trial, before BLACKBURN, J., at the Derbyshire Summer Assizes in 1864, it appeared that, by indenture dated the 30th September, 1847, certain coals and other minerals at Swadlincote, in the county of Derby, called the Newhall Pit Colliery, were demised to the defendant for the term of twenty-eight years from the date of the lease at the royalty of one-eighth of the net proceeds of the minerals demised. The lease gave the lessee various powers necessary to the effectual working of the minerals, and there was a proviso that if the minerals should be fully and fairly gotten before the expiration of the term the lessees might determine the lease on giving twelve months' notice. At the end of the lease was the covenant set out in the plea.

It was admitted by the defendant that some coals in the pit were not worked out, but evidence was given that they were either not saleable or could not be got without costing more than they could be sold for at the pit's mouth. For the plaintiffs it was contended that a stratum of coal called the Stanhope Seam, which was discovered in 1863, could be worked at a profit.

It was agreed that a verdict should be entered for the plaintiffs for 65l.,

and that it be referred to an arbitrator to decide whether the Stanhope Seam coal could have been, during the time within which the action was brought, practically worked without costing more than it was worth: a point which the arbitrator afterwards determined in the negative. The learned Judge ruled that the words "worked out," in the plea, meant actually worked out, though the mine could not be worked at a profit, that is without an expense greater than the coals would be worth; and leave was reserved to move to enter the verdict for the defendant.

In Michaelmas Term, 1864, *Digby Scymour* obtained a rule *nisi* accordingly, on the ground that the plea was an answer in law to the declaration and had been proved in fact on the finding of the arbitrator. He cited *Jones v. Shears* (7 C. & P. 346).

Hayes, Serjeant, and Field shewed cause.—This is an absolute covenant to supply coals to the lessors, and so long as the defendant holds the lease he is bound to supply them if they can be got. It is no answer to such a covenant that the cost of getting them is such that they cannot be sold at the pit's mouth to other persons at a profit. [MELLOR, J.—The lessee of a coal mine is not excused from working out a stratum because by reason of its growing thinner it cannot be worked at a profit.] If the question of profit affected the performance of a covenant a rise in the price of labour might cause a mine not to be fully worked out. [BLACKBURN, J.—In *The Marquis of Bute v. Thompson* (13 M. & W. 487) there was a covenant by the lessees that they would raise and work 13,000 tons of coal yearly and pay 8d. per ton royalty, or pay 433l. 6s. 8d. each year as fixed rent whether coals should be wrought or not, and also 9d. upon each ton over and above that quantity; the Court of Exchequer held that there was no implied condition that there should be coals to that amount capable of being wrought, and therefore the lessees were liable to pay the fixed rent although the mine was so exhausted that they could not raise thirteen thousand tons of coal in a year.] In *Jones v. Shears* (7 C. & P. 346) the agreement was to work a colliery so long only as it was "fairly workable," and COLERIDGE, J. held that under those words the defendants were not obliged to work at a dead loss. *Griffiths v. Rigby* (1 H. & N. 237) is in favour of the plaintiffs; there the question was whether the coal could be "fairly wrought;" and on the trial ERLE, J. told the jury they must judge what the meaning of that phrase was, but he thought it meant what could be got by a prudent person with a fair profit, however small: the Court however held that the direction was insufficient, and POLLOCK, C.B. said, p. 241, "'fairly wrought' means, that which can be fairly and properly gotten, according to mining usage, without extraordinary difficulty or expense." [COCKBURN, C.J.—The phrase "fairly workable" is well known in the mining world. I am inclined to think the Court of Exchequer went wrong, not understanding that language. MELLOR, J.—That Court only say that the test proposed by ERLE, J. is not proper: they do not lay down one independent of mining usage. BLACKBURN, J.—On a question of the constructive total loss of a ship¹ MAULE, J. defined that to be impossible which was not practicable, and that to be impracticable which could only be done at an excessive or unreasonable cost, so that it would be a case of total loss if it would cost more to recover the ship than she was worth.]

Digby Seymour and Wills, in support of the rule.—The lease does not contain a covenant by the lessees to work the mine. And the language of the covenant in question is to supply to the lessors coals from those brought to the pit's mouth. [COCKBURN, C.J.—The pit's mouth is the place where they are to be delivered.] Then the lessee is not bound to get coal which cannot be got without costing more than it is worth. Working a colliery means working it so long as it is reasonable to do so; *Jones v. Shears* (7 C. & P. 346). In *The Marquis of Bute v. Thompson* (13 M. & W. 487) there was an absolute covenant to get the coal or pay a fixed rent, and *Griffith v. Rigby* (1 H. & N.

(1) See *Moss v. Smith* (9 C. B. 94. 103).

237), as well as *Jervis v. Tomkinson* (1 H. & N. 195), belong to that class of cases. But the finding of the arbitrator in the present case is tantamount to what was laid down in *Griffith v. Rigby* (1 H. & N. 237). [They also cited *Smart v. Morton* (5 E. & B. 30).]

COCKBURN, C.J.—I am of opinion that the rule should be discharged. The effect of the covenant is not conditional and qualified, as stated in the plea, but absolute, and must be performed as long as the lease lasts, subject to this, that if no coal can be got it becomes inoperative. Here coal can be got. The lessee, in consideration of the demise of the coal mine, is to pay a royalty and to supply a certain quantity of coals at the pit's mouth. If the coal should be fully and fairly gotten before the expiration of the term he has power to determine the lease on giving twelve months' notice, and so get rid of this onerous covenant; and by holding the lease the defendant prevents the lessors from getting this seam of coal. These three things satisfy me that the proper construction of the covenant is that contended for by the plaintiffs.

BLACKBURN, J.—At the trial I was under the impression that the covenant declared upon was subject to the proviso for cesser of the term "if the minerals should be fully and fairly gotten," and that the question was whether they had been fully and fairly gotten. But the proviso for cesser is upon twelve months' notice being given, and therefore does not attach. The covenant is that the lessors shall be entitled, during the term, to a certain quantity of coals at the pit's mouth: whatever may be the measure of damages for breach of that covenant, it is broken, and either the plea is not proved or it is bad. If the lessee intended to limit the covenant as contended for he should have done so in express terms.

MELLOR, J. had left the Court.

Rule discharged.

IN THE QUEEN'S BENCH.

June 2, 1866.

THE IPSWICH DOCK COMMISSIONERS, *appellants*, THE OVERSEERS OF THE PARISH OF ST. PETER, IPSWICH, *respondents*.

7 B. & S. 310; 30 J. P. 820.

See, *Bridgwater Trustees v. Bootle Surveyors*, [1867] E. R. A.; 36 L. J. Q.B. 41; 7 B. & S. 348; L. R. 2 Q.B. 4; 15 L. T. 351; 15 W. R. 169 (Q.B.).

Poor rate—Dock Commissioners—Arm of the sea—Navigable tidal river—Parochiality—Evidence—Conflicting presumptions—Perambulations—Entries in parish book—Dock dues—Coal dues not annexed to docks.

RATES AND RATING. B.—*An estuary or arm of the sea is prima facie extra-parochial; but this presumption may be rebutted.*

A wet dock was constructed on a portion of land reclaimed from the ooze or bed of a navigable tidal river. In order to prove that it was not part of the adjoining parish evidence of perambulations of that parish and of others abutting on other portions of the reclaimed land was given, which seemed to shew that the rights of those parishes extended only to high-water mark. Against this, however, it appeared that in each of the parishes considerable tracts were reclaimed from the ooze or bed of the river, and rated to the poor rate:—Held, that the presumption of parochiality arising from payment of these rates outweighed the contrary presumption arising from the perambulations.

On appeal against a poor rate by the Commissioners of the Ipswich Docks, it appeared that by statute 45 G. 3. c. ci., for rendering more commodious the

port of Ipswich, Commissioners were appointed for improving part of the river Orwell, within the borough of Ipswich; and section 14 enacted, that certain duties should be paid to them by the owners and masters of vessels belonging to or coming to the port between Stoke Bridge and Levington Creek, a distance of about eight miles, and by the owners of all goods, wares, merchandise, and commodities exported from or imported into the port of Ipswich within those limits, and for all ships coming into the river within those limits. By statute 55 G. 3. c. xxvi., paving Commissioners for the town of Ipswich were empowered, in addition to rates on houses and land, to levy a certain duty on all coals which should be imported or brought into, landed or delivered within the river Orwell or town of Ipswich, or the harbour thereof. In 1837, the paving Commissioners obtained another Act, omitting the sections by which they were empowered to levy the coal duty, in pursuance of an arrangement by which the river Commissioners, in consideration of the paving Commissioners giving up that duty, took upon themselves the debts of the latter. In the same year the river Commissioners obtained statute 7 W. 4. & 1 Vict. c. lxxxiv., which repealed statute 45 G. 3. c. ci., and appointed the Ipswich Dock Commissioners Under that and subsequent Acts a wet dock was constructed and had since been maintained; and by section 39 the wharfs, &c., and so much of the channel and ooze or mud of the river Orwell as would be enclosed within the area of the dock, &c., was vested in them. The Ipswich Dock Act, 1852, 15 & 16 Vict. c. cxvi. s. 40. re-enacted section 14 of statute 45 G. 3. c. ci. By section 43 vessels navigating the river above Levington Creek shall be deemed to be within the river of the port as if they had come into the dock. By section 43 vessels remaining in the dock for more than two months shall pay an additional duty per month. Section 52 continues to the Commissioners the duty of 1s. per ton, and the further duty of 6d. per ton given by former Acts, for every ton of coal which should be imported or landed within the river Orwell or town of Ipswich, or the harbour thereof, or otherwise brought or delivered within the limits of the Act, in addition to all other duties. All the moneys raised under the Acts were expended on the dock and on improvements in the river, in pursuance of the requirements of those Acts. The wet dock consists of a portion of the ooze and tidal channel of the Orwell, which is about twelve miles in length, and lies between the town of Harwich towards the south on the coast, and the town of Ipswich inland to the north. The river G. falls into the Orwell at its northernmost extremity at or near Stoke Bridge. The flow of the tide reaches a point upwards of a mile beyond Stoke Bridge. The channel of the Orwell is always covered at low water. Evidence of perambulations, consisting of entries in a book produced from the chest of the respondent parish, of the earlier of which the handwriting could not be identified, the later of which were in the handwriting of deceased vestry clerks, tended to shew that the Orwell below high water mark was extra-parochial. On the other hand evidence was given that between 1797 and 1811 tracts of land were reclaimed from the bed of the Orwell on the side of the respondent and other parishes, and that in those cases persons who reclaimed them were rated to the poor rate without opposition.

Quære, whether the site of the wet dock was an estuary or arm of the sea?—Held, that the wet dock was parochial; and that the Commissioners were rateable for the revenue derived from the duties paid by vessels which navigated the river above Levington Creek, though they did not actually enter the dock; but that they were not rateable in respect of the coal duties, as they were not attached to or connected with the occupation of the docks. *Quære, whether the earlier entries in the parish book were admissible in evidence?*

The appellants are a Corporation created by section 19 of the Ipswich Dock Act, 1852, 15 Vict. c. cxvi., "An Act to consolidate and amend the Acts relating to the Ipswich Dock, to allow certain drawbacks, and for other purposes."

By a rate made in November, 1863, for the relief of the poor in the

respondent parish, the appellants were assessed as owners and occupiers of "part of Wet Dock," estimated extent 24a. 1r. 31p., at the gross estimated rental of 2,159*l.* and the rateable value of 1,463*l.*

Against this rate the appellants appealed to the Quarter Sessions for the borough of Ipswich, and the parties agreed that the Quarter Sessions should alter, amend, or confirm the rate in accordance with the decision of this Court, which was to be at liberty to draw any inferences of fact on the questions raised by the following case.

The wet dock was constructed in the years 1837-8-9 and 1840 under the provisions of the first Dock Act, 7 W. 4 & 1 Vict. c. lxxiv., and has been maintained under the provisions of that and subsequent Acts of Parliament from that time.

The wet dock, excluding a portion of the entrance lock as to which no question was raised, had not nor had the land upon which it was constructed been ever before rated to the relief of the poor. It consists of a portion of the ooze and tidal channel of the Orwell about twelve miles in length, lying in a north-westerly direction between the town of Harwich towards the south on the coast and the town of Ipswich inland to the north, forming as the appellants contended, but the respondents denied, an estuary of the sea. The river Gipping falls into the Orwell at its northernmost extremity at or near Stoke Bridge. The flow of the tide reaches a point upwards of a mile beyond Stoke Bridge. The channel of the Orwell is always covered at low water.

The Orwell in its natural state and before the passing of the Act of Parliament next referred to and before any of the works were commenced was extremely difficult of navigation owing to the enclosure at different times by the proprietors of adjoining lands of portions of the ooze or bed of the river. The silting up by natural causes of the only navigable channel was greatly accelerated, so much so that vessels drawing eight feet of water when at Downham Reach, a distance of three miles below Ipswich, were necessarily lightened to enable them to approach the quays where the depth of water was at ordinary tides about five feet. The soil of the bed of the Orwell, excepting those portions to which the Acts after referred to apply, is vested in the Corporation of Ipswich.

In 1805 statute 45 G. 3. c. ci., entitled "An Act for improving and rendering more commodious the port of Ipswich, in the county of Suffolk," after called the River Act, was passed. The preamble refers to the great antiquity of the port of the town of Ipswich and its capability of being rendered more commodious for carrying on trade both foreign and coastwise by deepening, widening, cleansing, altering and improving part of the river Orwell, within the town and borough, and appoints Commissioners for putting the Act into execution.

By section 5 the Commissioners were empowered to make bye-laws for the stationing, &c., of vessels coming into or lying in the river or port, and for preventing nuisances or encroachments within the liberties of the river or port.

By section 14 it was enacted that there should be paid to the Commissioners by the owners and masters of vessels belonging to or coming to the port between Stoke Bridge and Levington Creek, a distance of about eight miles, and by the owners of all goods, wares, merchandise, and commodities exported from or imported into the port of Ipswich within the said limits, and for all ships and vessels coming into the river within the said limits, except wherries or passage boats belonging to the port, the several and respective rates, dues, or duties mentioned and specified in the table thereunto annexed.

By section 20 it was enacted that the moneys raised by the duties should be applied by the Commissioners towards improving the river in the proportion and manner therein specified, and after a certain event, which had happened, the duties were to cease, and in lieu thereof certain small tonnage rates on vessels were to be paid.

By section 38 it was enacted that all vessels coming into the river Orwell,

and navigating therein above Levington Creek, and the cargoes of which, or any part thereof, should be delivered in any part of the river, or brought to the port of Ipswich, should be deemed to be within the river of the port of Ipswich in such and the same manner as if they came to and used the quay called the Common Quay, and should be subject to the rules, bye-laws, and regulations to be made by virtue of the Act.

The Commissioners under this Act constructed a ballast wharf on the ooze of the river, built a dredging engine, barges, &c., and by cutting new channels and dredging at various points between Ipswich and Harwich materially increased the depth of water in the port of Ipswich.

In 1793 statute 33 G. 3. c. 92, entitled "An Act for paving, lighting, cleansing, and otherwise improving the town of Ipswich," &c., was passed.

The Commissioners under that statute having contracted a heavy debt in carrying out its objects, obtained an amending Act, 55 G. 3. c. xxvi., by which, after reciting that it was expedient that more effectual provision should be made, *inter alia*, for paying the interest of that debt, the paving Commissioners were empowered by section 6, in addition to levying rates on houses and land, to levy on and after the 24th June, 1815, additional duties of 1s. per chaldron or 8d. per ton on all coals, coke and cinders which should be imported or brought into, landed or delivered within the river Orwell or town of Ipswich or the harbour thereof.

The paving Commissioners, however, got further into debt, and in 1837 obtained statute 7 W. 4 & 1 Vict. c. lxxiii., which, after reciting that they had incurred debts to the amount of 16,000*l.* and upwards, and that a Bill was then before Parliament to amend the River Act, 45 G. 3. c. cci., repealed previous Acts and re-enacted, with certain alterations, the provisions as to paving, lighting, &c., therein contained, but omitting the sections contained in those Acts by which they were empowered to levy the coal, coke and cinder rates. This omission was in pursuance of an arrangement sanctioned by the inhabitants of the town by which the river Commissioners, in consideration of the paving Commissioners giving up such duties and rates, took upon themselves the debts of the latter body.

The river Commissioners obtained the first Dock Act (7 W. 4 & 1 Vict. c. lxxiv.), 30th June, 1837.

The preamble, after referring to the River Act and what had been done under it, states "Whereas, since the passing of the said recited Act the trade and shipping of the port of Ipswich have greatly increased, and it would tend much to the advantage, not only of the said port and of the neighbourhood thereof, but of that part of the kingdom in which it is situate, and it is highly expedient for the security and improvement of the public revenue and for the benefit of commerce, that a convenient wet dock and basin, with all necessary quays, &c. should be made and constructed, &c.; and that for the carrying into effect the said purposes the said recited Act should be amended, and that the powers and provisions therein contained should be enlarged and vested in the Commissioners, hereby appointed."

Sect. 1 repeals the River Act; and sect. 3 appoints the mayor, aldermen, and councillors of Ipswich and seventy-two other persons therein named, the then river Commissioners, Commissioners for the purpose of carrying the Act into execution, by the name and style of "The Ipswich Dock Commissioners."

By sect. 17, the provisions of which are re-enacted and continued by the Ipswich Dock Act, 1852, the Commissioners were empowered to make and maintain upon part of the river Orwell and harbour of Ipswich, as well as the lands which should be purchased by or vested in them, under the authority of the Act, a navigable dock or basin, with an entrance lock or locks, embankments, cuts, with entrances, into and from the same, and also a new cut, channel, or river with roadways on each side thereof, and into and through the said cut or channel, to turn and divert the waters of the river Gipping and the flow of the tide of the river Orwell, and to construct quays, wharfs and other

works necessary or proper for carrying into effect the purposes of the Act, and also to build a quay 30 feet wide for the trade and business of the town and port along the north and east sides of the dock, to project into the then channel of the river in front of the then line of quays, the quay wall to be the property of the owners of the quays in front of which the same should be built, and to be kept in repair by them.

These works were duly executed by the Commissioners.

Sect. 39 vests the wharfs, quays, lands, and all erections, cuts, locks, sluices, and other things purchased, acquired, or made under the River Act, all lands, &c., to be purchased under the Act, all buildings to be erected thereon, "and so much of the channel and ooze or mud of the river Orwell as will be enclosed within the area of the said intended dock," and all cuts, &c., to be made by virtue or in pursuance of this Act, and all the personal property vested in the Commissioners under the River Act in the dock Commissioners appointed by virtue of the Act and their successors.

Sect. 45 imposes the rates, dues, and duties specified in a Schedule to the Act on all vessels coming into the river between Stoke Bridge and Levington Creek, in effect re-enacting the 14th section of the River Act, and the same rates are imposed by section 40 of the Ipswich Dock Act, 1852.

Sect. 48 declares it to be the true intent and meaning of the Act, that for one arrival together with one departure of each vessel at and from the port of Ipswich only one tonnage rate for the dock shall be due and payable for each vessel, &c.

Sect. 50, which is in effect re-enacted by sect. 43 of the Ipswich Dock Act, 1852, but to which there was no corresponding provision in the River Act, provides that all vessels remaining in the dock for upwards of two months, shall pay an additional rate or duty per ton per month.

Sect. 52 contains regulations for the payment of the duties, referring to them as dockage rates.

Sect. 53, which is in effect re-enacted by section 42 of the Ipswich Dock Act, 1852, enacts that vessels navigating the river above Levington Creek shall be deemed to be within the river of the port, in such and the same manner as if they had come into the dock.

Sect. 60, which is recited and in effect re-enacted with certain additions by section 52 of the Ipswich Dock Act, 1852, and which is in effect a re-enactment of sect. 6 of stat. 55 G. 3. c. xxvi., gives the Commissioners a duty of one shilling for every ton of coals, coke, and cinders which shall be imported or landed within the river Orwell or town of Ipswich, or the harbour thereof, or otherwise brought or delivered within the limits of the Act, in addition to all other duties payable in respect thereof by any law or statute whatsoever.

Sect. 68 directed the appropriation of the monies authorized to be collected to the purposes of that and the previous Acts exclusively.

The Commissioners, finding their means insufficient to complete their works, obtained in 1841 stat. 4 & 5 Vict. c. lii., the second Dock Act, empowering them to raise in addition to the sum of 70,000*l.* authorized to be raised by stat. 7 W. 4 & 1 Vict. c. lxxiv., a further sum of 20,000*l.* on the credit of the rates and duties created by the last mentioned Act to be applied in completing and improving the dock and works authorized by that Act to be made.

This 20,000*l.* was also found to be insufficient, and in 1843 the Commissioners obtained stat. 6 & 7 Vict. c. xx., the third Dock Act, empowering them to impose an additional duty of 6*d.* per ton on all coals, coke, and cinders imported within the river Orwell or town of Ipswich, or otherwise brought or delivered within the limits of stat. 7 W. 4 & 1 Vict. c. lxxiv. to be applied in the same manner as the duties granted by that Act.

Under stat. 6 & 7 Vict. c. xx., the Commissioners raised the sum of 18,500*l.*, which, together with the sums of 70,000*l.* and 20,000*l.* amount to 108,500*l.*, the whole of which had been duly expended in pursuance of the requirements

of the several statutes in the construction of the dock, and in improvements in the river, and which now constitute the existing debt.

The Commissioners under this Act, whenever they had any surplus income, expended it in completing and maintaining the dock and channel, deepening and cutting new channels, dredging and otherwise improving the navigation of the river in accordance with the requirements of the Act.

The Ipswich Dock Act, 1852, 15 & 16 Vict. c. cxvi., under which the appellants now act, by sect. 3 repeals the previous Dock Act with the exception of certain provisions expressly retained, by sect. 2 incorporates certain provisions of the Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27., by sect. 31 incorporates the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18., and by sect. 4 vests the dock, and all cuts, quays, wharfs, houses, warehouses, roadways, embankments, locks, sluices, sewers, drains, and other works and buildings, tenements, rights, privileges, exemptions, easements, hereditaments, and real estate, and all stocks, funds, &c., and personal estate belonging to the Commissioners under the repealed Acts, in the Commissioners incorporated under this Act.

Sect. 32 re-enacts the 17th and subsequent sections of the first Dock Act, 7 W. 4 & 1 Vict. c. lxxiv., empowering the Commissioners under that Act to construct the wet dock as therein described, and after reciting that the Commissioners had executed those works, and certain others in connection therewith for the convenience of business and for the health and recreation of the inhabitants of the town, enacts that the works shall be maintained and kept in good order and repair, of the form and dimensions of which the same had been constructed, and that all the powers of that Act for dredging and deepening the dock and basin should continue in force.

By sect. 40, a re-enactment of sect. 14 of the River Act, and of sect. 45 of the first Dock Act, the Commissioners are empowered to levy the rates specified in the Schedule on the persons and the owners and masters having command of vessels belonging to or coming to the port, between Stoke Bridge and Levington Creek, for all vessels coming into the river within those limits.

The 41st section contains regulations for payment of the rates and duties which become payable on the arrival or departure of vessels "at and from the port of Ipswich."

Sect. 42. "All vessels coming into the river Orwell, and navigating therein above Levington Creek, and the cargoes of which or any part thereof shall be delivered in any part of the said river, or brought to the port of Ipswich, shall be deemed to be within the river of the port of Ipswich, in such and the same manner as if they came into the dock, and shall be subject and are hereby declared to be liable to the rates or duties hereby granted, and to such rules, byelaws, and regulations of the Commissioners as shall be in force immediately after the passing of this Act, or shall be hereafter made under the provisions thereof."

By sect. 43 every vessel going into the dock may be and remain there for the space of two months, to be computed from the time of going into the dock, on paying the rates or duties specified in the Schedule; and if such vessel shall remain in the dock more than two months there shall be paid and payable to the Commissioners, or their collectors or deputies, in addition to the rates or duties aforesaid, by the master, owner, or consignee of such vessel, according to the tonnage burden thereof, for every month which such vessel shall remain in the dock, the rate or duty of one penny per ton per month.

Sect. 52 recites the duties on coals, coke, and cinders, leviable under the Dock Acts, the sums the Commissioners were authorized to borrow on the credit of those duties, and that the same powers of levying those duties were intended to be reserved to the Commissioners notwithstanding the repeal of those Acts; and enacts that from and immediately after the passing of the Act there shall be paid to the Commissioners the duty or sum of one shilling, and also the further duty or sum of sixpence for every ton weight of coals, coke, and

cinders, and so in proportion for any less quantity which shall or may be imported or landed within the river Orwell or town of Ipswich, or the harbour thereof, or otherwise brought or delivered within the limits of the Act, such rates or duties to be paid in addition to all other duties and impositions payable or to become payable in respect thereof by any law or statute whatsoever.

Sect. 64 directed the application of all moneys then in the hands of the Commissioners or due to them at the time of the passing of the Act, together with all moneys which should be borrowed under its provisions upon the credit of the rates and duties thereby authorized to be taken, and all other moneys to be collected and received by them under its authority.

The appellants duly levied and collected the tonnage rates and coal duties authorized to be levied and collected by them under the Acts of Parliament before referred to in the manner most conducive to the maintenance and encouragement of the trade of the port, and according to the rates by which the largest amount of revenue could be collected, and duly applied that revenue to the objects and purposes and according to the provisions of the Acts, and did not receive or appropriate to themselves any benefit, pecuniary or otherwise, out of the proceeds of any such rates or duties, and managed and conducted the necessary business connected with the port, harbour and dock without any remuneration or allowance for expenses as directors or otherwise of such port, harbour, or dock.

There was still due and owing the sum of 18,500*l.* borrowed on the credit of the additional duty of sixpence per ton on coals, coke, and cinders authorized to be levied by the last mentioned Act.

In order to maintain, and if practicable extend, the trade of the port of Ipswich, to give facilities for the use of the harbour, and to enable vessels to reach the docks, it had hitherto been found necessary to expend considerable sums in each year in dredging, cleansing, widening and improving the cuts in the river. Since the Ipswich Dock Act, 1852, came into operation, the surplus revenue, after paying the costs, charges and expenses of and attending the passing of the Act and incidental thereto, and after paying the interest on the money borrowed, which had never amounted to 3,000*l.*, had always been required for maintaining the dock and for the necessary works in the river, and was always so applied by the appellants.

Before the construction of the dock and works the maritime commerce of Ipswich was conducted in that part of the river Orwell which now forms the wet dock; the water at high tide extended to the quays and banks on each side of the river, but at low tide receded to a narrow channel on the north side, leaving the ooze on the south uncovered.

Portions of land above high water mark on both sides the river, were admitted by the appellants to be in the respondent parish. The promoters of the first Ipswich Dock Bill proposed to convert this space into a wet dock, and accordingly took the powers conferred in sect. 17 of that Act. The Act having passed, the Commissioners proceeded to carry out their plans in the following manner, viz.: They purchased a large quantity of land in the respondent parish and in the parish of St. Mary, Stoke. They then excavated a large cut or channel through that land intersecting the river Orwell above and below that portion of the river to be enclosed as a dock. Having thus provided a new channel for the reception and diversion of the river waters, they constructed banks and quays at points in the Orwell, which they proposed enclosing; and finally, making an entrance lock from the new channel into that enclosure, completed the wet dock and its approaches as they now subsist.

The only access to the wet dock is through the new cut and lock in the respondent parish. The quantity of land claimed by the respondent parish in the wet dock and lock is 24*a.* 1*r.* 31*p.* And the only question now before the Court is as to the rateability of the 24*a.* 1*r.* 31*p.*

For several centuries past the parish of St. Peter has comprehended certain lands on both sides of the river.

A piece of land called Cordingley, on the north east corner of that portion of the parish of St. Peter which is on the southern side of the river Orwell, was reclaimed from the ooze of the river some time between the years 1797 and 1811 and built upon, and has been since rated to the relief of the poor of that parish.

A large piece of land on the St. Clement's side of the river, consisting of several acres, was in like manner reclaimed from the ooze of the river, and improved and built upon, and afterwards rated to the relief of the poor of that parish.

Before the first Dock Act was obtained the ordinary course of perambulation by the parish officers and inhabitants of St. Peter's, as far back as living memory extends, commenced at a point on the north side of the river, commonly called Alexander's Key. Here the perambulators crossed the river by a boat to the opposite shore, where some landed in the mud, and proceeded by an embankment on the margin of the river Orwell, on which embankment there was no public right of road, to the extreme bound of the parish at the south east corner, called The Point, carefully comprehending in such perambulation the portion of land reclaimed by Cordingley after that had been won from the river. The rest of the party went down by the same boat along the stream of the Orwell, to the same point, where the whole party met and continued their course by land along the undisputed boundary of the parish, till they again reached the bank of the river a little above the bridge called Stoke Bridge. Here one or more swam straight across the river to a point on the opposite bank, while others walked round by the bridge to the same point. From this point the perambulating party proceeded along the north bank of the river to the bound of the parish, whence, after crossing several marshes, they reached the river Gipping a little to the south west of Handford Mill, where they crossed and proceeded along the north bank of the river until they arrived at a point where they turned down the Handford Road into Tanner's Lane, and again reached the river Gipping which they crossed and kept along the west bank until they reached a place called The Hole in the Wall, where they crossed, and then continued the undisputed bounds to the place whence they started.

The ordinary course of perambulation by the parish officers and inhabitants of the adjoining parish of St. Mary Key before the first Dock Act was obtained was from St. Mary Key Church to the margin of the river at the left side of Alexander's Yard. From this point a line of private quays extended to the extreme boundary of the parish at the east end on the Orwell side of the parish, which quays were railed and fenced off from each other so as to make it impossible or dangerous to walk along the top of the quays on the margin of the river. Some of the perambulators went down by boat on the Orwell from one extreme point to the other, alongside the quay but necessarily outside the vessels moored to the quays, so that the perambulation might comprehend all the quay property which was rated to the relief of the poor. The others proceeded by the public streets to the same point at the east end, where they met the party landing from the boat, and all proceeded together to perambulate the inland boundary of the parish.

In the parish of St. Clement, which extended about two miles and a half on the Orwell side, the ordinary course of perambulation was for one portion of the perambulators to proceed from the extreme point on the east to the extreme point on the west by boat along the river, necessarily in the middle of the channel when the tide was out; another proceeded by land on the margin of the river. When these came within a few hundred yards of the point at the extreme west several warehouses projected towards the river so as to leave no proper footing between such warehouses and the river. A few of the more active of the party contrived, with difficulty, to crawl or scramble between these warehouses and the river for the avowed purpose of going the whole river boundary, comprehending in such boundary the land reclaimed from the

river, while the residue took the ordinary roads on the land side of these obstacles.

After the first Dock Act was obtained, and more particularly after the formation of the docks, the officers and parishioners of all the three parishes, in perambulating their respective boundaries on the Orwell side, carefully pursued, as accurately as they could trace it, the line of the centre of the old channel of the river.

The appellants tendered in evidence entries in a book produced from the chest of St. Peter's parish purporting to contain accounts of the disbursements of the churchwardens of St. Peter's parish, some of which purported to have been signed as passed by the outgoing and incoming churchwardens, a few by the minister and others assembled in vestry; also copies of church rates and rates for the maintenance of the minister under the powers of a local Act, and of the distribution of various charitable donations, and occasional memoranda about parochial affairs, such as resolutions at parish meetings to try questions arising out of the removal of paupers, purporting to be signed by the churchwardens and overseers. The dates in the book ran from 1743 to 1860, but after the year 1756 the entries consisted chiefly of accounts, of which some purported to have been signed and some were not signed. The entries and signatures where they occurred appear to have been genuine, and made at the time when they are respectively dated. The book bore no title inside or out, but was referred to in a later parochial book as a book for churchwardens' accounts.

In this book appeared at the proper places, according to their respective dates, certain unsigned entries, copies of which were set out in an appendix to the case. In 1771, among the directions for perambulating the bounds of the parish, was the following, "From Mr. Fowler's great gate in the street go through his yard to the salt river, which cross passing along the bank of the said river:" in 1781 and 1797 there was a similar entry: in 1811 the direction was to pass "along the border of the same until &c. (taking in a new piece of ground belonging to Mr. Robert Fulcher, which lays between the channel and bank of the said river), proceed along the same border." In 1823, the entry was the same, calling it "a new piece of ground belonging to Mr. William Cordingley." In each of these years the direction where the river Gipping formed the boundary of the parish was "proceed to Handford Mill, &c., passing along the bank of the river leading to Handford Bridge, &c., so as to comprehend one-half of the said river."

The handwriting of the earlier entries of 1771, 1781 and 1797 could not be identified. The entry of 1811 was in the handwriting of William Angell, since deceased, who appeared by other entries to have been acting at that time as vestry clerk. As to the entry of 1823 the heading and latter half of the description was in the handwriting of James Haill, since deceased, who was then the vestry clerk, and the residue of the entry was in the handwriting of one Bruce, since deceased, who was at that time a clerk of James Haill.

These entries were objected to by the respondents' council as inadmissible in evidence.

The appellants contended: First. That they had no such beneficial occupation as to render them liable to be rated to the relief of the poor.

Secondly. That the whole of their revenue accruing under the Acts of Parliament referred to was specifically appropriated, to the exclusion of any liability to be rated to the relief of the poor.

Thirdly. That if rateable at all they were not rateable in the respondent parish.

Fourthly. That if rateable at all such part only of the revenue was rateable as was derived from vessels which remained for upwards of two months in the dock. That part amounted to 10*l.* a year.

Fifthly. That if the tonnage duties were rateable at all such part only

was rateable as was derived from the tonnage duties paid by vessels which actually entered the dock.

Revenue from tonnage duties for one year	£2000	0	0	
20 per cent. on an average of the tonnage of vessels coming within the limits of the port never enter the dock	...	400	0	0
Gross Revenue	...	...	£1600	0 0

Sixthly. If the revenue derived from coal duties were rateable at all, such part only was rateable as was derived from vessels which actually entered the dock.

Revenue from coal duties less drawbacks for one year	...	...	...	5360	0	0
10 per cent. on an average of the coal landed within the limits of the port from vessels which never entered the dock. The appellants claimed not to be rateable	...	...	...	536	0	0
				4824	0	0
				£6400	0	0

In order to ascertain the net rateable value, if any, the parties agreed to certain disbursements on an average of the three years 1861, 1862 and 1863.

The appellants also claimed various deductions, which raised questions, if any, of fact for the Sessions, and further contended that no part of the rateable revenue was earned by their occupation of the wet dock in the respondent parish, and if any portion of their rateable revenue was so earned then the proportion of rateable revenue in the respondent parish was that which the area of the portion of the wet dock occupied by them in that parish bears to the area of the river of the port of Ipswich.

Area of wet dock in respondent parish, 24a. 1r. 31p.

Area of the river of the port of Ipswich, 2097a.

The questions for the opinion of this Court were:—

First. Whether the appellants were rateable to the relief of the poor of the respondent parish in respect of the 24a. 1r. 31p. of the wet dock, or in respect of so much thereof as was formerly above low water mark.

Secondly. If rateable at all, whether they were not rateable for that portion of their revenue only which was derived.

(1.) From vessels remaining more than two months in the dock.

(2.) From the tonnage dues on vessels which actually entered the dock.

(3.) From the coal duties paid by vessels which actually entered the dock.

Thirdly. If rateable at all, whether they were not entitled, in estimating the net rateable value of their revenue, to deduct the per centages claimed on the capital invested in the dock and in the river.

Fourthly. If rateable at all, whether they were rateable in respect of their occupation of part of the wet dock in the respondent parish, and, if so rateable, what proportion of their revenue was there rateable.

Manisty (Cherry with him), for the respondents.—First. Since the decision of the House of Lords in *The Mersey Docks and Harbour Board Trustees v. Cameron* (11 H.L. C. 443) it must be taken that the appellants are liable to be rated as occupiers of the wet dock. [He referred to statute 7 W. 4 & 1 Vict. c. lxxiv. ss. 45. 58. 60. 68.]

Secondly. The mid channel of the river Orwell is the boundary between the parish of St. Peter and the parish of St. Clement on the opposite side of the river; and therefore the area of the wet dock, which is between high and low water mark, and partly below low water mark, is within the parish of St. Peter. Higher up the river than the wet dock the parish of St. Peter comprehends the lands on both sides of the river. Stat. 7 W. 4 & 1 Vict. c.

lxiv. s. 39, vests in the dock Commissioners the wharfs, quays, lands and all erections thereon, &c., "and so much of the channel and ooze or mud of the river Orwell as will be inclosed within the area of the said intended dock," thereby treating it as part of the channel. [BLACKBURN, J.—Is this dock part of the mud banks of the river or part of the bottom of the sea? The dividing line is where the sea ends and the river begins; and that is, I suppose, to be left as a question of fact to a jury, as some other questions of difficult solution. He referred to *Hule de Jure Maris*, Pars prima, cap. 4, *Hargrave Law Tracts*, p. 10.] In Acts of Parliament and the ordnance map it is called the river Orwell; and it is a river in the ordinary acceptation of that term. [BLACKBURN, J.—I do not feel that calling it river or sea has much weight.] The sea shore between high and low water mark is *primâ facie* extra-parochial; *Reg. v. Musson* (8 E. & B. 900). But in the case of a tidal river the *primâ facie* presumption is that the parish extends to the middle of the river; *McCannon v. Sinclair* (2 E. & E. 53; 28 L. J. M.C. 247; 5 Jur. N.S. 1302); where it was held that a pier leading from the bank of the Thames into the river beyond the low water mark was liable to be rated to the poor rate. The evidence to rebut the *primâ facie* presumption would be that it had always been treated as extra-parochial. In *Reg. v. Cunningham* (Bell C. C. 72), an indictment for feloniously cutting and wounding with intent to do grievous bodily harm, it appeared that the offence was committed on board a ship in the Penarth Roads, in the Bristol Channel, three quarters of a mile from the Glamorganshire coast, at a spot never left dry by the tide, but within a quarter of a mile from the land, which is left dry by the tide; and it was held that the part of the sea where the vessel was at the time when the offence was committed was within the body of the county of Glamorgan; but nothing was decided as to parochiality; and it was unnecessary, for in determining whether a place is in a county the question of parochiality is immaterial. In *Rex v. The Inhabitants of Landulph* (1 M. & Rob. 393), which was an indictment for the non-repair of a road which led across a small inlet or estuary of the river Tamar, not far from its mouth, one of the contentions being that the road was not in the parish of Landulph, Patteson, J. held, "in reference to the question of boundary, that where two parishes are separated by a river, and there is no positive evidence of the boundary line between them, it is to be presumed to coincide with the middle line of the channel." That case was not disputed in *Lord v. The Commissioners for the City of Sydney* (12 Moo. P. C. C. 473), where it was held that a grant made by the Crown of land bounded by a creek in Botany Bay, in New South Wales, passed the soil *ad medium filum aquæ*. [BLACKBURN, J.—There the creek mentioned in the grant was an unnavigable stream of fresh water; nothing turned on the distinction between an arm of the sea and a river.] In *McCannon v. Sinclair* (2 E. & E. 53) salt and fresh water were combined in the tide.

Thirdly.—In order to rebut the presumption of parochiality the appellants relied on the perambulations, and put in evidence a series of documents produced from the parish chest of St. Peter's, which was the proper custody; but the entries in the disbursement books were not signed. The entries tended to shew that before the first Dock Act the parishioners of St. Peter's, in beating the bounds, kept close along the bank. But in *McCannon v. Sinclair* (2 E. & E. 53) Lord Campbell said, pp. 55-6, "It may be that the parish authorities of Rotherhithe go as near to the boundaries as the land will permit, on the assumption that it is well known that the parish really extends to the middle of the river." [BLACKBURN, J.—These entries seem to be admissible as evidence of reputation; but if the respondents do not object to them it is not necessary to decide as to their admissibility.]

Pickering (A. K. *Stephenson* with him), for the appellants.—It is a *primâ facie* presumption that the soil of the channel where the tide flows and reflows is in the Crown; and the onus is on the respondents to prove that it is parochial. In *Com. Dig. Parish* (B. 2) it is said, "So, land shall not be

within any parish, unless by prescription, or Act of Parliament," citing *Banister v. Wright* (Sty. 137). The channel of the Orwell, in which the wet dock is, is an estuary or arm of the sea. "An arm of the sea is said to extend into the land so far as the flow and reflow goeth;" *Callis on Sewers*, p. 56. The same is said in *Com. Dig. Navigation* (B), citing 2 Roll. Abr., p. 169, l. 12. *Comyns* adding, "And every arm of the sea, or navigable river so high as the sea flows and reflows, belongs to the king, and he has the same property therein as *in alto mari*," citing the case of *The Royal Fishery of the Banne* (Dav. 56), 2 Roll. Abr. *Prerogative le Roy*, 170, l. 20. But in *Com. Dig. Navigation* (A) it is said, "So, the property of the soil in all rivers, which have the flux and reflux of the sea, belongs to the king, and not to the lord of the manor adjoining, without grant or prescription," citing *Bulstrode v. Hall* (1 Sid. 148, 9); and this was held to be so in the case of the Thames as high as Richmond Bridge; *Rez v. Smith* (2 Dougl. 441); where Lord Mansfield said, p. 444, "that the case did not state, whether the water, when the tide rises at Richmond, is fresh or salt, but that it rather took it for granted that it is salt, describing the Thames generally as a navigable river." [BLACKBURN, J.—I should have taken for granted that the water of the Thames there was fresh, the tide being occasioned by the pressure backwards of the river water.] [He also cited *Phear on Rights of Water*, p. 41¹.] In *The Lord Advocate of Scotland v. Hamilton* (1 Macq. 46) the trustees appointed under an Act of Parliament for improving the navigation of the river Clyde, &c., had in former times proceeded upon the principle of narrowing and deepening the channel, the consequence of which operation was an accumulation of soil at the sides of the river. Of later years they had become satisfied that the proper course of improving the navigation was not to narrow but to widen the channel; and in this process it became necessary to resume certain soil which had previously formed a part of the *alveus* or bed of the river. Thereupon a question arose with the adjacent landowners, and an Act, 3 & 4 Vict. c. cxviii., was obtained, section 20 of which carried out a compromise, by which the soil in question was to be valued, and the landowners were to accept half the estimated value in full satisfaction of all their demands. This money was claimed by and decreed by the Court of Session to belong to the Crown. On appeal, the House of Lords reversed this judgment; but Lord St. Leonards C. said, p. 49, "With respect to the question which has been mooted as to the right of the Crown to the *alveus* or bed of the river, it really admits of no dispute. Beyond all doubt, the soil and bed of a river (we are speaking now of *navigable* rivers only) belong to the Crown;" and Lord Brougham. p. 54. "We generally speak of the soil of a navigable river as being in the Crown, not only in Scotland, but in England." [LUSH, J.—By the term "navigable" the learned Judges probably meant "tidal."'] In *The Attorney General v. Chambers* (4 De G. M. & G. 206), in which the Lord Chancellor requested the assistance of Alderson, B. and Maule, J., on an information against the owners and occupiers of lands contiguous to the shore of an arm of the sea, near to the harbour of Llanelly, for erections on the sea shore, it was held that the right of the Crown to the sea shore was limited to the line reached by the average of the medium high tides, between the spring and the neap, in each quarter of a lunar revolution during the whole year. [BLACKBURN, J.—The decision in *McCannon v. Sinclair* (2 E. & E. 53; 28 L. J. M.C. 247; 5 Jur. N.S. 1302), being in an action, might have been taken to a Court of error. That case establishes that the bed of the river Thames is parochial as low down as Rotherhithe.² In *Rez v. The Inhabitants of Barnes* (1 B. & Ad. 113), it was taken for granted that one half of the bed of the river was in Barnes, and the other half in Hammersmith; though argued by very eminent counsel, it was not suggested that the bed of the river was extra-

(1) See also *Hall on the Sea Shores*, p. 3.

(2) See also *Forrest*, appellants, *The Overseers of Greenwich*, respondents, 8 E. & B. 890.

parochial.³ According to the report of *McCannon v. Sinclair*, in 28 L. J. M.C. 247, the decision there was wholly on the effect of the evidence from the perambulations in Rotherhithe, and the adjoining parish. In *Reg. v. Musson* (8 E. & B. 890) land on the sea shore was held to be *prima facie* extra-parochial, though it belongs to the adjoining county; and for this purpose there is no distinction between the open sea and an arm of the sea or a navigable tidal river. [LUSH, J.—When portions of the bed of the Orwell have been reclaimed and buildings erected on them, the occupiers have been rated in respect of them.] If there is an insensible accretion to the land above high water mark, it belongs to the owner of the adjacent land, and would become parochial: if, on the other hand, there was a sudden encroachment of the tidal waters, the land overflowed would remain within the area of the parish. [BLACKBURN, J.—The case means that the land was reclaimed by embankment; this was not insensible accretion. LUSH, J.—In two of the entries the perambulation is to be made so as to take in what is called a new piece of land. Land so reclaimed from the sea would not become part of the parish.] The evidence of the perambulations is different from that in *McCannon v. Sinclair* (2 E. & E. 53). The ordinary course of perambulations shews that no part of the wet dock formed part of the respondent parish, and that the Orwell below high water mark is extra-parochial. The documents coming from the chest of the respondent parish may be referred to as evidence against that parish; at all events the documents which are in the handwriting of deceased vestry clerks are admissible. These entries shew that in the years 1771, 1781, 1797, 1811, 1823, the bounds were taken along the bank or border of the salt river; and where it was intended to claim beyond the bank, as along a portion of the river Gipping, the bounds were taken so as to comprehend one half of that river. The perambulations made after the formation of the dock, and the entry of the perambulation made in 1847, after the dock had been commenced, are not the true bounds of the respondent parish.

The principle on which the appellants have been assessed is erroneous. As to the dock dues, the Commissioners are rateable only on the revenue accruing from vessels which actually enter and use the dock. The soil of the dock is vested in the Commissioners. The soil lower down the Orwell is in the Corporation of Ipswich: the Commissioners have only an easement in exercising their power of widening and deepening the channel as far as Levington Creek.

The dues paid by vessels which do not enter the dock, but the cargoes of which are delivered in any part of the river or brought to the port, is a naked toll, for which, because not connected with the occupation of the soil, the Commissioners are not rateable. These are like the town dues received by the Corporation of Swansea for landing goods on or shipping goods from the quays and wharfs on the shore of the harbour of Swansea, within the borough, some of those quays and wharfs being the property of a third person; *Lewis*, appellant, *The Overseers of Swansea*, respondents (5 E. & B. 508). [BLACKBURN, J.—In some turnpike Acts there is a clause making toll payable by persons who come in carriages or on horseback within 100 yards of the turnpike gate; and if turnpike gates were rateable they would be rated in respect of those tolls. Stat. 15 & 16 Vict. c. cxvi. s. 42., enables the Commissioners to take dock dues whether the ships enter the dock or not; they get the dues by reason of the occupation of the land by their dock; if they let the dock a hypothetical tenant would receive these dues.] But the Commissioners are not rateable in respect of the whole. [BLACKBURN, J.—Yes they are: subject to the deductions in The Parochial Assessments Act, 6 & 7 W. 4. c. 96. In *Rex v. The Inhabitants of Barnes* (1 B. & Ad. 118), the proprietors of the Hammersmith Bridge were held rateable for the land occupied by them in the parish of Barnes for the purpose of facilitating the passage over the Thames, though the tolls were

(3) See statute 5 G. 4. c. cxii. s. 137. *Reg. v. The Hammersmith Bridge Company*, 15 Q.B. 369.

taken in the parish of Hammersmith. I never heard that a deduction should be made from the tolls payable by steamboats at a pier, because they must have consumed coals in reaching it.] The dues paid by vessels navigating above Levington Creek which do not enter the dock are paid for the transit along the channel, which has been made navigable by the Commissioners. Suppose a canal Company has an easement through several parishes, and in one of them has land, and a toll at a mileage rate is charged, it is immaterial where the toll is collected, it is earned equally through the whole distance.

[LUSH, J.—The dues are paid to the Commissioners for the use of their dock?]

In *Rex v. The Leeds and Liverpool Canal Company* (5 East, 325), Lord Ellenborough said, p. 330, "I agree with the principle of those cases, that the toll is only due and can only be taxable, if at all, at the place where the voyage ends for which the goods were contracted to be carried, and that it is not to be portioned out amongst the several parishes through which the goods may immediately pass: but where the Legislature have expressly exempted a particular line of navigation from being rateable in respect of the tolls, along which line the goods have been carried in respect of which in part the toll is calculated, there is nothing which should prevent us from giving effect to this exemption by saying that where the toll is received, it may be taxed for that proportion of it accruing along the line which is taxable, but that it shall not be taxed for that proportion which accrued along the line which is exempted.

[BLACKBURN, J.—It was not then determined that for ascertaining the rateable value of a canal or other undertaking in several parishes the tolls must be apportioned; therefore the case does not throw much light on the present point.] Suppose the Commissioners owned the soil of the whole channel, which has been made navigable at their expense; a portion of the dues would be earned by the use of the land in the several parishes through which the vessels passed, so as to make the Commissioners rateable in those parishes respectively.

[BLACKBURN, J.—That would not make any difference. LUSH, J.—A vessel does not occupy the soil or make any use of it in passing along a public navigable river unless it casts anchor. BLACKBURN, J.—The owner of the soil of a navigable river has no more claim to toll than the owner of the soil over which is a public highway for carriages passing along it.] In *Reg. v. The Hull Dock Company* (7 Q.B. 2) the dock Company were held rateable in the parish of T. for the duties on vessels which entered the dock, those duties being profits of the Company's lands in that parish, but not rateable in respect of duties which were paid by vessels not entering or using it.

As to the coal dues, they are not incident to the occupation of the soil: they were originally granted by stat. 55 G. 3. c. xxvi., for paying the interest of the debt contracted by the Paving Commissioners, and a further duty was granted to the Dock Commissioners by stat. 15 & 16 Vict. c. cxvi. s. 52. By stat. 43 G. 3. c. xxxiv. s. 17., the Corporation of London were authorised to take coal dues from ships coming within the port of London, for establishing and maintaining the Coal Exchange, but the parish in which the Coal Exchange is situated could not be rated in respect of those dues. [BLACKBURN, J. Those dues are wholly unconnected with the occupation of the soil on which the Exchange stands.] It is like the right of shooting in *The Overseers of Hilton and Wakegeld*, respondents, *The Overseers of Bowes*, applicants (7 B. & S. 223).

Further. The whole area of the dock is not stated: the wet dock is in several parishes, and the rate upon so much as lies in St. Peter's parish must be assessed according to the acreage principle: *Reg. v. The Hull Dock Company* (18 Q. B. 825).

Manisty, in reply.—In 1 *Russell on Crimes*, p. 158, 4th ed., "It is clear that upon the open sea shore the common law and the Admiralty have alternate jurisdiction between high and low water mark; but it is sometimes a matter of difficulty to fix the line of demarcation between the county and the high sea in harbours, or below the bridges in great rivers. The question is often

more a matter of fact than of law, and determinable by local evidence." [BLACKBURN, J.—We need not trouble you on the question as to the dock being parochial and rateable.]

The duties paid by vessels navigating the river above Levington Creek enhance the rateable value of the dock. It is no objection that they are not earned at the dock: they are called and treated as dock dues. [BLACKBURN, J.—Mr. Pickering did not at last feel much confidence on that point.]

The coal dues are applicable to the maintenance of the dock. [BLACKBURN, J.—They are part of the revenue of the Dock Commissioners, but it does not follow that they enhance the rateable value of the dock. Mr. Pickering's illustration of the coal dues levied by the Corporation of London applies here.] The dock would be valueless unless the coal dues were received. [LUSH, J.—The large income of a landed proprietor does not enhance the rateable value of the house in which he resides. Suppose a large legacy bequeathed to the Dock Commissioners, the income of which was to be applied to the maintenance of the dock. It matters not where the funds for the maintenance of the dock come from. BLACKBURN, J.—The present is very like *Roberts and others*, appellants, *The Overseers of Aylesbury*, respondents (1 E. & B. 423), where tolls on goods sold in the market were held not the subject of a rate, though the market was the meritorious cause of the payment of those tolls. Suppose a rate on all rateable property in the town of Ipswich for the purpose of maintaining the dock.] Suppose the occupier of a particular house were entitled to an annuity of 1,000*l.* and in consideration of it would give 2,000*l.* a year for the lease of the house. [BLACKBURN, J.—If the owner of a house gives a man 100*l.* a year to reside in it and keep it in order, the occupier would not be rateable in respect of the receipt of that sum. LUSH, J., referred to *Allison v. The Overseers of Monkwearmouth Shore* (4 E. & B. 13) and *The Overseers of Sunderland*, appellants, *The Guardians of Sunderland Union*, respondents (18 C.B. N.S. 531). [BLACKBURN, J.—I cannot see the distinction between this and the grant of a manor or land for the purpose of maintaining the dock. The question is, whether the coal dues are so attached to the real subject as that under a demise of it the lessee would have a right to receive them.] A hypothetical tenant of the dock would take them with all the rights as well as liabilities of the Commissioners. [MELLOR, J.—The coal duties are not a profit arising from the dock.] But they give additional value to it. [LUSH, J.—Suppose the Commissioners closed the dock for the purpose of repairing it they would still receive the dues.] The Commissioners have the right to take these dues by reason of the occupation and maintenance of the dock: the dues are charged only on the coals imported or landed within the river Orwell or town of Ipswich, or the harbour thereof, or otherwise brought or delivered "within the limits of the Act." [BLACKBURN, J.—But they are not confined to the coals brought into the dock which is the real property to be rated.]

BLACKBURN, J.—We are all agreed on three points.

The first point is one of considerable nicety. The appellants are rated in respect of their occupation of part of the wet dock alleged to be within the parish of St. Peter, Ipswich. The objection to their rateability is that no part of the wet dock is in that parish. The dock was made in 1837, 1838, 1839 and 1840 in the bed and tidal channel of the river Orwell, partly between high and low water mark and partly in the channel, which is always covered at low water, and the appellants contend that the Orwell at this point was a continuation of an estuary or arm of the sea, which being part of the sea is *prima facie* extra-parochial, and therefore the dock was not rateable because not within any district for which a rate can be levied. We do not give a positive determination on this subject. When a question is out of the ordinary run it is better not to decide more than is necessary. In *Hale de Jure Maris*, Pars prima. cap. 4, *Hugr. Law Tracts*, p. 10, a distinction

is laid down between the sea and what he calls arms of the sea, which may be within the body of a county; and afterwards he says, p. 12, "that is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows; so that the river of Thames above Kingston and the river of Severn above Tewkesbury, &c., though they are public rivers, yet are not arms of the sea. But it seems, that, although the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and reflow as in Thames above the bridge." Cases have been quoted which point out that *prima facie* the Orwell would be considered an arm of the sea, and the consequences which would follow from that. In *Reg. v. Musson* (8 E. & B. 900) it was rightly decided that what Lord Hale calls the main sea is *prima facie* extra-parochial, and in the absence of evidence that it forms part of a parish it must be taken that it does not; and the same reason, that it is part of the waste and demesnes and dominions of the Crown, would apply to an estuary or arm of the sea: it is a part of the great waste, both land and water, of which the king is lord. This seems to be so, *prima facie*, whatever evidence there may be to rebut it. Lord Hale, in the first part of the same chapter, *Hargr. Law Tracts*, p. 10, says, "Thus much concerning fresh waters or inland rivers, which, though they empty themselves mediately into the sea, are not called arms of the sea, either in respect of the distance or smallness of them." The distance from the sea and the small size of the stream are two of the elements for determining how far the river extends and when the arm of the sea begins, upon which depends, *prima facie*, whether it is to be considered parochial or not. In *McCannon v. Sinclair* (2 E. & E. 53), which bears very much on the present case, and where the question was as to the parochiality of the bed of the Thames in a part much farther from the main sea than the dock here in question and much more like an arm of the sea than the channel of the Orwell at this point, the Court decided according to the report in 2 E. & E. 53, that the presumption was against parochiality, but that it might be proved by evidence, and it was proved, that the bed of the river was not extra-parochial. So in the river Orwell, looking at the distance of the dock from the sea and the size of the stream inasmuch as the tide flows and reflows, and the channel is navigable, the *prima facie* presumption seems to be that it is extra-parochial.

Then we have to see whether upon the preponderance of the evidence this wet dock is extra-parochial or not. One class of evidence which is of considerable weight is the course of perambulations made by the respondent and the neighbouring parishes abutting on the Orwell. Another class of evidence consists of acts of ownership. Both are equally admissible to shew parochiality, whether in the case of the bed of a salt river, as it is called in some cases, or a fresh river. Looking at the evidence of perambulations and the directions for perambulating the bounds of St. Peter's parish, the conclusion is rather in favour of the appellants, for the parish officers and inhabitants appear to have taken some pains to go along the bank of the river Orwell, and to have had an idea that the rights of the parish extended only to high water mark. But against that it appears that in each of the parishes abutting on the Orwell, considerable tracts have been reclaimed from the ooze or bed of the river and warehouses built upon them, and these were constantly rated to the poor rate. In St. Peter's parish a piece of land was reclaimed between the years 1797 and 1811 and built upon, and had since been rated to the relief of the poor. And in St. Clement's parish, a large piece of land was in like manner reclaimed and built upon, and afterwards rated. So that for more than fifty years the occupiers of land so reclaimed have been rated without opposition. I attach more weight to those acts which raise a question of money value⁴ than to the evidence of reputation

(4) This seems an application of the rule laid down by the civilians, and apparently adopted by the common law, that special presumptions take precedence of general ones. "Specialis præsumptio est fortior generali:" *Huberus, Præl. Jur. Civ.*, lib. 22, tit. 3, N. 17. It

from perambulations; and I draw the conclusion of fact in favour of the respondents that the bounds of the parishes abutting on the Orwell go down to the middle of the channel, as in *McCannon v. Sinclair*, the reports of which in 2 E. & E. 53, and 28 L. J. M.C. 249^s are not quite consistent as to whether there is a presumption against parochiality or not.

As to rating the Commissioners in respect of the dock dues the principle is clear. In ascertaining the rateable value the Court are to consider everything attached to and connected with the occupation of the dock, so that it would pass in a lease to a hypothetical tenant, excluding that which belongs to the occupier in his individual right, and which would not so pass. The difficulty is to apply the principle in particular cases. Here the ships which navigate the Orwell above Levington Creek pay dock dues in the same manner as if they entered the dock and remained there. Mr. Pickering says that the dock dues are given to the Commissioners for widening and deepening the channel, and that part of the dues paid by the vessels navigating above Levington Creek are in respect of sailing on this improved highway. But this is analogous to the rateable value of a farm: if there are good parish roads in the neighbourhood a tenant would pay a higher rent for the farm, and would be rated higher.

Then Mr. Manisty says the Commissioners are assessable for the coal duties. They were originally given by statute to the paving Commissioners to enable them to pay the interest of the debt contracted by them. I agree that if the duties were attached to the occupation of the dock it would not matter that formerly they were received by a different body than the Dock Commissioners. But they are not annexed or knit to the occupation of the dock: at one time they belonged to a body of Commissioners who had no connection with the dock: they were granted to them personally. If the dock was demised to a hypothetical tenant, these duties would not pass to him: it may be that without them the dock would be a *damnosa hæreditas*; but that is a point with which the Sessions must deal. They are not received in respect of the ownership of the land which has been converted into the wet dock.

Our judgment is that the rate be supported, but reduced.

MELLOR and LUSH, JJ., concurred.

Judgment for the respondents as to the parochiality of the dock and the dock duties; for the appellants as to the coal dues.

IN THE QUEEN'S BENCH.

April 18, 1866.

LLOYD v. JONES.

7 B. & S. 475.

Observations by Judge at Nisi prius—New trial.

PRACTICE. O.—On the trial of an action of slander, before the plaintiff's counsel stated his case, the Judge, in the hearing of the jury, suggested to the parties that it would be better to withdraw a juror. This was declined,

rests on the obvious principle that, as all general inferences (except, of course, such as are *juris et de jure*) are rebuttable by direct proof, they will naturally be affected by that which comes nearest to it; namely, specific proximate facts or circumstances, which give rise to special inferences, negating the applicability of the general presumption to the particular cases. The payment of money under a claim of rateability is obviously stronger and more proximate to the issue whether the place is rateable than a perambulation (which may or may not have been correctly made) in which that place is excluded.

(5) Also reported 5 Jur. N.S. 1302.

and the jury found a verdict for the defendant:—Held, that this observation of the Judge was not calculated improperly to sway the jury to give their verdict for either of the parties.

This was an action of slander in imputing felony to the plaintiff.

On the trial before Blackburn, J., at the Glamorganshire Spring Assizes, after the jury were sworn and before the plaintiff's counsel stated his case, the Judge, in the hearing of the jury, suggested to the parties that it would be better to withdraw a juror. This was declined, the trial proceeded, and evidence was adduced by both parties. Blackburn, J., in a charge which was not complained of, left to the jury to say if the words were spoken, and if so with the intention of imputing felony or only as vulgar abuse. The jury having found a verdict for the defendant—

Giffard (J. W. Bowen with him) moved for a new trial, on the ground that the learned Judge had pre-judged the case, and also that the verdict was against the evidence.—There being nothing on the record to shew that this action ought not to have been brought, the suggestion made by the learned Judge in the hearing of the jury after the case was called on, that it would be better for the parties to withdraw a juror, was calculated to induce the jury to think that the case was not a serious one, and prevent their doing justice between the parties. It was, however, a very grave matter to the plaintiff, the slanderous words being calculated to do him considerable damage. In *Goldicut v. Beagin* (11 Jur. 544) the Judge having, in the hearing of the persons summoned to compose the jury, made some observations calculated to prejudge the case against the defendant, whereupon his counsel withdrew from the cause, which was tried in his absence, and a verdict returned for the plaintiff, the Court set aside the verdict. [BLACKBURN, J.—I certainly did make the observation ascribed to me and see no reason to repent it. On hearing the record read I came to the conclusion that such an action as this would come to little good. And what took place afterwards did not alter my opinion. The jury found for the defendant, and the evidence justified their finding.]

COCKBURN, C.J.—There was nothing in the observation of the Judge in this case calculated improperly to sway the jury to give their verdict for either of the parties. In *Goldicut v. Beagin* (11 Jur. 544) the observations made by the Judge were much stronger than those made here, and he added others which do not appear in the report.¹

BLACKBURN and SHEE, JJ., concurred.

Rule refused.

May 22, 1866.

SPRINGETT, ADMINISTRATRIX OF WILLIAM SPRINGETT, deceased,
v. BALLS.

7 B. & S. 477.

New trial—Action of tort—Verdict evading issue—Amount of damages.

PRACTICE. O.—In an action by an administratrix under statute 9 & 10 Vict. c. 93., for compensation for loss sustained in consequence of the death of the intestate, the questions being whether there was negligence in the defendant or contributory negligence in the deceased, the jury found a verdict for the plaintiff, damages 40s., 1l. for the widow, and 10s. for each of the children; the Court granted a new trial without saying anything about costs, on the ground that the jury had shrunk from their duty of deciding the issue.

This was an action brought under statute 9 & 10 Vict. c. 93. by the

(1) The Lord Chief Justice was the counsel in *Goldicut v. Beagin*.

widow of the intestate, on behalf of herself and two children, to recover compensation for the loss sustained by them in consequence of his death. Issue was joined on the plea of not guilty.

On the trial, before COCKBURN, C.J., at the Sittings at Westminster after Hilary Term, it appeared that the deceased was run over and killed by an omnibus, which was being driven by a servant of the defendant, while crossing the Borough Road near London Bridge. The deceased was a hop inspector and earned from 4*l.* to 5*l.* per week. There was conflicting evidence on the questions which the Lord Chief Justice left to the jury, viz.: whether there had been negligence on the part of the driver of the omnibus causing the death of the deceased; whether, if so, there had been contributory negligence on the part of the deceased, and whether, even if so, the driver of the omnibus had used reasonable care to avoid the accident.

The jury gave a verdict for the plaintiff, damages 40*s.*; apportioning 1*l.* for the plaintiff and 10*s.* for each of the children.

In Easter Term, *Robinson, Serjeant*, obtained a rule *nisi* for a new trial on the ground that the verdict was against the evidence and was perverse, inasmuch as the jury having found a verdict for the plaintiff they should have given much larger damages.

Patchett shewed cause.—In actions for tort where the jury have found the issue, and there is no reason to suppose them to have been actuated by improper motives, the Court will not disturb their verdict on the ground that they have given merely nominal damages; *Gibbs v. Tunaley* (1 C. B. 640). In *Howard v. Barnard* (11 C. B. 653), in which the jury gave a verdict for the plaintiff damages 1*s.*, Maule, J., said, p. 654, "Another jury would in all probability not give him 20*l.*; and that would bring it within the rule upon which we always act in these cases,—not to grant a new trial as for a verdict against evidence (which could only be upon payment of costs, and therefore not worth while), where the damages are of so small amount." The defendant might have moved to set aside the verdict as against the evidence, but the Court would not have granted the application except on payment of costs by him. And the Court will not make this rule absolute if they see that justice is practically done by the verdict. The jury may have thought that the deceased could by due care have avoided the accident.

Robinson, Serjeant, and *Dowdeswell*, in support of the rule.—The jury in giving unsubstantial damages have acquitted the defendant's servant of negligence and therefore ought to have found for the defendant. Consequently the verdict is inconsistent, and the jury have failed to discharge their duty.¹ Probably their object in finding for the plaintiff was to prevent his having to pay costs, not being aware that the Judge had power to certify so as to entitle him to receive costs from the defendant. Or the verdict is a compromise between those jurymen who wish to find a substantial verdict for the plaintiff and those who wished to find a verdict for the defendant, and therefore the Court will set it aside.² [They cited 2 *Archb. Pr.* by *Prentice*, pp. 1541-2, and The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. s. 44.]

COCKBURN, C.J.—The rule must be made absolute without imposing on the plaintiff the condition of paying the costs of the first trial. Where the jury have actually decided the issue before them, the Court are exceedingly indisposed to interfere with the verdict on the ground that the damages are inadequate. But here the jury have shrunk from their duty as jurymen in deciding the issue submitted to them; so that we are entitled to look at the verdict as no verdict at all. It is as if they had resorted to the mode of

(1) See *Richards v. Rose* (9 Exch. 218. 222).

(2) See *Hall v. Poyser* (13 M. & W. 600).

settling the matter by tossing up what their verdict should be. We cannot suppose that they intended to find the issue of negligence in favour of the plaintiff when they have awarded damages wholly incommensurate with the injury resulting to the widow and children from the death of the intestate. We think such a verdict cannot stand, and that there must be a new trial without saying anything about costs.

BLACKBURN, MELLOR and SHEE, JJ., concurred.

*Rule absolute accordingly.*³

IN THE QUEEN'S BENCH.

Nov. 22, 1866.

THE QUEEN v. HENRY ALLEN, ESQ. AND ANOTHER, JUSTICES OF BRECKNOCKSHIRE, AND JAMES HERRING.

7 B. & S. 902.

Parish house—Service of summons—Jurisdiction of justices—Claim of title.

MAGISTERIAL LAW. C.—*The rule which ousts justices of the peace from entering upon a question of title does not apply where title is an essential element in the inquiry and the application of the rule would deprive them of jurisdiction to enter upon it.*

When the facts to be proved are of the very essence of the inquiry, and there is evidence before the justices on both sides, this Court will not interfere with their decision simply because they think it would have been better if the justices had decided differently.

In February parish officers gave M., who occupied a parish house, notice to quit. Before the expiration of the notice V., by whom M. had been let into possession, and who claimed title to the house, received possession of it from him, and let it to W. On the 4th April the parish officers, upon complaint to justices under statute 59 Geo. 3. c. 12. s. 24, obtained a summons against M. for refusing to deliver up possession. On the hearing neither M. nor V., who had knowledge of the notice given to M., appeared, and the justices issued their warrant, under which the churchwardens and overseers were put into possession:—Held, that the justices had jurisdiction to issue their warrant, notwithstanding the claim of title.

This was an application for a rule calling upon Henry Allen and John Vaughan, Esqs., justices of the peace for the county of Brecon, and James Herring, to shew cause why an order of the justices bearing date the 2nd May, 1866, made at the instance of the churchwardens and overseers of the parish of Llanfillo against one J. Morgan, and purporting to be made under the provisions of statute 59 Geo. 3. c. 12. s. 24, and also a warrant issued upon that order authorising the persons in the warrant named to turn one J. Williams out of possession of the tenement in the order mentioned, should not be removed into this Court for the purpose of being quashed.

The affidavit of William Vaughan, on whose part the application was made, stated that he claimed to be owner of the tenement in fee simple as purchaser from the grandson and devisee of Charles Vaughan, who, having obtained possession of it from his father Charles Vaughan, had occupied it for fifty-five years; that after the conveyance to him, which was dated the

(3) See *Bradlaugh v. Edwards* (11 C. B. N.S. 377).

19th September, 1864, he let it to J. Morgan, who entered into possession on the 2nd April, 1865; that in February he indirectly or accidentally had information of a notice served on Morgan from James Herring, churchwarden of the parish of Llanfillo, to quit on the 13th March, and thereupon, on the 12th March, he consented to take possession of the tenement from Morgan, and possession was given to him accordingly. Before the end of March he let it to J. Williams, and on the 2nd April put him into possession. On the 4th April Morgan was served with a summons for refusing to give up possession, but paid no attention to it, and did not tell W. Vaughan that he had been served with it until a day or two before the 2nd May, when it came on to be heard; who treated the summons as a nullity, as he was the landlord of and in possession of the tenement, Williams being in occupation of it as his tenant. He therefore did not appear before the magistrates, and afterwards a warrant was issued under which the county constabulary, on the 23rd August, ejected Williams and put the parish officers into possession. No notice or summons was given to W. Vaughan or to Williams demanding possession of the tenement before he was ejected, and no demand of possession was made on either of them.

The affidavit of James Herring, one of the churchwardens of Llanfillo, stated that the tenement was the property of the parish, having been purchased by their parish officers, and that it was occupied by Charles Vaughan and his son after him as clerk and sexton of the parish and as part of their salary; that at a meeting of parishioners early in the year the churchwardens were directed to take the necessary proceedings to recover possession of it, and on the 13th February, 1866, they caused a notice to be served upon Morgan, who refused to give up possession; that on the 4th April he applied to the justices for a summons against Morgan and made an information and complaint; that, if Williams was substituted for Morgan in the occupation of the tenement after the service of the notice on the 13th February and before the service of the summons dated 4th April, it was a trick to endeavour to nullify the notice.

The application was, in the first instance, made to Mellor, J., at Chambers, who referred the matter to the Court, cause to be shewn in the first instance.

Statute 59 G. 3. c. 12. s. 24. "And whereas difficulties having frequently arisen, and considerable expenses have sometimes been incurred by reason of the refusal of persons who have been permitted to occupy, or who have intruded themselves into parish or town houses, or other tenements or dwellings built or provided for the habitation of the poor, or otherwise belonging to such parishes, to deliver up the possession of such houses, tenements, or dwellings, when thereto required; and it is expedient to provide a remedy for the same; be it further enacted, That if any person who shall have been permitted to occupy any parish or town house, or any other tenement or dwelling belonging to or provided by or at the charge of any parish, for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into any such house, tenement, or dwelling, or into any house, tenement, or hereditament belonging to such parish, shall refuse or neglect to quit the same, and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish, within one month after notice and demand in writing, &c., shall have been delivered to the person in possession, or in his or her absence affixed on some notorious part of the premises, it shall be lawful for any two of His Majesty's justices of the peace, upon complaint to them made by one or more of the churchwardens and overseers of the poor of the parish in which any such house, tenement or dwelling shall be situated, to issue their summons to the person against whom such complaint shall be made, to appear before such justices at a time and place to be appointed by them, and to cause such summons to be delivered to the party against whom the complaint shall be made, or in his or her

absence to be affixed on the premises, seven days at the least before the time appointed for hearing such complaint; and such justices are hereby empowered and required, upon the appearance of the defendant, or upon proof on oath that such summons hath been delivered or affixed as is hereby directed, to proceed to hear and determine the matter of such complaint, and if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the premises in question to be delivered to the churchwardens and overseers of the poor of the parish, or to some of them."

H. Matthews, in support of the application.—First. The order was irregular. Statute 59 G. 3. c. 12. s. 24. requires that, after a notice and demand in writing has been delivered to the person in possession, a summons shall be issued to the person against whom the complaint is made, that is, the person really in fault, or, in his absence, affixed on the premises. Morgan had given up possession to his landlord on the 12th March, after which the information should have been against the landlord, and the summons served upon him or his tenant Williams. Proof of the proper service of the summons is essential to give the justices jurisdiction; *Reg. v. Evans* (19 L.J. M.C. 151; nom. *Ex parte Jones*, L.M. & P. 357), before Coleridge, J.

Secondly. The order was made without jurisdiction. Statute 59. G. 3. c. 12. s. 24. gives the justices jurisdiction in two classes of cases,—one in which a person has been permitted to occupy a house provided for the habitation of the poor, the other in which a person has intruded himself into a parish house; *Reg. v. The Justices of Middlesex* (7 Dowl. 767); and the present case is not within either. [LUSH, J.—In that case the facts shewed that the justices had not jurisdiction.] Where the title to property comes in question, the jurisdiction of the justices ceases; *Thompson v. Ingham* (14 Q.B. 710), *Reg. v. Dayman* (7 E. & B. 672). *Paley on Convictions*, 41, 117, 4th ed. [LUSH, J.—The decision in *Reg. v. Bolton* (1 Q.B. 66), decided upon this statute, applies.] In that case there was no question of title before the justices.

Henry James shewed cause.—First. The applicant admits that he had knowledge of the notice served on Morgan. Morgan allowed the matter to go by default; and the applicant now seeks to take advantage of his own absence. If this objection prevailed, statute 59 G. 3. c. 12. s. 24. never could be carried into effect in the case of a weekly tenant.

Secondly. Statute 59 G. 3. c. 12. s. 24. gives the justices direct authority to determine whether the house is a parish house, and therefore they had jurisdiction notwithstanding the title was in dispute; *Williams v. Adams* (2 B. & S. 312). [He was then stopped.]

COCKBURN, C.J.—If this proceeding had been an inquiry before the justices into the title to the tenement their jurisdiction would have ceased; but the Legislature cannot have intended that the rule, which ousts the jurisdiction of justices when title comes in question, should apply where, as in the present case, title is an essential element in the inquiry, and the application of the rule would deprive them of jurisdiction to enter upon it. If the justices gave themselves jurisdiction to make an order by finding a collateral fact or facts essential to be proved in order to warrant the making of it when there was no evidence to support their finding, this Court would control the exercise of their authority. But when the fact or facts to be proved are of the very essence of the inquiry and there is evidence before the justices on both sides, we should not interfere simply because we think it would have been better if they had decided differently. It would be contrary to the established practice of this Court to do so. Our decision is consistent with *Reg. v. Bolton* (1 Q.B. 66), where the Court laid down the principle that it would not interfere with the decision of the justices on a pure question of fact which they had statutory power to determine.

MELLOR, J.—I am of the same opinion. The question depends upon what

does the statute describe as constituting the offence charged. If it makes a certain fact an essential ingredient in the offence the justices must inquire into and determine it. Statute 59 G. 3. c. 12. s. 24. makes it an essential matter that the house should be a parish house, and if there was any evidence of that fact before the justices we cannot interfere with their decision even if we thought that the evidence on the other side preponderated. But the justices cannot give themselves jurisdiction by an erroneous finding on a collateral matter. *Reg. v. Dayman* (7 E. & B. 672) proceeds on that distinction, and with respect to it there was no real difference of opinion between Erle, J., and the other members of the Court.

SHEE, J.—The object of statute 59 G. 3. c. 12. s. 24. was to provide a summary remedy by complaint of the churchwardens and overseers to justices where persons either refuse to quit parish houses after having been allowed to occupy them or have intruded into them. The justices are to proceed to hear and determine the matter of the complaint, and there can be no complaint under the statute unless the house occupied by the person whom it is sought to eject is a parish house or dwelling belonging to or provided by or at the charge of a parish for the habitation of the poor. Therefore that was a necessary matter to be inquired into and determined by the justices; and, according to the words of the section, "if they shall find and adjudge the same to be true, then, by warrant under their hands and seals," they are to cause possession of the premises to be delivered to the churchwardens and overseers, and there is no appeal from their decision, for an appeal would defeat the object of the statute. I cannot distinguish the present case from *Reg. v. Bolton* (1 Q.B. 66), in which it was held sufficient under this statute that the complaint before the justices brought the case within their jurisdiction, and therefore, though on inquiry their decision might not be wholly satisfactory, this Court would not interfere. If the justices made an order when there was no evidence before them upon the fact, that would be disregarding the sections of the statute. But here was evidence which the justices determined to be sufficient to warrant them in coming to the conclusion that the complaint was true.

LUSH, J.—The information is not before us; but I presume it brought the case within statute 59 G. 3. c. 12. s. 24., and if so it would state that the present applicant had been permitted to occupy or had intruded himself into a parish house, that due notice to quit had been given to him, and that he had refused to give up possession. The justices were bound to inquire into and affirm or disaffirm each of those allegations. No appeal is given against their determination, and there is no provision in the statute similar to section 58 of statute 9 & 10 Vict. c. 95., on which *Thompson v. Ingham* (14 Q.B. 710) was decided, and which provides that the County Court shall not have cognizance of any action in which the title shall be in question. The present case is precisely within the doctrine of *Reg. v. Bolton* (1 Q.B. 66); where the Court, in a considered judgment, said, p. 73, "Where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry: in so doing he undoubtedly acts within his jurisdiction: but in the course of the inquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be that the offence has not been committed, and so that case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of shewing this is clearly in effect to shew that the magistrate's decision was wrong if he affirms the charge, and not to shew that he acted without jurisdiction: for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such

circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry: and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry." Every word of that passage applies to the present case.

Rule discharged, without costs.

IN THE COURT OF EXCHEQUER.

June 6, 1866.

BYRNE v. THE MERCANTILE INSURANCE COMPANY, LIMITED.

4 H. & C. 506.

MARINE INSURANCE. J.—*A marine policy of insurance contained the following clause:—"The usual deduction of one-third of the amount of repairs will not be made by this Company in the case of ships built within the limits of the United Kingdom until after eighteen months, or in the case of Colonial built ships until after twelve months from the date of the builder's certificate; but after such dates respectively the deduction will be made." By custom, underwriters make a deduction of one-third, new for old, only in respect of repairs made after the first voyage of a vessel:—Held, that the expression "usual deduction" had reference to the quantum only, and that in the case of a Colonial built ship the underwriters were entitled to make the deduction of one-third, after twelve months from the date of the builder's certificate, although the ship had not completed her first voyage.*

This was an action to recover 1,002*l.* 3*s.* 8*d.* under a policy of insurance. By consent of the parties and order of a Judge, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of this Court, without pleadings:—

It has been for many years a custom amongst underwriters, in cases of losses under policies which have not contained the special clause set out in the policy hereinafter mentioned, to make a deduction of one-third, new for old, only in respect of repairs made after the first voyage of a vessel.

By a policy of insurance effected with the defendants dated the 9th day of December, 1864, the plaintiff, who is the owner of the ship *Melmerly*, insured that vessel at and from Bombay to Liverpool.

The Policy contains the following clause:—

"N.B.—The usual deduction of one-third of the amount of repairs will not be made by this Company in the case of ships built within the limits of the United Kingdom until after eighteen months, or in the case of Colonial built ships until after twelve months, from the date of the builder's certificate, but after such dates the deduction will be made."

The *Melmerly* was a Colonial built ship and the voyage insured was her first.

During the voyage insured, but after twelve months from the date of the builder's certificate, the ship received damage and was repaired; and the plaintiff claims from the defendants the full amount of the repairs as a particular average loss.

The defendants have paid 669*l.* 2*s.* 2*d.*, being the amount of the claim after deducting 333*l.* 1*s.* 6*d.*, being the allowance they claim in respect of new for old materials.

The question for the opinion of the Court is, whether the defendants are liable to the plaintiffs for the full amount of the repairs without any deduction of new for old. If they are, judgment is to be entered for the plaintiff for 333*l.* 1*s.* 6*d.* with costs. If they are not, judgment is to be entered for the defendants with costs.

Mellish, for the plaintiff.—The defendants are liable for the full amount of repairs. If the policy had not contained this special clause, it is clear that no deduction could have been made, because the insurance was on the ship's first voyage. Then does the clause mean that the deduction will, at all events, be made after the expiration of the periods specified, or does it leave the custom still applicable? It is submitted that, according to the true construction, the custom applies. The clause was introduced for the benefit of the assured, not of the underwriters. The expression "*usual deduction*" means the deduction made after the first voyage, and the word "*deduction*" in the latter part of the clause should receive the same construction. The defendants, by extending their liability, hold out an inducement to shipowners to insure with them. They, in effect, say that the deduction usually made after the first voyage will not, after that time, be made until the expiration of the respective periods of eighteen months and twelve months from the date of the builder's certificate.

Milward (*Hirschell* with him), for the defendants.—The bargain between the parties excludes the custom. The intention was that at the expiration of the periods mentioned the defendants should have an absolute right to make the deduction, which, under ordinary circumstances, was subject to the condition of the vessel having made her first voyage. The words "*but after such dates respectively the deduction will be made*" shew that the right to make the deduction attaches upon the expiration of the eighteen months and twelve months, although the ship may then be on her first voyage. On the other hand, if the ship made several voyages within the twelve months, during all that time the defendants would be bound to pay the full amount of repairs without any deduction.

Mellish replied.

MARTIN, B.—I am of opinion that the defendants are entitled to judgment. Whatever may have been the intention of the parties we must give a construction to the words they have used. In the first part of the clause there is the expression "*the usual deduction*," and in my opinion "*the deduction*" in the latter part has the same meaning. The clause commences: "*The usual deduction of one-third of the amount of repairs will not be made by this Company in the case of ships built within the limits of the United Kingdom until after eighteen months, or in the case of Colonial built ships until after twelve months from the date of the builder's certificate.*" If it had stood there, I should have been disposed to think that the argument of Mr. Mellish was right. But it seems to me that the intention of the defendants was to hold out a bonus or temptation to shipowners to insure with them by substituting this contract for the custom. The clause then goes on: "*but after such dates respectively the deduction will be made.*" Then what deduction is that? It seems to me that it means the deduction mentioned at the commencement of the clause. That being so, there is an express contract that after the dates respectively mentioned the usual deductions will be made. My impression is that this construction is in accordance with the intention of the parties.

BRAMWELL, B.—I am reluctant to add anything to what my Brother Martin has said, since his view of the case so entirely coincides with my own. Moreover, I am inclined to think that this construction is what the parties meant. Very likely they intended to substitute certain fixed periods in order to avoid trying that inconvenient question "*what is a first voyage?*" If a ship completed her first voyage within a month it would be unreasonable that shortly afterwards the underwriters should make a deduction of one-third new for old in respect of the repairs. It is therefore probable that the parties intended to substitute for the custom a stipulation more reasonable.

This, however, is a question of construction; and I think it tolerably clear that the defendants are right. The expression "*usual deduction*," in the first part of the clause, might mean "*usual deduction after the first voyage*"; but

that would be a singular interpretation of the word "usual" when applied to "deduction" in the latter part of the clause, where it indicates the quantum of deduction, not the circumstances under which it is to be made. Therefore, although if the first part of the clause had stood alone the expression "usual deduction" might have meant "usual deduction after the first voyage," yet, inasmuch as it does not stand alone, but in connection with the word "deduction" in the latter part of the clause, it seems to me that by the expression "usual deduction" nothing more is meant than a deduction of one-third, which is to be made after the periods mentioned. I think that whatever sense is attached to the expression "usual deduction" in the first part of the clause, must be attached to the word "deduction" in the latter part, where the word "usual" is not used; and that if the words "after the first voyage" are interpolated in the first part of the clause, they must also be interpolated in the latter part, which must then be read, "but after such dates respectively the deduction will be made after the first voyage." That, however, would be repugnant and absurd. It seems to me, therefore, that the word "usual" must be limited to the quantum of deduction, and not include the time when it is to be made; and, consequently, the true interpretation is that given by my Brother Martin.

CHANNELL, B.—I do not think it necessary to speculate upon what may possibly have been the intention of the parties. The duty of the Court is to put the best construction they can upon the words which the parties have used. I think that the expression "usual deduction" has reference to the quantum, and not to the first voyage. I am satisfied that the true meaning of the clause is that during certain limited periods the underwriters will not make the usual deductions of one-third, but after the expiration of those periods respectively the deduction will be made.

PIGOTT, B.—I am of the same opinion. At first I was disposed to take a different view, but on considering the words "but after such dates respectively the deduction will be made," and giving full effect to those words, I think that the defendants are entitled to judgment.

Judgment for the defendants.

IN THE EXCHEQUER CHAMBER.

June 19, 1866.

WEBBER v. THE GREAT WESTERN RAILWAY COMPANY.

4 H. & C. 582.

CARRIERS. C.—*A package addressed to the plaintiff was delivered to P. at Worcester to be carried from Worcester to Chester. P. (who acted as agent for receiving goods both of the Great Western Railway Company and the London and North Western Railway Company), delivered the package to the Great Western Railway Company, with directions that it should go by the London and North Western Railway. The Great Western Railway Company made out a way bill in the usual form of their way bills. The London and North Western Railway Company have no communication with a station at Worcester, but their line joins the Great Western Railway at Stafford. The package was carried in a waggon of the Great Western Railway Company to Stafford, and from thence on the line of the London and North Western Railway Company to Chester. The contents of the package having been damaged on the journey:—Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that there was evidence from which the jury could properly find a contract by the Great Western Railway Company with the plaintiff to carry the whole distance from Worcester to Chester, and therefore they were liable for the damage.*

This was an appeal by the defendants against the decision of the Court of Exchequer in discharging a rule to enter a verdict for the defendants. (Reported, 3 H. & C. 771).

The case on appeal stated the following facts¹, as proved by the plaintiff. The plaintiff purchased a clock from Messrs. Sherratt, at Worcester, and directed them to send it to his address at Chester.

Messrs. Sherratt, having packed the clock, addressed it to "R. Webber, Esq., Chester," and delivered it so addressed to Messrs. Pickford, at their office in Worcester.

3. Messrs. Pickford took the package to the defendants' station at Worcester, and delivered it to a clerk of the defendants there in good condition, together with a consignment note of which the following is a copy:—

"West Midland Railway.

"Received from P. & Co.

Skerratt.

"per L. & N.W. Ry.

Care.

"Webber, Esq.

2 Boxes.

"Chester.

"Charges forward."

4. At the time of such delivery to the defendants Messrs. Pickford gave directions that the package should go by the London and North Western Railway. The defendants use their own discretion as to whether such directions should or should not be followed, sometimes striking out such directions and sometimes allowing them to remain and acting upon them.

5. Messrs. Pickford are the appointed agents of the London and North Western Railway Company, but act as agents for the Great Western Company also, and the firm of R. T. Smith & Co. are the appointed agents of the defendants, and both firms have offices in Worcester.

6. The defendants have a direct communication between Worcester and Chester by means of their own line. The London and North Western Company have no communication with a station at Worcester, and the nearest point to Worcester at which the systems of the London and North Western Railway Company and of the Great Western Company join is at Bushbury, near Stafford, and goods intended to go by the London and North Western Railway are put into a waggon at starting at Worcester, which waggon is labelled "Via Bushbury," and it is believed that this was done in this instance with the package in question.

7. The package was conveyed to Chester and delivered to the plaintiff, and a way bill, of which the following is a copy, was sent with the goods, and in due course arrived at Chester with them.

Great Western Railway.

Goods invoiced, No. 953.

Progressive No.

From Worcester to Chester.

Invoice arrived 186 h. m.

Route via clock train, March 14, 1864.

Goods arrived 186 h. m.

Reference to Delivery Book. ²	Waggon. No. of Consig- ment Note.	Consignor.	Consignee, the residence.	No.	Goods.			Rate.	Delivery or paid through.	Paid on.	Paid.	To pay.	Amount to Ledger.	Folio.	Amount to Station.	Remarks.	
					Des- crip- tion.	Mail.	Weight. .										
							Goods carted.										Goods. not carted.
P. & Co. from 1697 Stafford.	445	P. & Co.	Webber, Chester.	2	Boxes.		1 0 0	1 23	60	8 and 16/36/4		1s. 6d.					
			R. Webber.	28	Taun Road, Chester.		Sd. J. Wemold.										

(1) The pleadings sufficiently appear in the report, 3 H. & C. 771.

8. The plaintiff received the package at the Chester general station, and there paid for the carriage for the whole distance, and the defendants paid Messrs. Pickford for the carting of the goods from their office in Worcester to the defendants' station there.

9. On the delivery of the clock at Chester it was found to be broken, but there was no evidence to shew at what period of the journey between Worcester and Chester the damage had been done.

No evidence was given on behalf of the appellants.

The question for the decision of the Court is, whether there is such evidence of a contract with the defendants as would justify a verdict for the plaintiff.

If the Court shall be of opinion in the affirmative, judgment is to be entered for the plaintiff for the damages assessed by the jury. If the Court shall be of opinion in the negative, a nonsuit is to be entered.

Grove (*Horatio Lloyd* with him) now argued for the defendants². This case was decided on the authority of *Muschamp v. The Lancaster, &c., Railway Company* (8 M. & W. 421), and *The Bristol and Exeter Railway Company v. Collins* (7 H. L. 194); and it is conceded that if the plaintiff had delivered the clock to the Great Western Railway Company, and they had undertaken to carry it, although not upon their own line, they would have been liable; for it has been long established that where a person contracts to carry goods he is responsible for their loss or damage notwithstanding he has delivered them to another person to carry for him. But here there was no contract between the plaintiff and the Great Western Railway Company. The plaintiff delivered the clock to Messrs. Pickford, and they delivered it to the Great Western Railway Company, with directions that it should go by the London and North Western Railway. The plaintiff's remedy is against Messrs. Pickford. There was no evidence for the jury that on this occasion Messrs. Pickford acted as the agents of the Great Western Railway Company. [WILLES, J.—Suppose Messrs. Pickford, instead of directing the package to be sent by the London and North Western Railway, had directed it to be sent by the Great Western Railway, could they have sued that Company?]

McIntyre appeared for the plaintiff, but was not called upon to argue.

WILLES, J.—We are all of opinion that the judgment of the Court below must be affirmed.

The question is, whether there is sufficient evidence—not as regards its weight but its character—upon which the jury could properly find that the contract to carry the package from Worcester to Chester was a contract between the plaintiff and the Great Western Railway Company.

The contract must either have been with the London and North Western Railway Company, or with the Great Western Railway Company; and to entitle the plaintiff to succeed it was necessary for him to adduce evidence leading to the probable conclusion, and which the jury believed, that the contract was with the Great Western Railway Company. Mr. Grove insists that there was no such evidence.

Now, in the case of *Cotton v. Wood* (8 C.B. N.S. 568), it was laid down that there must be evidence pointing to the one conclusion rather than the other, and that where the evidence is equally consistent with either view it is not competent to the Judge to leave the matter to the jury. So in *Avery v. Bowden* (6 E. & B. 953) it was laid down that where the evidence leads only to conjecture it is not fit for the consideration of the jury. That doctrine has not only been laid in modern cases, but so long ago as the time of *Plowden* (*Plowden*, 412) it was held that in civil cases it was sufficient if either party had a reasonable probability in his favour.

Then is there in this case sufficient evidence to turn the balance of

(2) Before Willes, J., Byles, J., Blackburn, J., and Mellor, J.—Shee, J., and Montague Smith, J., had gone to Chambers.

probability that the contract was rather with the Great Western Railway Company than the North Western Railway Company? We think there is. In the first place it does not appear that goods intended to go by the London and North Western Railway could be conveyed otherwise than in the manner stated in the 6th paragraph. In the next place the way bill was made out by the Great Western Railway Company in their office, and in the form of their way bills. That is a circumstance for the consideration of the jury; and in addition there is a circumstance of considerable weight, viz., that the London and North Western Railway Company had no line by which they could carry the whole distance Worcester to Chester, the only line by which there was a direct communication between those places being that of the Great Western Railway Company. These circumstances make it more probable that the contract was with the Great Western Railway Company than with the London and North Western Railway Company.

Then comes the question whether the contract was with Messrs. Pickford or with the plaintiff. The facts shew that the contract was with the plaintiff. There is the circumstance of the plaintiff being described in the way bill as consignee of the goods; and, although Messrs. Pickford were agents for the London and North Western Railway Company, they also acted as agents for the Great Western Railway Company. It further appears that when Messrs. Pickford brought parcels to the Great Western Railway Company, and gave directions that they should go by the London and North Western Railway Company, the Great Western Railway Company were in the habit of treating them, not as the directions of the customer but of their agent Messrs. Pickford, and of using their discretion as to whether such directions should or should not be followed. There is, therefore, the most probability that the contract was with the plaintiff, and the jury have found that in fact the contract was with him. We think that their view was quite correct; and the judgment of the Court below must be affirmed.

Judgment affirmed.

IN THE COMMON PLEAS.

Feb. 10, 1866.

DICKINSON v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

H. & R. 399.

Railway Company—Line crossing highway on a level—Neglecting to keep gate at crossing closed—Statutory misconduct 5 & 6 Vict. c. 55. s. 9.

RAILWAY. C.—*The plaintiff negligently fastened his horse by the bridle to a railing in the open yard of a public-house, within which he remained for two hours. The highway leading from the house crossed the railway of the defendants on a level, and they had set up gates across both ends of the highway at the crossing. The gates opened outwards from the railway, and closed with a catch, but were easy to open, and would open when a train passed, and there was no gatekeeper at the crossing. During the plaintiff's absence the horse escaped from the railing, owing to the negligent fastening, strayed to the highway and along that to the crossing, and, the gate there not being closed, through the gateway to the railway, where it was killed by a passing engine of the defendants:—Held, on the authority of Fawcett v. The York & North Midland Railway Co. (16 Q.B. 610), that under Stat. 5 & 6 Vict. c. 55, s. 9, an obligation was imposed on the defendants to keep the gates closed against stray cattle on the highway, that the accident had been caused by their statutory*

misconduct, and that the plaintiff was entitled to recover from them the value of the horse.

This was a case stated on appeal from the County Court at Chorley, in Lancashire.

The action, which had been tried before the County Court Judge, without a jury, was to recover 25*l.*, the value of a horse, killed on the defendants' railway at Euxton on the 9th of August, 1865.

On the trial it was stated by the plaintiff that about half-past eight o'clock on the evening of the 9th of August, 1865, he was returning home, and that he called at a public-house between one and two hundred yards from the defendants' railway at Euxton, that he fastened his horse by the bridle to a railing in the open yard of the public-house, although there were proper stables attached to the public-house. He remained in the public-house about two hours, and when he went to look for the horse it was gone from the place where he had fastened it; he went home without finding or making much search for it.

It was proved that there is a common and public highway used for horses, carts and carriages leading from that public-house towards and across the defendants' railway in Euxton; that the crossing of such highway by the railway is a level crossing, and that the railway company had set up gates across both sides of the highway at such crossing, but the evidence showed that they had no gate-keeper at that crossing. It was also proved that the gates opened outwards from the railway and that they were closed by a catch, but the plaintiff stated that they were easy to open, and a witness said it did not require a strong pull to open them, and that they would open when a train passed and would remain open, and that he had opened one of them by pushing against it with a hand cart. When the plaintiff went home from the public-house about half-past ten o'clock on the night in question he arrived at the gates and found them closed.

The dead body of the horse was discovered on the railway about one hundred and forty yards from the gate, and a witness proved that he observed that the horse had stood near the gate on its outer side at the crossing, and that the next day he traced the marks of the horse from the gate along the railway to the place where the animal was killed. The plaintiff, also spoke to the footmarks of the horse having been traced on the 10th August along the railway from the gate to the place where it was killed, and it was not disputed that the horse had been killed on the railway during the night by a passing engine of the defendants.

The plaintiff's counsel first rested his case on the Railway Clauses Consolidation Act, 8 Vict. c. 20, but afterwards, finding that the defendants' railway was completed previously to the coming into operation of that Act, on the broad ground that the defendants were liable for want of precaution in carrying on a dangerous trade.

The defendants called no witnesses; but it was contended on their behalf that there was no proof of the horse's death having been caused by any negligence on their part, the facts proved being quite consistent with the absence of such negligence; that even if the gate had been left open and the horse, straying on the road, had passed through it, the plaintiff had contributed to his own loss by his gross negligence in not properly securing the horse at the public-house; that there was no evidence of the manner in which the horse got from the railing at the public-house to the railway, and it was quite possible that the horse might have been taken away from the railing by some person who opened the gate, and that the horse had so got on the railway without any negligence or default on the part of the defendants; that there was no evidence of the bridle or the railing having been broken, and that it was admitted by the plaintiff that when he saw the bridle on the dead horse the next day it was differently buckled than when he had fastened it round the railing at the public-house.

The County Court judge found in point of fact that the horse had been insecurely and negligently fastened by the plaintiff to the railing at the public-house; that during his absence in the public-house the animal had escaped from the railing owing to such negligence and insecure fastening; that it had strayed from that place to the highway and along the highway to the crossing; that the railway gate there was not then closed but open; that the horse had strayed through the gateway on and along the railway, and had been killed while so straying by an engine of the defendants passing along the railway.

By the Defendants' Special Act (a Public Act), which was passed 22nd May, 1834, whereby the previous Acts relating to the railway were repealed, section 52, it is enacted as follows:—"Provided that in all cases where the railway shall cross any turnpike road or public carriage way on a level, the said Company shall erect and at all times maintain a good and sufficient gate on each side of the said railway where the said turnpike road or public carriage way shall communicate with such railway, which gates shall be constantly kept shut, except at such times as wagons, carts and other carriages passing along such turnpike road or public carriage way shall have to cross the said railway, and then shall be open for the purpose only of letting such wagons, carts and other carriages pass through; and every driver or person entrusted with the care of any wagons, carts or other carriages, or with any string of wagons, carts or other carriages, shall and he is hereby directed to cause the said gates and each of them to be shut as soon as such wagons, carts or other carriages shall have passed through the same, under the penalty of 5s. for every offence."

The County Court judge held in point of law, that the provisions of the Special Act above set out had been modified and altered by the subsequent general Acts, 2 & 3 Vict. c. 45, and 5 & 6 Vict. c. 55, s. 9, and considered that the death of the horse had been caused by the defendants' non-performance of the statutory obligation imposed on them to keep the gates constantly closed and shut, except when it was necessary to open them, and, on the authority of *Fawcett v. The York and North Midland Railway Company* (16 Q.B. 610), gave a verdict for the plaintiff.

No counsel appeared for the defendants, who were the appellants.

C. H. Hopwood, for the respondent.—The verdict was right. In *Fawcett v. The York and North Midland Railway Company* (16 Q. B. 610), the railway crossed a highway on a level; and there were gates across each end of the road where it crossed the line of railway. The plaintiff's horses strayed from his field into the highway through the gates which were open to the railway, and were in consequence there killed by a train; and it was held, that by statute 5 & 6 Vict. c. 55, s. 9, an obligation was imposed on the company to keep the gates closed as well against stray cattle on the road as against cattle travelling thereon, and that the plaintiff was entitled to recover the value of the horses from the Company. The present is not distinguishable from that case. [WILLES, J.—That case is in your favour. *Dovaston v. Payne* (2 H. Bl. 527) shews that the avowant for damage feasant is bound to fence against cattle lawfully passing along the highway; but *Fawcett v. The York and North Midland Railway Company* (16 Q.B. 610) shews that statute 5 & 6 Vict. c. 55, s. 9, has a wider operation.] In *The Manchester, Sheffield and Lincolnshire Railway Company, appellant, v. Wallis, respondent* (14 C.B. 213), the question was as to the obligation of the railway company, under 8 & 9 Vict. c. 20, s. 68, to fence against the owners and occupiers of lands adjoining; and Jervis, C.J. (p. 223), distinguishes it from the case of a railway crossing a highway upon a level, and throughout the authority of *Fawcett v. The York and North Midland Railway Company* (16 Q.B. 610) is recognized. On the other side, *Ellis v. The London and South Western Railway Company* (2 H. & N. 424) may be relied on. There it was held a question for the jury whether the plaintiff by his own negligence had contributed to the accident.

But in that case the railway crossed an occupation way on a level, and it has no analogy to the present.]

WILLES, J.—We are called on to pronounce an opinion, without hearing the appellants, whether the County Court judge was right, and we were desirous of seeing whether there was any substantial ground for the appeal. The County Court judge was judge both of fact and law, and it is to be taken that the facts are according to his finding. The accident was entirely caused by the statutory misconduct of the defendants; and the case of *Fawcett v. The York and North Midland Railway Company* (16 Q.B. 610) is in point. Therefore, as the learned judge followed the authority of that case, his decision must be affirmed with costs.

Keating and Smith, JJ., concurred.

Appeal dismissed with costs.

IN THE EXCHEQUER CHAMBER.

June 16, 1866.

SCRIVENER AND ANOTHER v. PASK.

H. & R. 834; L. R. 1 C.P. 715.

Adopted, *Pope v. Buenos Ayres New Gas Co.*, 1892, 8 T. L. R. 758 (C.A.).

See, *Antisell v. Doyle*, [1899] 2 I. R. 275 (Q.B. D.). Referred to, *In re Ford v. Bemrose*, 1902, 18 T. L. R. 443 (C. A.).

Principal and Agent—Employment of builder by architect—Liability of architect's employés to builder.

WORK AND LABOUR. D.—*The defendant employed an architect to prepare plans for a villa, and to procure a builder to erect it; and the plaintiffs were the builders so engaged. An arrangement between these three parties was then entered into, and the plaintiff, before signing it, received from the architect a bill of quantities. These having proved incorrect while the building was in progress, the plaintiffs sought to recover from the defendant the difference in the cost of the building on its completion:—Held, affirming the judgment of the Common Pleas, that there was no such evidence of agency as rendered the defendant liable for the mistake of the architect.*

This was an appeal against a decision of the Court of Common Pleas in refusing a rule to enter a verdict for the plaintiffs, who had been nonsuited.

The proceedings in the Court below are reported 18 C.B., N.S. 785.

Denman (Prentice with him), for the plaintiffs.—The architect Paice, having been employed by the defendant to give him plans for his villa, and also to procure a builder, the plaintiffs, on their engagement by the architect, were entitled to look to the defendant as the principal, and to Paice as his agent merely. Consequently the plaintiffs are entitled to make their claims against the defendant for the work actually done. [BLACKBURN, J.—You say that in consequence of the “quantities” being wrongly taken you have charged 155*l.* too little?] The plaintiffs would rather rely on the money counts; the defendant rests his case on the contract, but that he cannot do without shewing the circumstances under which the contract was entered into. In determining the question of agency the material point is not, who pays? but, who employs? [BLACKBURN, J.—To establish your case you must make out, that Paice was acting as the defendant's agent; that Paice was guilty of fraud, and that the defendant was aware of it; but there is no evidence of any one of these things.] There is no evidence of fraud, but there is evidence of a gross blunder. [MELLOR, J.—Your remedy appears to be against the architect.]

M. Chambers (Clare with him) was not called upon. *Per Curiam*¹.

Judgment affirmed.

(1) Pollock, C.B., Channell and Pigott, BB., Blackburn and Mellor, JJ.

IN THE PRIVY COUNCIL.

SIR J. L. KNIGHT BRUCE, L.J., SIR G. J. TURNER, L.J., SIR E. V. WILLIAMS,
SIR J. W. COLVILLE, and SIR L. PEEL, Feb. 12, 1866.

CASSANOVA AND ANOTHER, *appellants*, REG. AND ANOTHER
respondents.

12 Jur. N.S. 127; L. R. 1 P.C. 115.

Sierra Leone—Vice-Admiralty Courts—Leave to appeal after time expired—Apology for delay—26 Vict. c. 24, s. 23.

COLONY. C.—*Where the time for appealing from a Vice-Admiralty Court has expired, owing to the delay by counsel in advising on the success or failure of such appeal, such delay being caused by counsel's waiting for the decision of another appeal pending before the Privy Council, which decision it is reasonably possible may throw some light on the appeal to be advised upon, such apology may, in the absence of the circumstances to destroy its effect, induce the Judicial Committee to allow the prosecution of the appeal under the 26 Vict. c. 24, s. 23.*

This was a motion for leave to prosecute an appeal from the Vice-Admiralty Court of Sierra Leone, notwithstanding the petition of appeal had not been lodged within the time prescribed.

The application was made under the Vice-Admiralty Court Act, 1863 (26 Vict. c. 24, s. 23, which limits the time for appealing from a Vice-Admiralty Court to six months from the date of the decree, "unless her Majesty in Council shall, on the report and recommendation of the Judicial Committee of the Privy Council, be pleased to allow the appeal to be prosecuted, notwithstanding the petition of appeal has not been lodged within the time prescribed."

By a decree of the Vice-Admiralty Court of Sierra Leone, dated the 26th September, 1864, *The Ricardo Schmidt* (belonging to foreign owners), having been seized as an alleged slave ship, was restored to the claimant (one of the appellants), but on the ground of there being probable cause for the capture, without costs or damages.

On the 4th October, 1864, the claimant asserted an appeal for damages and costs.

On the 18th January, 1865, the owners of *The Ricardo Schmidt* having been communicated with at Genoa, a case was laid before counsel in England to advise the appellants on the probable success of an appeal.

The counsel employed delayed writing an opinion with a view to obtaining some light from the judgment in a similar appeal for costs and damages, entitled *Dionissis v. Reg.—The Ship Laura*, then pending before the Judicial Committee of the Privy Council. The last-named appeal did not raise any point of law which would affect the present case, but might afford some indication of the manner or temper in which the Judicial Committee would treat an appeal for costs and damages under similar circumstances.

The appeal in the case of *The Laura* was heard on the 23rd and 26th January, and the 15th March, but judgment was reserved.

Ultimately, without waiting for the judgment, counsel wrote his opinion, in April, 1865, in favour of prosecuting the appeal.

In consequence of the delay above mentioned, the petition of appeal was not filed till the 14th September, 1865, the limitation of time having been overlooked.

V. Lushington and *R. A. Bayford*, for the appellants, in support of the motion, urged (*inter alia*) that counsel's waiting for the decision in the case of *The Laura* was some excuse for the delay.

The Queen's Advocate, contra.—The discretion of the committee will not be arbitrarily exercised. No point of law essential to this case was raised in *The Laura*. Counsel only waited to see the temper of the Court.

V. Lushington, in reply.

Sir J. L. KNIGHT BRUCE, L.J., delivered the judgment of the Judicial Committee.—There is only one ground of apology for the delay which their Lordships can entertain, and that is, that it was reasonably possible that the decision of the case of *The Laura* might throw light on the appellant's chances of success in this appeal, and that that was a sufficient reason for waiting.

As the other circumstances in the case do not take away that ground of apology, their Lordships will recommend to her Majesty that the motion be complied with, but the applicants must pay the costs of this application.

IN THE HOUSE OF LORDS.

April 30, 1866.

CHARLOTTE TREVILLIAN AND OTHERS, *appellants*; WILLIAM KNIGHT AND OTHERS, *respondents*.

L. R. 1 H.L. 30.

Parties—Next of kin—Practice—10 & 11 Vict. c. 96.

APPEAL, B.—Where, upon the construction of a will, there was a doubt whether an intestacy might not be declared, and where the fund to be distributed had been paid into Court under the Trustee Relief Act (10 & 11 Vict. c. 96), the House declined to proceed with the appeal in the absence of any one to represent the next of kin, and the appeal was ordered to stand over in order to enable the parties contesting the construction of the will to apply to the Court below on the subject. The case was then to be heard on a supplemental petition.

This was an appeal against an order of the Master of the Rolls, which had been confirmed by the Lords Justices.

The question in the case arose on the will of Richard Corrie, dated 30th of July, 1801, by which (among other things), after appointing three persons his executors and trustees, he gave them all the residue of his personal estate on trust, as to 15,000*l.* Three per Cents., to pay the dividends to his wife for life, and upon farther trust, after paying debts and funeral expenses, to place out all the residue at interest in the public funds, and pay the dividends to his sister, Mary Streatwells, for her life; and as to the whole fund, after the death of his wife and sister, the will went on thus:—"And I desire the interest of all to be paid and applied, and I give and bequeath equally between my nephew, John Corrie, and his sister, my niece, Mary Portal" (free from her husband's control), "for life and after her decease and the decease of my said nephews, respectively, I give and bequeath the principal monies equally among their issue, if there be any child or children to take the share of their deceased parent; and in case both my nephew and niece both die without issue, or leaving issue, they shall die under the age of twenty-one years without issue, then I give the share of him, her, or they so dying to the other of them, of¹ his or her issue, if he or she then be dead leaving issue aforesaid. But

(1) It will be seen that this devise is full of verbal inaccuracies. This word *of*, it was agreed in the Court below by both sides, ought to have been *or*; and as to the word *both*, twice repeated, it was at the Rolls "conceded that this word *both* meant *either*."

if both my nephew and niece aforesaid shall die without issue aforesaid, then and in that case my will and desire is, that a moiety or half part of the interest and principal, including a moiety or half part left in trust for my wife after her decease, be paid by my executors and trustees. And I give and bequeath the same to my aforesaid cousin, Robert Campbell, and his heirs; and as for and concerning the other moiety or half part of all the principal and interest, including the moiety and half part of that interest for my wife after her decease, I give and bequeath to my aforesaid cousin, Mary Lowrie, and her issue."

The testator died in 1807. Mary Portal, the niece, died in 1811, having had eight children, one of whom died in the testator's lifetime, and four others not long afterwards, all five being infants and unmarried. The testator's sister died in 1818, and his widow in 1824. The nephew, John Corrie (brother of Mary Portal) died in 1862, without ever having had any issue. All the children of Mary Portal who survived Richard Corrie married and had children. After investing the sum of 15,000*l.* in Consols, the clear residue of the testator's property was found to amount to 6,268*l.* 6*s.* 8*d.* Three per Cents., and one moiety of these two sums was, on the death of the testator's widow, divided between the three daughters of Mary Portal—namely, Caroline (Knight), Frances (Murray), and Charlotte (Trevillian). In July, 1863, the surviving trustees transferred, under The Trustee Relief Act (10 & 11 Vict. c. 96) the other moiety into the name of the Accountant-General, to abide the orders of the Court. In May, 1863, Mr. Knight, as administrator of his deceased wife, Caroline (formerly Caroline Portal), presented a petition to the Master of the Rolls, praying that his interest in the same might be declared; and in May, 1863, his Honour declared that "' issue ' in the first part of the will meant ' children,' but in the latter part of the will meant ' issue generally,' and that on the death of the nephew all the issue of the niece then living took *per capita*," and made an order to that effect, and directed the usual inquiries (32 Beav. 426). On appeal the Lords Justices differed, and so the order stood affirmed.

This was an appeal against that order.

The Attorney-General (Sir R. Palmer), Mr. Rolt, and Mr. Schomberg, for the appellants.

After the case had been partly opened on the question of construction of the will—

[LORD WESTBURY inquired whether the next-of-kin were represented here, and observed that there could be no gift to the issue of Mary unless the word *both* in the will could be shewn to mean *either*. It might be argued that the whole gift was void.]

It was answered that it had been agreed between the parties in the Court below to treat the word *both* as signifying *either*. The statement of the Case of the three persons who appeared as executors of George Rutt was read in order to shew that the possible interests of the next-of-kin had not been overlooked. George Rutt was the surviving trustee and executor of the testator, Richard Corrie, and Henry Rutt was the executor of George Rutt, and was also one of the executors of John Corrie. The statement made in the Case of these three persons, who were some of the respondents in Mr. Knight's petition for the distribution of the fund in Court, shewed that intestacy had been a subject of consideration in the Court below. The statement was this: "The petition stated who, according to the different constructions of the testator's will, would be the parties entitled to the fund, and also stated who were the testator's next-of-kin, and the legal personal representatives of such next-of-kin as were deceased, in order that the parties who would be entitled in case of intestacy, by reason of uncertainty or remoteness, might be represented, and such parties were accordingly represented on the hearing of the petition." Among such next-of-kin was the said

(2) It did not appear that this statement was verified by affidavit.

John Corrie." Mr. Henry Rutt, John Corrie's executor, was one of the respondents in the present appeal. There was matter of substance here sufficient to dispose of the case; all the parties substantially interested were before the House; and the House had not been in the habit of sending back a case on a mere point of form, unless clearly satisfied that the justice of the case required such a course. The will was too clear for an intestacy to be declared. The only real question was, in what shares and proportions the property was to be distributed.

LORD WESTBURY.—This is a trust fund; it is distributable in one manner or another, according to a particular construction of the will. The fund has been paid into Court, and that makes it more than ever desirable that the Court should be particularly scrupulous in determining on its administration. The appeal should stand over, with liberty to apply to the Court to be allowed to take such steps as may be deemed necessary to bring the next-of-kin before the Court, and with liberty to re-enrol the order when pronounced, and to bring it up by way of supplemental petition without the necessity of any new appeal.

The LORD CHANCELLOR (Lord Cranworth).—I am inclined to think that the next-of-kin here have no interest whatever, either on account of intestacy or remoteness, but still it is not so clear as to prevent all argument on that point. I cannot say that the Court ought not to have required the next-of-kin to be brought before it. The Court cannot deal with a fund which is put into its hands as a trustee without being satisfied as to the real title of the claimants of the fund, and that it is not parting with the fund to an improper person, to the disadvantage of some one who is not present, who is not represented in Court.

LORD CHELMSFORD.—I entertain the same opinion as to any possible claim by the next-of-kin, but I cannot say that it is so clear that we ought to decide the case without being satisfied that all interests are duly represented.

Mr. Selwyn, Q.C., Mr. Speed, and Mr. Leigh Pemberton, were for the respondents.

It was ordered that the appeal do stand over, with liberty to either of the parties to apply to the Court below to vacate the enrolment, and to take such steps as they may be advised to bring some one or more of the next-of-kin before the Court, in order that the rights of the next-of-kin may be adjudicated upon; that the order be re-enrolled, and brought up again to this House by a supplemental petition, without the necessity of any new appeal.

IN THE HOUSE OF LORDS.

July 19, 26, 1866.

R. C. HICKSON, appellant, E. LOMBARD AND J. LOMBARD,
respondents.

L. R. 1 H.L. 324: reversing 13 Ir. Ch. R. 98.

Distinguished, *Parker v. M'Kenna*, [1875] E. R. A.; 44 L. J. Ch. 425;
L. R. 10 Ch. 96; 31 L. T. 739; 23 W. R. 271 (L.C. & L.J.J.). Applied,
Tabor v. Cunningham, 1876, 24 W. R. 153 (V.C.).

Equity—Jointure—Pleadings—Practice.

PRACTICE. Z.—When pleadings in equity are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out, from the allegations in the bill, facts which might, if not put forward as proofs of fraud, have warranted the

plaintiff in asking, and the Court in granting, relief. It is the duty of the Judge to determine whether the two are so interwoven with each other, that, on the failure of the proof of fraud, it is impossible to treat the other facts as separate allegations justifying a separate mode of dealing with them.

JOINTURE. C.—*H. was the tenant of land, under G., on a lease renewable for ever. L. and N., and several other persons, held under H. on the same terms. L. charged his holding with a jointure in favour of his wife. L. became embarrassed, and owed money to N., who obtained from him possession of his land, though on what terms did not appear, and then granted him a lease for a year of a portion of it. H. was in arrear with his landlord, and all H.'s tenants were in arrear with him. N. purchased G.'s interest in all the lands, and then gave notice to the tenants to pay the arrears, and to take out renewal leases, and pay the fines thereon. These demands were not complied with. N. thereon brought ejectment as for forfeiture, recovered judgment, and took possession of all the lands under a writ of habere:—Held, that these circumstances did not raise an equity in favour of the widow of L. such as would entitle her to have her jointure declared to be a charge on the lands which N. had thus acquired.*

This was an appeal against a decision of the Master of the Rolls in Ireland, which had been affirmed on appeal by the Lords Justices there (13 Ir. Ch. Rep. 98).

Eliza Lombard, the respondent, claimed to be entitled to a charge, by way of jointure, on certain lands, now held by the appellant, as the devisee of one Richard Norris.

The lands of Nohoval, in the county of Kerry, belonged in fee to Trinity College, Dublin, but had been leased out by that body to a Dr. Synge, who granted an underlease of them to two persons named Gun. These persons had again underlet them, at improved rents, to various other persons, of whom Harnett was one, and Æneas Lombard and Richard Norris held as under-tenants to him. Every lease and sub-lease contained the covenants for perpetual renewal usual in such leases, and known as *toties quoties* covenants. On the 14th of August, 1846, Lombard, being about to marry, executed a deed of settlement, by which he assigned the land then in his occupation under the lease, and subject to an annual rent of 129*l.*, to trustees, to the use of himself for life, and after his decease in trust for his intended wife (the present respondent), "in case she should survive him, to pay her out of the rents thereof a sum of 25*l.* a year for her natural life;" and, subject thereto, to the use of his own executors, administrators, and assigns.

This deed was duly registered on the 8th of October, 1846.

The cause petition filed by Eliza Lombard alleged, that in 1848 Lombard fell into embarrassed circumstances; that Norris got from him a list of his debts, and, by promising to pay them off, obtained from Lombard possession of most of his portion of the lands of Nohoval, held under the sub-lease from Harnett, leaving Lombard only possession of "a house, a kitchen-garden, grass for two cows, some sheep, and half an acre of land for potato garden, and that at that time no rent was in arrear for the said lands;" that by means of false representation Norris fraudulently induced Lombard to give up possession of the lands, and then used them entirely for his own benefit; that after this Harnett fell into arrear with his rent, and became bankrupt, and Norris allowed his own rent to get into arrear, and then went to other sub-tenants of Harnett and fraudulently got them to deposit money with him under pretence of clearing off the arrears, and so saving the forfeiture; that he applied the moneys so obtained, not in paying off the arrears, but in purchasing the interest of the Gun family; and that, "to conceal his fraudulent conduct in that behalf, the said purchase was ostensibly made in the name of his sister, Ellen Norris, who lived with him, and had no means

of her own whatever; that Norris having so purchased the lands and arrears of rent, caused ejectments to be brought, in the name of his sister, against himself and the other tenants and sub-tenants of the lands, and so obtained and took possession of them; that the trustees under the petitioner's settlement were not made defendants in any such ejectment; that petitioner's husband was, in order to avoid being houseless, compelled to take from Norris a lease, as a yearly tenant, at 10*l.* a year, of a portion of the dwelling-house, and a small portion of the land, Norris promising Lombard grass in summer and hay in winter for two cows, sheep, &c., also a sum of 10*s.* a month; that such sum was paid up to November, 1854, the date of Æneas Lombard's death, and for four months afterwards to the petitioner, but had since then ceased, and the house was allowed to fall into disrepair; that shortly after the death of petitioner's husband Norris called on her, and offered her 200*l.* to release her rights under the settlement, but she refused to do so; that he made his will, and gave the residue of his property to Hickson, who was now in possession of the same; and that he made a codicil, by which he bequeathed to petitioner "the sum of 150*l.*, provided she gives up quiet and peaceable possession of the farm, portion of the lands of Nohoval now in her possession," which portion was that previously taken by her husband at 10*l.* a year; that Hickson said he would make up the 150*l.* to 200*l.*, which she consented to accept on the terms mentioned in the codicil, but he caused a solicitor to prepare a release, which would have made her surrender not only the possession of the lands, but also all right to her jointure. This she refused to execute, and another release was prepared, and then Hickson only paid her the 150*l.* That the jointure was now in arrear to the amount of 162*l.* 10*s.* That one of the trustees was dead, and the other, being on intimate terms with Hickson, would do nothing for her. The cause petition prayed that it might be declared that the jointure was well charged on the premises, and for a receiver, and accounts, and for farther relief.

Hickson put in an answer, in which he positively denied any fraud on the part of Norris or of himself; and alleged that Norris had spent much money on his own portion of the holding under Harnett, and was very desirous not to lose it; that Gun had taken proceedings against one of Harnett's tenants for rent due from Harnett; that Norris entered into negotiations with Gun to purchase Gun's interest; that he did purchase it, that the conveyance was made to Ellen Norris only as a matter of legal precaution, and under legal advice, and with no view whatever of concealment; that as the rents were universally in arrear, notice was given to the tenants to pay them, and also to pay renewal fines and take renewals; and as this notice was not complied with, ejectment was brought for the forfeiture, and possession delivered to Norris under a writ of *habere*, and he afterwards granted leases to many of the former tenants, but without any reservation of rights to them as under the former leases.

Evidence was taken, and the cause came on before the Master of the Rolls, who thought that the charge of fraud had failed, but that there was in equity a ground of relief made out on the facts; and, being of opinion that Norris took the estate subject to the charge which then existed on it, he made a decree in the petitioner's favour, so far as to declare the jointure a good charge on the estate; but as the petitioner had improperly alleged fraud, of which there was no proof, he made the decree without costs. The Lord Chancellor and Lord Justice of Appeal confirmed the decision of the Master of the Rolls, on the ground that, "on the face of the petition there is enough, unencumbered with charges of fraud, to sustain the petitioner's case."

This was the decree appealed against.

Sir R. Palmer, Q.C., and Mr. Jessel, Q.C. (Mr. Hickson, of the Irish Bar, was with them), for the appellant:—

The decree of the Court below cannot be sustained. The cause petition proceeded on the ground of fraud, which, not being proved, the petition

ought to have been dismissed with costs: *Wilde v. Gibson* (1 H.L. C. 605). It had been supposed that that case decided that if a bill proceeded on the ground of fraud, which was not made out, the plaintiff was in no case entitled to relief on any other ground. But that was carrying the doctrine farther than Lord Cottenham had intended. His Lordship, therefore, in the subsequent case of *Archbold v. The Commissioners of Charitable Bequests in Ireland* (2 H.L. C. 440), after referring to *Glascott v. Lang* (2 Ph. 310), thus stated the true doctrine of the Court of equity, that "if fraud be imputed, and other matters alleged, which will give the Court jurisdiction as the foundation of a decree, the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the plaintiff may be entitled to." Accepting that limitation of the rule, it is submitted that here no case has been made out which, on any other ground but that of fraud (and the charge of fraud utterly failed), will entitle the plaintiff to relief.

On this point the Master of the Rolls, in the Court below, entirely mistook the decision in *Montfort v. Cadogan* (17 Ves. 485), which really has no bearing on the present case. There was not here, as there, any trust which the purchaser of the land was bound to carry into execution, nor were there any trustees who were bound to take care that the renewals were obtained. By the entry of Norris into the possession of Lombard's estate as a creditor of Lombard, he did not become liable to all the trusts to which Lombard had subjected the estate in his own hands, *Moore v. Greg* (2 Ph. 717), where Lord Cottenham, in a case of the same kind, said: "The question immediately occurs, why should equity compel a party, whose only connection with the property is that he has taken a piece of parchment as a security for a debt, to put himself in a totally different situation from that which he had intended—namely, to clothe himself with a legal liability to the covenants by taking an assignment of the lease:" and he refused the aid of the Court to produce such a result. *Jones v. Kearney* (1 D. & War. 134) has nothing to do with this case: it merely shews that where a man charges an annuity on lands which he holds under one title, and that title is afterwards defeated, but he acquires the same lands under another title, equity fastens on the new title in order to make him fulfil his contract. Here the new title is not in, or under, the same person who was previously bound, but in one whose interests are not merely different, but opposite. It is not true, therefore, that Norris, in whatever way he acquired Lombard's interest, but merely because he did acquire it, "stood in Lombard's shoes." Relief of the kind here prayed will not be granted in equity on mere assumptions of liability, from having obtained some beneficial interest: *Walters v. The Northern Coal Mining Company* (5 De G. M. & G. 629). There must be something done to shew that the party really became chargeable with the duty of obtaining the renewal, or paying the jointure, but that he neglected that duty, and so occasioned injury to the petitioner. There is nothing of that kind here.

Mr. Serjeant Sullivan (of the Irish Bar), and *Mr. Horton Smith*, for the respondents.—It is not contended that Norris, by getting possession of Lombard's interest as a creditor only, was bound to renew the lease with Harnett, but that obligation did arise when he became a purchaser of that interest. He then took it with all its liabilities. The settlement was duly registered. Registration has, in Ireland, the effect of notice to all the world. Norris was, therefore, by law, as indeed he was in fact, a purchaser, with notice. That registration is itself sufficient to support the judgment of the Court below. The settlement of 1846 was a settlement of a renewable interest with a *toties quoties* covenant. The trustees of the settlement were entitled to take any money in their hands for the purpose of paying the head rent, and keeping up the lease, but they were actually bound to do so for the purpose of preserving the wife's jointure. That was a trust which flowed from the settlement itself. The registration of the deed is notice to everyone,

and is equally so whether the interest purchased is legal or equitable: *Mill v. Hill* (3 H.L. C. 828). That case distinctly laid it down that an equity in a grant which is registered will prevail against the right even of a *bona fide* purchaser to whom the grantor had subsequently sold part of the property comprised in the registered deed; and it also decided that if a man has a limited interest, and has settled that on a trust, he cannot, by getting a new and extended interest, avoid that settlement. The man who, in reality, obtained his interest, even though obtaining it by purchase, could not do so more than he. The purchaser stands as a trustee for the parties interested under the settlement.

If Norris was not bound to renew the lease, he took the property subject to the charge upon it for the jointure, so that, whether he renewed or not, his liability was the same. That liability had been declared by Lord Manners, in *Eyre v. Dolphin* (2 Ball. & B. 290), and the rule was adopted by Lord Redesdale, in *Griffin v. Griffin* (1 Sch. & Lef. 352), and by Lord Chancellor Sugden, in *Jones v. Kearney*.

Though the charges of fraud were not distinctly sustained, yet, as the cause petition disclosed a clear title to equitable relief on another ground, the decree was justified by the uniform practice of the Court. The supposed rule in *Wilde v. Gibson* (1 H.L. C. 605) has been qualified in *Archbold v. The Commissioners of Charitable Bequests in Ireland* (2 H.L. C. 440), and, so qualified, has always since been acted on: *Beale v. Billing* (13 Ir. Ch. Rep. 250); *Espey v. Lake* (10 Hare, 260); and *Parr v. Jewell* (1 K. & J. 670). And in *Best v. Brown* (10 W. R. 569) a plaintiff was held entitled to relief on the substance of his bill, but, as he had needlessly introduced charges of fraud which were not proved, it was held that on them, but on them alone, he was liable to costs.

Sir R. Palmer, in reply.—Registration merely gives a registered deed precedence over one which is unregistered, but it cannot make a man a trustee. The appellant here is only the equitable assignee of the life estate. The real estate is still in the trustees, and, so far as the appellant is concerned, equity has nothing to fasten on. *Mill v. Hill* is, therefore, inapplicable.

July 26.—The LORD CHANCELLOR (Lord Chelmsford).—My Lords, the only difficulty which I feel upon this appeal against the decretal order of the Master of the Rolls in Ireland, and against the order of the Court of Appeal affirming the decretal order, arises from the respect which is due to the united opinions of three learned Judges, all agreeing in a view of the case in which I am utterly unable to concur. The case is altogether of a very unsatisfactory description, and is not calculated to exhibit to much advantage the mode of proceeding in Chancery in Ireland by cause petition. The statements in the petition, which are founded chiefly on hearsay, and scarcely at all upon the personal knowledge of the petitioner, are supported by an affidavit, in which the facts which rest upon hearsay and belief are not at all distinguished from those which might have been within the knowledge of the petitioner. And upon each of these classes of facts the Master of the Rolls observes: "The petitioner has thought fit to state matters as if they lay within her own knowledge, which she obviously can know nothing at all about except from hearsay and belief." And again: "If it was not for the small amount of the matter in dispute, and the expense, I should require her to be examined *viva voce*, which I am satisfied would establish that she is not acquainted with the matters to which she deposes as of her own knowledge." The petition, which, under these circumstances, can hardly be said to be verified by affidavit, contains charges of fraud against the appellant, not one of which, in the opinion of all the Judges, was proved. This being the case, they had to decide whether, upon the facts stated in her petition, the petitioner was entitled to relief independently of the allegations of fraud which it contained. That was to be decided upon the principle explained by Lord Cottenham in the case of *Archbold v. The Commissioners of Charitable*

Bequests in Ireland (2 H.L. C. 460), that where a bill alleges matters of fraud, and all the subsequent considerations depend on these matters which are not proved, the Court must necessarily dismiss the bill; "but if fraud be imputed, and other matters alleged which will give the Court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as, under the circumstances, the plaintiff may be entitled to." The Court of Appeal thought that the petition was founded upon an equity independently of fraud. The Lord Chancellor said: "I think that the Master of the Rolls was right in coming to the conclusion that this was not a petition founded on fraud, but on a substantial equity, in the statement of which the word 'fraud' was used very often." And the Lord Justice of Appeal was satisfied "that it was competent to the Court to disregard the charges of fraud, and to act as the Master of the Rolls has done, on the grounds clearly separate and distinct from the unwarrantable charges of fraud." It appears, however, that the Master of the Rolls advisedly abstained from expressing a conclusive opinion upon this point. He stated that there was considerable difficulty in the case from the charges of fraud being connected with every part of it; and he added, "On the whole, however, I think it is better for me to consider whether, independently of the charges of fraud, the petitioner would be entitled, on the facts stated and proved, to any relief, and leave the question, as to whether the charges of fraud are so interwoven with the case as to deprive the petitioner of any right to relief, to be decided upon appeal." With great respect for the Master of the Rolls, I think that the parties were entitled to his judgment upon this point, and that he ought not to have sent it as an original question to the Court of Appeal. The deference which is deservedly due to his judicial opinion might have caused his opinion, if it had been expressed, to be acquiesced in, and have saved all the expense which has been since incurred.

It is not very easy to extract from the case stated in the petition any separate ground of equity which entitled the petitioner to relief apart from fraud. But the Master of the Rolls, and the Court of Appeal, having selected certain facts as establishing an equity independently of fraud, it will be necessary shortly to consider the case as it would stand on those grounds alone.

There is no necessity to go back to the dealings with the lease of the lands of Nohoval, granted by Trinity College in 1761, farther than to the two Guns, who hold a sub-lease, with covenants for renewal, and who granted another sub-lease of the whole of the lands to William Harnett. Harnett granted five separate sub-leases to different persons. The only two necessary to be noticed are one for twenty years to Æneas Lombard, the husband of the respondent, and another to Richard Norris, the deviser of the appellant. Lombard, on his marriage with the respondent, on the 14th of August, 1846, executed a settlement, by which he gave to trustees his farm and lands of Nohoval for and during the unexpired residue of the said term of twenty years, "and for and during such farther and other term of years that may be granted thereof," "pursuant to the *toties quoties* clause or covenants for the renewal thereof," "to the use of himself for life, and from and after his decease to the use that his intended wife (the respondent) surviving should have and receive an annuity of 25*l.*, to be issuing out of, and charged upon, the said farm, lands, and premises.

Lombard and his wife occupied the farm till 1848 or 1849, when Lombard, being in embarrassed circumstances, his cattle were seized under an execution, and it is alleged that Richard Norris offered to pay off the debts, and to have a portion of Nohoval given up to him till he was repaid. It is alleged that upon this promise Norris obtained from Lombard the possession of his farm, except the house, kitchen-garden, grass of two cows, some sheep, and half an acre of land for a potato garden. Harnett, who held under the Guns as

before-mentioned, had fallen considerably into arrear for his rent, and was liable, in consequence, to be evicted. It is alleged in the petition that Norris went about to the different tenants, and procured from them various sums of money under pretence of paying the rent in arrear to prevent the loss of their sub-leases by the forfeiture of Harnett's lease; and that he never applied the money so obtained to that purpose, but used it in purchasing the interest in the lease to the Guns, under whom Harnett held. There is no proof of this allegation; and the only fact in evidence is, that on the 18th of December, 1850, a conveyance was executed by the Guns to Ellen Norris, as trustee for Richard Norris, of all their interest in the lands of Nohoval, for the sum of 1,107*l.* 13*s.* 10*d.*

Norris, afterwards having served a notice to quit on Harnett, brought an ejectment in the name of his trustee, Ellen Norris, against himself and Lombard, and the other tenants of the lands of Nohoval, and obtained possession under a writ of *habere facias*. He afterwards made a lease to Lombard, at the yearly rent of 10*l.*, of the portion of the land which Lombard was allowed to occupy when Norris entered into possession, upon the occasion of the execution on the farm. Mrs. Lombard afterwards gave up this lease upon receiving a sum of 150*l.* from the appellant, which was bequeathed to her by a codicil to the will of Richard Norris, on condition of her giving up quiet and peaceable possession.

Upon these facts the Master of the Rolls first, and afterwards the Court of Appeal, held that, Lombard having been permitted by the trustees of his settlement to remain in possession, he was bound to pay the rent and fines in order to preserve the lease; and that, when Richard Norris entered into possession as a creditor of Lombard (to use the words of the Lord Chancellor), "he stood in Lombard's shoes," and, having full notice of the settlement, it was his duty to pay the proportion of the renewal fines payable out of the part of which he was in possession. In the argument for the respondent at your Lordships' bar this proposition was pushed to a greater extent. It was said that the marriage settlements of the Lombards being registered, the registration was notice to all the world, and bound every one in possession of the land (no matter how or under what circumstances that possession was acquired) to preserve the right of renewal.

It seems to me to be impossible to push the liability of Norris to this extent. I quite agree that if he had possessed himself of the whole interest of Lombard, whether legal or equitable, and, *à fortiori*, if he had obtained possession of it by fraud, he could not deal with the property in any way so as to prejudice the right of renewal which attached to that interest. He could not, therefore, supposing such a state of things, by purchasing Gun's interest, and enforcing the forfeiture of Harnett's lease, put an end to Lombard's right of renewal. There is, however, no evidence of the nature of Norris's possession, and, certainly, nothing to shew that it was acquired by fraud. All that appears is, that he was permitted to occupy a portion of the farm held by Lombard, and to place his cattle thereon, which certainly is insufficient to impose a liability upon him to keep up the renewal of the lease. If, as the Lord Chancellor supposes, Norris has represented the whole interest in Lombard's portion of Nohoval, the consequence which the Courts below drew, that he was bound to renew, might have been a legitimate one; but in the absence of all proof of such a possession by Norris, it cannot properly be adopted.

I am, therefore, of the opinion that the decrees of the Master of the Rolls, and of the Court of Appeal, ought to be reversed.

LORD CRANWORTH.—My Lords, in this case, if Lombard had himself purchased the reversion, he could have done so only for the benefit of those interested in the settlement. The same doctrine would affect any one purchasing his interest with notice of the settlement. The cause petition alleges, in substance, that Norris became equitable mortgagee with notice

of the settlement; so that, when he purchased the reversion from the family of the Guns, he must be taken to have done so for the benefit of those interested in the settlement.

This is the foundation of the decree below, which is right if the case is properly raised by the pleadings, and if the allegation as to Norris having become equitable mortgagee is made out in proof. But is it made out? The proof on this point rests, first, on the affidavit of the petitioner verifying her petition. This, however, is sufficient to support her case; for, even if it could be taken to prove that Norris had possession of the lands, it affords no proof that he had been let into possession under a contract that he should hold them as a security for the advances he had made. The existence of any such contract depends on certain conversations alleged to have taken place between Æneas Lombard and Norris; but the respondent Hickson does not believe that any such conversations took place, and there is no evidence sufficient to establish their existence. It is true that the petitioner repeats in her affidavit the allegations in her petition; but she does not say that she was present at any such conversation, or explain how she knows that any arrangement was made giving to Norris the right to hold as mortgagee in possession. I think, therefore, that she fails in proving anything, except so far as we can give credit to her statement that from the year 1849 Norris had possession of the whole of the lands, except the house and gardens.

I think there is proof that Norris knew of the existence of the settlement, for it was found by Hickson in his possession, which may be presumed to have been because it was among the papers of Norris, his testator. So far, therefore, as notice of the nature of the title of Æneas Lombard is material, I think it must be considered that the petitioner had made out her case.

But notice of the nature and extent of the interest of Æneas Lombard is not important, unless it is shewn that the possession of Norris is to be attributed to a transfer, or an agreement for a transfer, of that estate and interest to him. And this is not established to have been the case. The possession of the land by Norris may have been by mere permission from Lombard. The circumstances make it not improbable that he had some interest, legal or equitable, beyond that of mere permission by Lombard. This, however, is not by any means a necessary consequence of his possession, even assuming it to be clear that he was possessed of the settlement; and, therefore, as the burthen of proof was on the petitioner, and as I think she failed to establish such proof, she failed to make out a title to relief.

This being the conclusion at which I have arrived, it is unnecessary to consider whether the pleadings do, or do not, properly raise the question on which the Court below proceeded. It was argued that no such case is made by the bill, and that the relief there asked is grounded solely on certain frauds on the part of Norris, alleged but not proved. Though the question does not in this case call for any decision, I yet feel bound to say that I subscribe most readily to the doctrine that, where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the bill facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing that ground, then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. But, then, the attention of the defendant has been distinctly directed to it, and he has been called on to answer the case according to both alternatives. There is nothing of this sort in the pleading of this case; and whether the facts alleged are so alleged as to preclude the petitioner from insisting on any ground for relief except fraud, is a point on which, for the reasons I have stated, I do not feel called on to give any opinion.

My opinion is, that the decree, as well of the Lords Justices as of the Master of the Rolls, ought to have been a dismissal of the cause petition with costs.

Decretal Orders appealed from reversed, with a declaration that the Cause Petition ought to have been dismissed with costs in the Court below.

LORDS JUSTICES, Nov. 16, 1865.

TIPPING v. ST. HELEN'S SMELTING COMPANY.

L. R. 1 Ch. 66.

Referred to, *Savile v. Kilner*, 1872, 26 L. T. 277.

NUISANCE. C.—*H. sold land to persons who were described in the conveyance as copper-smelters and co-partners, and as purchasing for the purposes of the partnership; and who, between the contract and conveyance, nearly completed smelting works on the lands. H. subsequently sold neighbouring land to the plaintiff, who bought with full notice of the existence of the copper-works. The plaintiff recovered judgment at law, with substantial damages, for injury done to this land by the smoke of the works, and then filed his bill for an injunction. Vice-Chancellor Wood held that the plaintiff's having come to the nuisance did not disentitle him to equitable relief, and that H.'s having sold the site of the works with full knowledge that such works would be erected on it did not disentitle him or those claiming under him to complain of any nuisance which the works might occasion, and his Honour granted an interlocutory injunction:—Held, on appeal, that the injunction had been rightly granted.*

This was a motion by way of appeal from an order of Vice-Chancellor Wood, granting an interlocutory injunction to restrain the defendants from injuring the plaintiff's land by the smoke from their works.

In August, 1859, part of the estate of Sir Henry de Hoghton, near St. Helen's, was put up for sale in lots. A Mr. Critchley bought at the sale one of the lots, being the land on which the defendant's works were afterwards erected. He bought it for the purpose of copper-works, obtained immediate possession, and immediately commenced erecting copper-works, which were nearly completed before the 14th of March, 1860, on which day the purchase was completed. The conveyance was made to Lord Alfred Paget, Mr. Critchley, and another, described therein as co-partners and copper-smelters, and it was recited that the purchase had been made on behalf of the partners and for the purposes of the partnership.

In July, 1860, Sir Henry de Hoghton put up for sale other parts of his property, including Bold Hall and the park belonging to it. The plaintiff became the purchaser. It was admitted by the plaintiff, that when he entered into the contract he had seen a large chimney which formed part of the works now belonging to the defendants and was aware that it belonged to copper-works.

It was in evidence that there were already many chemical works in the neighbourhood of St. Helens, emitting a large quantity of deleterious vapour, but it did not clearly appear that the plaintiff's property had ever sustained any appreciable injury from them.

In 1861 a company was projected for the purpose of carrying on the copper-works above mentioned. The plaintiff had already perceived that injury was done to his trees by the smoke, and understanding that the company would carry on the works on a larger scale, he entered into communication with the promoters. The company was incorporated in June, 1862, and after some correspondence—no arrangement being come to—the plaintiff

in July, 1863, commenced an action against the company. The company pleaded not guilty, and on the 27th of August, 1863, a verdict was found for the plaintiff, with 360*l.* damages. In November, 1863, an application for a new trial was refused by the Court of Queen's Bench. In November, 1864, this decision was affirmed by the Exchequer Chamber, and on the 5th of July, 1865, by the House of Lords.

The plaintiff then on the 10th of July, 1865, filed his bill to restrain the defendants from using their works so as to injure his estate, and for an account of damage since the time up to which damages had been obtained at law.

An injunction was moved for before Vice-Chancellor Wood. His Honour held that the fact of the plaintiff having come to the nuisance, did not disentitle him to the aid of a Court of equity. As regarded the site of the works having been purchased from the same vendor for the purpose of erecting copper-works, and before the purchase by the plaintiff, his Honour considered that the case was not the same as if the vendor had erected copper-works and sold them to the defendants, and that his selling the land with the knowledge that the purchasers intended to erect copper-works upon it, did not debar him, or those claiming under him, from complaining of any nuisance that might arise therefrom to the other parts of his property. With respect to an allegation, supported to some extent by evidence, that the existence of the copper-works was mentioned during the negotiations between the plaintiff and Sir Henry de Hoghton, and produced an abatement in the price, his Honour considered that the existence of a nuisance, though liable to be suppressed by legal proceedings, was a fair ground for an abatement of price, and that it could not be inferred from the fact of such abatement having been made, that the purchasers had agreed to give up the right to complain of the nuisance. His Honour accordingly granted an injunction, which the defendants now moved to discharge.

The Attorney General (Sir R. Palmer), Mr. Giffard, Q.C., and Mr. Jackson, for the appellants.—The persons through whom the defendants claim, acquired the site of their works from Sir H. de Hoghton, for the purpose of copper-works before the plaintiff's purchase. If this is not a good defence at law, as being in substance a conveyance of the land with a grant of the right to use it for copper-works, we contend that, at all events, neither the vendor nor any person subsequently claiming under him with notice, could complain in equity of the carrying on of the works. We also say that the plaintiff having voluntarily come to a nuisance, has no right to call upon a Court of equity to restrain it, but ought to be left to his legal rights and remedies. To this must be added, that the injury done by the defendants' works is only a trifling addition to that done by the numerous works about St. Helens. On the principles acted on in *Wood v. Sutcliffe* (2 Sim. (N.S.) 163), and *Bankart v. Houghton* (27 Beav. 425, 428), the injunction ought to be refused. At all events, the Court will give us time, it being clearly proved that every effort has been made to adopt processes which will remove the nuisance, and that there is every prospect of their being successful.

Mr. Rolt, Q.C., and Mr. Eddis, for the plaintiff, were not called upon.

SIR J. L. KNIGHT BRUCE, L.J.—A judgment at law has been obtained by the plaintiff against the defendants, for a nuisance affecting his real estate, and substantial damages have been given. It is almost of course, that in this state of circumstances, a Court of equity should grant an injunction to prevent the continuance of the nuisance, and I have heard no argument against it to which, consistently with the established rules, practice, and doctrine of this Court, any weight can be given. The cause has not been heard, and the defendants will have an opportunity of urging at the hearing any reasons why the injunction should not be made perpetual; but as matters now stand, I think that the course taken by the Vice-Chancellor was clearly right, and that the appeal motion ought to be refused with costs.

SIR G. J. TURNER, L.J.—I agree.

LORD CRANWORTH, L.C., April 16, 1866.

In re ROWLAND & CRANKSHAW.

L. R. 1 Ch. 421.

See, *In re Pulsford*, [1878] E. R. A.; 47 L. J. Bk. 54; 8 Ch. D. 11; 38 L. T. 288; 26 W. R. 597 (C. A.).

Bankruptcy—Joint Estate—Partnership—Practice—Exceptions.

BANKRUPTCY. H.—*C. entered into an agreement with R. that R. should buy and sell goods on behalf of C., and that the business should be carried on as R. & Co., R. being paid by a salary and a percentage on profits. The business was managed by R., but C. had bought goods for it. Each became bankrupt:—Held, that the book debts and stock in trade of R. & Co. were joint estate of the two. On an appeal coming on for further consideration, after the Commissioner has made a certificate in pursuance of a reference, the finding may be disputed without having been excepted to.*

On March 1, 1864, an agreement was made between William Crankshaw and William Rowland, calling themselves crinoline manufacturers, to the following effect: that Crankshaw would employ Rowland as his traveller and superintendent for fifteen months; that Rowland should purchase goods for Crankshaw without commission; that Rowland should receive a salary of 150*l.* a year, and 10 per cent. on the net profits remaining after the 150*l.* had been deducted therefrom; that the business should be carried on under the firm of Rowland & Co.; and that on the 1st of July, 1865, a partnership should be formed between them on certain terms therein mentioned. Under this agreement a business was carried on for some time. On March 27, 1865, Rowland was adjudged bankrupt, and on March 28, Crankshaw was adjudged bankrupt, on a separate petition. On April 10, an order was made vesting the estate of Crankshaw in the official assignee of Rowland's estate, all separate proceedings under Crankshaw's bankruptcy were stayed, and his bankruptcy was annexed to Rowland's.

The order under appeal was made in the Manchester Court of Bankruptcy, and dated December 21, 1865, and thereby it was found (amongst other things), that there was joint estate of the two bankrupts, consisting of property acquired by them in the business carried on by them as Rowland & Co., and that such estate was, and had been, kept separate and distinct from the separate dealings and transactions of Crankshaw, and from his separate estate, and it was ordered that Messrs. Shaw & Co., who claimed about 1,000*l.*, and who had dealt with Crankshaw separately, should be admitted to prove against his separate estate.

Messrs. Shaw & Co. appealed against this order, and the grounds taken by them at the bar, on the appeal, were, that there was in fact no partnership, and that under the agreement all the estate belonged to Crankshaw, and was his separate estate.

The Lord Chancellor on January 27, 1866, when the appeal was first heard, made a reference to the Commissioner as to the estates. The bankrupts were thereupon again examined, and other evidence taken before the Commissioner, who certified that there was joint estate of the bankrupts in their partnership or alleged partnership, and that the same consisted of stock in trade, machinery, fixtures, and book debts, which were of the estimated value of 3,516*l.*, and that there was separate estate of Rowland of the value of 29*l.*, and separate estate of Crankshaw of the value of 168*l.*

It appeared, from the examination of some of the creditors, that Rowland managed the business and made nearly all the purchases, but that some purchases had been made by Crankshaw, and several creditors deposed to their having given credit to the bankrupts as partners. The whole of the capital was furnished by Crankshaw.

The appeal now came on again for argument upon the return of the Commissioner.

Mr. De Gez, Q.C., and Mr. Swanston, for the appellants, Messrs. Shaw & Co., objected to the certificate of the Commissioner, and argued that it was not justified by the facts.

Mr. W. M. James, Q.C., and Mr. E. R. Turner, for the assignees, objected that as no exceptions had been taken, the finding of the Commissioner must be conclusive.

The LORD CHANCELLOR, however, held that formal exceptions to a certificate were not required in bankruptcy, and that upon the petition coming on for further consideration it was open to either side to argue that the return was not correct in law or in fact.

Mr. De Gez, and Mr. Swanston, then proceeded to contend that the 3,510*l.* ought to be held separate estate of Crankshaw. He had furnished all the capital, all the property belonged to him, and Rowland was only his servant at a salary until July, 1865, when he was to become a partner. If there had been no bankruptcy Rowland could have claimed no part of the property, and his assignees could take nothing except through him. No doubt they had held themselves out as partners, and both would be liable on an action at law, but that had nothing to do with the inference which the Commissioner had drawn, that it was joint property. The evidence if anything, was an attempt to show that this was a case of reputed ownership, but even if that had been made out, in the present state of the law, property not belonging to a bankrupt and merely in his reputed ownership did not vest in the assignee, under section 125 of the Act of 1849, without a special order: *Heslop v. Baker* (6 Ex. 740); *Quartermaine v. Bittleston* (13 C.B. 133). The assignee could only claim the property either as being in reputed ownership of the two, which it was not on account of the previous bankruptcy of Rowland, or else as joint estate, which it clearly was not under the agreement.

Mr. W. M. James, and Mr. E. R. Turner.—We do not say that the case is within the 125th section, but that the two bankrupts held out and represented themselves to the world as partners, and acquired this property as joint property, and that neither they, nor their separate creditors who claim under them, can be heard to allege the contrary: *Bond v. Pittard* (3 M. & W. 357); *Ex parte Chuck* (8 Bing. 469).

Mr. De Gez, in reply.

LORD CRANWORTH, L.C.—The question of reputed ownership has nothing to do with this case. When two partners are bankrupt, all the property must go in payment to all the creditors. In the administration of bankruptcy it has been the object from the earliest times to apportion the assets as fairly as possible between the joint and the separate creditors. There is often much difficulty in doing this satisfactorily, but some rules have been clearly laid down, for instance, that the joint property pays the joint creditors, and the separate property pays the separate creditors. Now what is said here is, that this estate, though said to be joint, is in fact separate. These two gentlemen traded under the Name of Rowland & Co., and tradesmen supplied them with large quantities of goods and then they became bankrupts, and it is now said that they were not partners, and that the real agreement between them was, that everything belonged to Crankshaw. That is no reason, and as Crankshaw suffered Rowland to trade in the name of the firm, any persons trading with him are entitled to say that Rowland & Crankshaw are the persons with whom they dealt, and that the goods are joint goods. This motion must be refused, and with costs.

LORDS JUSTICES, June 2, 1866.

Ex parte UPFILL. In re UPFILL.

L. R. 1 Ch. 439.

Bankruptcy—Annuling Adjudication on Equitable Grounds.

BANKRUPTCY. F.—*Discussion of the circumstances requisite to justify the annuling of an adjudication on equitable grounds.*

This was an appeal by the bankrupt from a decision of the Commissioner of the Bankruptcy Court of the Birmingham District, refusing to annul the adjudication.

The bankrupt had carried on business in partnership with Henry Haines and William Morton. The firm was heavily indebted to the Birmingham & Midland Banking Company, of which Mr. Edmunds was the manager, and Upfill owed the bank 487*l.* on his private account. On the 3rd of October, 1865, the partners signed an agreement for dissolving the partnership on the 31st of December then next, and winding up the business. Shortly after this the firm took stock, and it appeared that the liabilities somewhat exceeded the assets, but Upfill disputed the accuracy of the stock taking, and denied the insolvency of the firm. In December a meeting was appointed at the office of the solicitors of the firm, at which Edmunds attended on behalf of the bank, but Upfill did not attend. At this meeting the result of the stock taking was mentioned, and it was suggested that Haines who was the only monied man among the partners, should give Upfill a sum of money to go out of the concern, and the sum of 2,000*l.* was demanded on behalf of Upfill, to which Haines did not accede. Shortly after this meeting a writ of summons was issued by the bank against Upfill and his partners for 298*l.*, the amount of certain dishonoured bills of exchange, of which the bank were the holders. The writ was served on Upfill by solicitors who usually acted for Morton and Haines. On the 11th of January, 1866, judgment was recovered against the partners, and a *ca. sa.* was issued against Upfill but no process was issued against either of his partners. In the same month of January, other meetings took place, at which the subject of Haines giving Upfill a sum of money to retire from the concern was discussed, and Haines went so far as to offer 1,500*l.*, out of which Upfill's debt to the bank was to be paid, but the offer was declined. One of the witnesses examined on behalf of Upfill, stated that bankruptcy proceedings against Upfill were, at one of these meetings, threatened by Edmunds, if Upfill would not retire from the partnership. On the 30th of January Edmunds filed a petition for adjudication against Upfill, who was adjudged bankrupt, but afterwards obtained an order annulling the adjudication on the ground of some informalities. A fresh petition was then filed upon which Upfill was again adjudged bankrupt. This adjudication Upfill applied to annul on grounds affecting its legal validity, also on the ground that the proceedings in bankruptcy had not been resorted to for the legitimate purposes of bankruptcy, but had been taken in collusion with Haines and Morton for the purpose of driving Upfill to retire from the firm. Edmunds, in his evidence, deposed distinctly that he had not taken the proceedings in bankruptcy with any view to the interests of the other partners, but solely with a view to obtaining administration of the bankrupt's estate to the greatest advantage of the bank and the other creditors. The learned Commissioner, after hearing the application, made an order confirming the adjudication.

Mr. Bacon, Q.C., and Mr. Everitt, for the bankrupt.—It is clear upon the evidence that the object of these proceedings is to enable Haines and Morton to purchase Upfill's interest in the partnership at their own price.

The proceedings then not having been taken for the legitimate purposes of bankruptcy the adjudication ought to be annulled; *Ex parte Browne* (1 Rose, 151); *Ex parte Harcourt* (2 Rose, 203); *Ex parte Bourne* (2 Glyn & J. 137); *Ex parte Phipps*.¹

Mr. De Gez, Q.C., and Mr. Bardswell, for the respondents were not called upon.

SIR J. L. KNIGHT BRUCE, L.J.—Two questions are before us—one as to the legal validity or invalidity of the adjudication, the other as to its equitable invalidity on the ground of alleged impropriety of motive. Apart from the alleged impropriety of motive, I think that the learned Commissioner's conclusion is clearly right. The question remains whether sufficient impropriety of motive is established for annulling the adjudication. Now, when all the legal requisites are shewn to exist, it requires a strong case to warrant the annulling the adjudication on the ground of a collateral motive. In the present case there appears considerable reason to think that there was a strong bias in the minds of Upfill's partners in favour of making him bankrupt and disposing of his contention against them by settling it in this way. But it seems to me that these facts do not constitute a sufficiently strong case for doing away with the legal effect of the adjudication. The partners were well disposed towards bankruptcy; but that is not enough; the legal requisites existing, the adjudication must remain.

SIR G. J. TURNER, L.J., after shortly disposing of the objections to the legal validity of the adjudication, continued:—As regards the allegation that proceedings in bankruptcy were taken with an improper motive, and with the view of promoting the objects of the other partners, by driving Upfill to accept their terms, it must be observed that Edmunds stood in a peculiar position, for he had no prospect of obtaining payment of Upfill's separate debt, except by means of the proposed arrangement between Upfill and his partners. Under these circumstances I do not consider that we should be justified in imputing to Edmunds any motive different from the motive which he swears he had. I think, therefore, that the appellant's case fails in both points.

LORDS JUSTICES, July 27, 28, 1866.

In re BUTLER.

L. R. 1 Ch. 607.

See *In re Ferrior*, [1868] E. R. A.; 37 L. J. Ch. 571 (n); L. R. 3 Ch. 175; 18 L. T. 65; 16 W. R. 298 (L. J.); *Carrow v. Ferrior*, [1868] E. R. A.; 37 L. J. Ch. 569; 18 L. T. 806; 16 W. R. 922 (L. J.).

Deceased Lunatic—Jurisdiction—Possession of Real Estate—Committee—Solicitor—Account.

LUNATIC.—A lunatic was found by the Court to be seised in fee of certain real estate, and certain persons were found to be his heirs. On his death intestate:—Held, that the committee of the person who had been put by the Court into possession of certain part of the real estate, must deliver possession thereof to the heirs so found, but without prejudice to any question of title, and could not retain possession as an adverse claimant:—Held, that the Court could not order the committees of the person and estate to deliver possession of other part of the estate, which the committee of the person had

(1) 3 M. D. & D. 505. The following cases were referred to by the learned Commissioner in his judgment: *Ex parte Christie* (2 D. & Ch. 488); *Ex parte Johnstone* (4 De G. & Sm. 204); *Ex parte Gallimore* (2 Rose, 424); *Ex parte Wilbeam* (Buck, 459); *Ex parte Parkes* (3 Deac. 31).

taken possession of claiming adversely to the heirs, and that the committees were not accountable in lunacy for rents accrued since the death of the lunatic:—Held, also, that the Court could not, under its general jurisdiction, order a solicitor to account for rents so accrued and received by him as solicitor for the committee of the estate.

This was a petition by the co-heiresses of a deceased lunatic, and contained statements to the following effect:—Richard Fowler Butler, the father of the lunatic, had a base fee¹ in a certain estate called the Pendeford estate, and was tenant for life of an estate called the Barton Hall estate, with remainder to his eldest son, Richard Wynne Fowler Butler, the lunatic, in tail, with remainder to his son by another wife, Robert Henry Fowler Butler, in tail, with remainders over. In 1849, shortly after R. W. F. Butler attained the age of twenty-one years, a disentailing deed was executed by him and his father, whereby the Barton Hall estate was settled on the father for life, with remainder to the eldest son, the lunatic, in fee, subject to charges.

In July, 1864, after the death of his father, Richard Wynne Fowler Butler was found a lunatic, and in 1865, Henry Alsopp was appointed committee of the estate, and Robert Henry Fowler Butler and his wife were appointed committees of the person. By a report, dated 30th November, 1865, the Master in Lunacy found that the petitioners, Sarah Fowler Butler, Mary Fowler Butler, daughters of R. F. Butler, and Elizabeth Tassie, his granddaughter (all by his first wife) were co-heiresses of the lunatic, and that the lunatic was entitled to an estate in fee simple in the Pendeford estate, and to an estate in fee simple in the Barton Hall estate, subject to certain charges, and the Master submitted that it should be ordered that R. H. F. Butler and his wife should, as committees of the person of the lunatic, retain for his use the house and gardens called Barton Hall, and nine acres of land, part of the Barton Hall estate. This report was confirmed, and an order made accordingly.

On the 11th December, 1865, the lunatic died intestate.

Sarah Fowler Butler took out letters of administration of his estate, and Sarah Fowler Butler, and Mary Fowler Butler and Elizabeth Tassie, the other co-heiresses, now presented a petition entitled in Lunacy and in Chancery, stating as above stated, and that R. H. F. Butler disputed the validity of the disentailing deed, and claimed both the estate as tenant in tail in remainder; and that John Richardson was employed by Henry Alsopp, the committee, as his solicitor, and had received the March rents of the estates and paid them to R. H. F. Butler; and the petition prayed, among other things, that Henry Alsopp and R. H. F. Butler might be ordered to deliver to the petitioners the possession of the Pendeford estate and Barton Hall estate; that Henry Alsopp might account for the rents payable in March last, and include them in his final account, and that the Master might apportion them; and that H. Alsopp, R. H. F. Butler, and J. Richardson, might be ordered to pay to the petitioners the apportioned part of the rent.

The petition now came on for hearing.

Mr. G. M. Giffard, Q.C., and Mr. Bird, for the petitioners, contended that Mr. Alsopp and Mr. R. H. F. Butler came into possession of these estates as committees, and were bound now to take the directions of the Court before delivering up or retaining possession of them: *Ex parte Clarke* (Jac. 589); *In re Fitzgerald* (2 Sch. & Lef. 432). As to Mr. Richardson, he was a solicitor, and bound to account under the general jurisdiction of the Court.

Mr. Osborne, Q.C., and Mr. Swanston, for Mr. Alsopp.

Mr. Daniel, Q.C., and Mr. Rawlinson, for R. H. F. Butler, said that a bill had been filed by him under which the dispute as to the title would be brought before the Court.

(1) This was the statement on the petition, but the Pendeford estate was considered during the argument, and his Lordship's judgment, as in the same position as the Barton Hall estate.

Mr. Baggallay, Q.C., and Mr. Kay, for Mr. Richardson.
Mr. Bird, in reply.

SIR J. L. KNIGHT BRUCE, L.J., said that in his opinion no case had been established for the interference of the Court, and that the petition ought to stand over. He, however, deferred to the opinion of the Lord Justice Turner, being convinced that no injury could be done in the matter of title by interfering to the extent proposed.

SIR G. J. TURNER, L.J., after stating what appeared to be the facts of the case, continued:—Then, as to the whole of these estates, except Barton Hall, and the land occupied with it, Mr. R. H. F. Butler was under no obligation whatever that I can see in respect of any duty contracted by him towards the lunatic's estate. He was tenant in tail in remainder if the disentailing deeds were not duly executed, and I can see nothing which would preclude him from his right, immediately upon the death of the lunatic, to assert his title as tenant in tail in remainder to these estates. In fact, he did assert his title immediately upon the death of the lunatic, and he claimed to be entitled to the whole of the Pendeford estate and the Barton Hall estate, and I can find nothing whatever to restrict him from so doing. If he got into possession of these estates it was by virtue of his title, and not of any confidence reposed in him by the Court. And if these petitioners assert their title, what was there to prevent them from giving notice to the tenants not to pay their rents to Mr. R. H. F. Butler or his agent, because a disentailing deed had been executed under which the lunatic became owner in fee, and they were therefore entitled as his co-heiresses at law, and they might have followed this up by filing a bill in equity for a receiver. Instead of doing this, they present his petition, and ask that possession of these estates may be delivered to them. I cannot see any possible ground on which this Court, sitting in Lunacy, can give such a direction.

But as to Barton Hall and the nine acres, the case stands somewhat differently. Mr. R. H. F. Butler and his wife were appointed committees of the person of the lunatic, and were directed by the Court to retain possession of Barton Hall and the nine acres, for the convenience, comfort, and benefit of the lunatic. Mr. R. H. F. Butler, therefore, came into possession of this property not by virtue of any title in him as tenant in remainder, but by virtue of the order of this Court. Looking, then, to the cases of *Ex parte Clarke* (Jac. 589), and *In re Fitzgerald* (2 Sch. & Lef. 432), I think that upon the death of the lunatic, Mr. R. H. F. Butler was bound not to set up his own title as against the heirs-at-law of the lunatic, who was found by the Master's report to have been seised in fee of those estates. These two cases seem to establish that he was not entitled—having received possession from the Court as committee—to retain that possession in his character of tenant in tail in remainder. As to Barton Hall, therefore, we shall only be following the authority of Lord Eldon in *Ex parte Clarke*, which seems to have gone a little further than *In re Fitzgerald*, in saying that possession must be delivered up to the petitioners, but, of course, without any prejudice to any possible question of title.

Another part of the prayer is, that Mr. Alsopp, the committee of the estate, may be charged with the sums which have been received by Mr. Richardson—the rents which accrued due in March last.

Now, in the first place, so far as Mr. Richardson is concerned, this Court has nothing to do with it. This Court looks to the committee, and if he employs a person under him, the committee may be answerable to the Court, but the Court will never recognise the person who acts under the committee. The application so far as Mr. Richardson is concerned, seems to me altogether erroneous.

Then it is said that Mr. Richardson received these rents as agent of Mr. Alsopp, who must be answerable, and should have kept these rents in his own hands, as to which, and also as to the possession, the words of Lord

Redesdale in the case of *In re Fitzgerald* are cited, and it is said that the committee ought to have come to the Court to ask for directions as to the delivery up of possession of the estates. I never heard of such an application. If any party thinks right to come to the Court and ask for delivery of the possession, which is the ordinary course taken, then the Court entertains the application, but I never heard that it was the duty of the committee to come to the Court in the first instance. On the contrary, in all the cases which come before us, where a lunatic dies seised of real estate, and the administrator comes for payment of the funds out of Court, we leave the question as to the real estate untouched, in order that any person may assert any title he may think himself to have in respect of the estates, and the passage cited from *In re Fitzgerald* as to the abandonment of possession as committee exactly applies to Barton Hall, but has no application to any other part of the case.

[His Lordship also decided against the petitioners as to the other matters comprised in the petition, which do not call for any report; and an order was made that possession of Barton Hall and the nine acres should be delivered to the petitioners without prejudice to any question of title; except as to that, the petition was dismissed with costs.]

ADMIRALTY.

Nov. 21, 1865.

"THE MARY ANN."

L. R. 1 A. & E. 13.

Bottomry Bond—Answer by Mortgagee.

SHIPPING. C.—*Transactions between the owner and mortgagee of the vessel, which might render the voyage illegal, cannot invalidate a bottomry bond given by the master to a bonâ fide lender, who has only to look to the facts that the ship is in distress, that the master has no credit, and that the money is required for necessary purposes.*

This was a cause of bottomry instituted by Leon Serena, the alleged holder of a bottomry bond on *The Mary Ann*, which had been given by the master at Flushing to Messrs. De Groof and Hector, and by them assigned to the plaintiff. The principal facts of the case are stated in the preceding judgment.

The answer of the mortgagee, George Tanner, intervening, alleged that the mortgage contained a covenant that the vessel should not leave the port of London until the whole of the principal sum, 1,100*l.* and interest, should be re-paid; that the master sailed without the certificate of registry, which remained in the defendant's possession; and also set out at great length transactions between the owner and the mortgagee, which it was alleged rendered the voyage illegal and the bond invalid.

E. C. Clarkson, for the plaintiff (Nov. 7), moved the Court to reject the admission of the answer.

T. Rutherford, for the defendant, in support.

Nov. 21.—*DR. LUSHINGTON*.—The answer to the petition is objected to. The contending parties are, the bondholder and the mortgagee. The answer sets forth at length transactions between the mortgagee and the owner, and alleges that, in consequence of such transactions, whereby a fraud was practised on the mortgagee, the voyage was an illegal voyage, and the bond invalid. It is not averred that the lender of the money on bottomry was cognizant of these circumstances. Admitting all the facts to be true as pleaded, I am of opinion that the position that such circumstances would

avoid a bottomry bond, given to a *bonâ fide* lender ignorant of these facts, is utterly untenable; and I therefore abstain from going into particulars. I do not understand what is meant by the averment that the voyage was illegal. The voyage might be in fraud of the mortgagee; the master might violate the statute with regard to the certificate of registry; but that it was an illegal voyage, so as to affect merchants in a foreign country, who could not have the means of ascertaining these facts, is a proposition neither warranted by precedent, authority, or sound reason.

The case is too palpable for argument. What does a foreign merchant know, or what ought he to know, of mortgage, or the conditions therein? All the lender of bottomry has to look to is, that the ship is in distress; that the master has no credit; that the amount is required for necessary purposes. To require more, to demand from the lender on bottomry a knowledge of such facts as are contained in this answer, would be to impose restrictions on bottomry transactions destructive of the facility which is essential to the exigencies of commerce. As to the objection to the form of the bond, it has been decided over and over again that no particular form is necessary for a bottomry bond. The essence is, that there shall be a maritime risk to be ascertained from the contents of the bond. Maritime interest is not indispensable: *The Laurel* (11 Jur. N.S. 46), *Simonds v. Hodgson* (3 B. & Ad. 50), *The Nelson* (1 Hagg. 177).

Answer to be amended accordingly.

ADMIRALTY.

May 15, 1866.

"THE WHITE STAR."

L. R. 1 A. & E. 68.

See "*The J. C. Potter*," [1871] E. R. A.; 40 L. J. Adm. 9; L. R. 3 A. & E. 292; 23 L. T. 603; 19 W. R. 335 (Adm.); "*The Waverley*," [1871] E. R. A.; 40 L. J. Adm. 42; L. R. 3 A. & E. 369; 24 L. T. 713 (Adm.).

Salvage—Contract to tow.

SHIPPING. E.—*Where the master of a steamer engages to tow a vessel, it is upon the supposition that the wind and weather and the time of performing the service will be what are ordinary at the time of year; but if an unexpected change of weather, or other unforeseen accidents occur, he is bound to adhere to the vessel, and to do all in his power to rescue her from danger; and he will be entitled to reasonable extra remuneration for the extra service. Circumstances under which such extra remuneration was allowed.*

This was a cause of salvage brought by the owners of the steam-tugs *Alexandra*, *Nelson*, and *Enterprise*, and the masters and crews, against the ship *White Star*, cargo and freight, for services rendered on the 18th March, 1865. The *Alexandra* was of 110 tons burthen, with disconnecting engines of 120 actual horse power, and valued at 4,000*l.*; the *Nelson* of 99 tons burthen, with engines of 90 horse power, and valued at 3,000*l.*; the *Enterprise* of 120 tons burthen, with engines of 150 horse power, and valued at 5,000*l.* The *White Star* was a ship of 2,329 tons register, and at the time of the service was bound from Melbourne to London, laden with a general cargo worth between 100,000*l.* and 200,000*l.* On the 18th of March, 1865, the *White Star*, when in the English Channel, off Newhaven, engaged the *Alexandra* to tow her up to Gravesend, for 75*l.* without assistance, and 67*l.* 10*s.* if another tug was required. The *Alexandra*, having towed the ship for about three hours, the tug *Nelson* was employed to help the *Alexandra* for 35*l.* The tugs towed the

vessel to off Hastings, where they were cast off, and on the 19th the ship wore and stood in for the land, picked up a pilot off Dungeness, and in the evening anchored off Folkestone, with both bower anchors. On the 20th the ship, in a heavy gale, dragged and slipped from both anchors and ran down past Dungeness. It was alleged by the owners of the ship, that upon her getting under weigh the sheet anchor and chain were got up, which was one of Trotman's patent of 43 cwt., more powerful than the anchors lost, and which on former voyages had frequently alone held the ship, and that the chain of 100 fathoms, 6½ inch, was sufficient to ensure her safety. On the 20th and 21st the easterly gale continued, and the ship stood on and off the land, and about midnight, as the weather moderated, she commenced beating up Channel; that early on the morning of the 22nd the assistance of a steam-tug, the *Napoleon*, was tendered but refused; that shortly afterwards the tugs *Alexandra* and *Nelson* rejoined the ship, and began towing her, she being then some ten miles from Dungeness. About 1 p.m. of the 22nd the steam-tug *Enterprise* came up, and it was arranged that the master of the *White Star* should be put ashore at Dover by the *Alexandra*, in order that the master might obtain an anchor and chain, which, however, he was unable to do of the size required, and he returned to the ship, and the pilot considered that a third tug was necessary to tow the vessel up to London, and the *Enterprise* was thereupon engaged, and the vessel was towed by the three tugs up to the entrance of the Victoria Docks, which she reached on the 23rd of March. The plaintiffs asserted that the *White Star*, her cargo and freight, the value of which together amounted to 218,000*l.*, were in considerable danger of being lost, but this the defendants denied, and contended that the anchor they had left was quite adequate to effect her security, and that the service was towage and not salvage.

Brett, Q.C., and E. C. Clarkson, for the plaintiffs.

Dr. Deane, Q.C., and Vernon Lushington, for the owners of the White Star.

Lodge, for the owners of the cargo.

Evidence having been given *vivâ voce*,

DR. LUSHINGTON, in his address to the Trinity Masters, after stating the facts, said:—The question is, whether the agreement was rendered invalid by anything which afterwards happened. No doubt the principles laid down by the Judicial Committee in the *Minnehaha* (Lushington, 935) are the true ones, and those which I have endeavoured to act upon for nearly thirty years. When I first came to the bench, I found considerable difficulty in determining whether a vessel engaged to tow another was bound, notwithstanding change of weather, to adhere to her, and perform services—not the service she originally engaged for, but a service which happened by accident to be superadded; and the doctrine I then held was, that she was bound to adhere to the vessel, and do all in her power to rescue her from danger, and she was to receive something additional, and not merely the remuneration originally agreed upon. The real question is, what are the contracting parties reasonably supposed to have intended by the engagement, and what degree of alteration had they a right to expect, because to suppose that the performance of the service would always be of the same character would be absurd. I apprehend that, when a master of a vessel contracts with the master of a tug, it is upon the supposition that the wind and weather, and the time for performing the service, will be what are ordinary at the time of year, and that the sum contracted for is that which is supposed to be a sufficient remuneration for the ordinary performance of the voyage. It may be a short voyage if all the circumstances are favourable, and it may be a long one if they are unfavourable. I shall submit to you that when an engagement is made—a contract—for a specific time, that contract must be adhered to, and is not to be broken hastily, unless it be shewn that circumstances have occurred which could not have been with the contemplation of the parties, and that such is the state

of circumstances, that to insist upon the contract and hold it binding would be contrary to all principles of justice and equity. It would be utterly impossible to define all such circumstances, but I think we should never have any doubt in saying in any particular case what they were, which would give a right to abandon the contract. It has been argued for the tugs that a conversation took place, whereby the master of the *White Star* agreed with the masters of the *Alexandra* and *Nelson* that the whole should go to arbitration, or, in other words, that the original contract should be done away with, and that it should be as a matter of right referred to arbitration or the decision of this Court. I think the asserted salvors have not made out that case. I think, as the *Alexandra* went and put the master on shore to bring off further anchors, that that was an extra service, not connected in any way with the towage, and that they would, if they thought fit, have a right to have that determined by law; and I think the *Enterprise* has a right to come here for such reward as the law would give her for her services. But to say there was an express agreement and understanding that the contract originally made should be no longer binding upon the parties is, in my opinion, in no degree sustained by the evidence. Therefore, to avoid this contract, we must look to the facts of the case, and not to any supposed agreement alleged to have been made. The important question for you will be, what was the state and condition of the *White Star* after she had slipped from her two anchors. Whatever may have been the size and power of Trotman's anchor, would you think having that anchor alone it could be properly said the *White Star* was in a safe condition? I do not mean that she was exposed to immediate peril, but whether contingencies might not arise, in which, having a single anchor only, whatever might be its size and strength, she would be exposed to risk and peril which she should not encounter. If the tugs were merely ordinarily delayed in performing the service they must not have additional remuneration; but if the delay was unexpected, and beyond all contemplation, they must have something additional.

The Court and Trinity Masters retired for consultation, and, upon their return,

DR. LUSHINGTON said: We are all of opinion that a very small addition to that which has been tendered will be a sufficient reward for those who performed the services in question. Including the sums tendered, I shall give to the *Alexandra* 120*l.*, to the *Nelson* 100*l.*, to the *Enterprise* 75*l.*, and we all think that 10*l.* to the *Alexandra* for going into Dover is amply sufficient.

ADMIRALTY.

July 3, 1866.

“ THE MEGGIE.”

L. R. 1 A. & E. 77.

Admiralty Court Act, 1861 (24 Vict. c. 10, s. 8)—Co-owners.

SHIPPING. K.—*In a cause between co-owners, under the 8th section of the Admiralty Court Act, 1861, the Court granted a citation in personam on the defendant, and a monition on the London Dock Company to bring in freight detained by them under a stop order from the defendant.*

This was a cause instituted under the 8th section of the Admiralty Court Act, 1861, on behalf of John Nelson, of Wallsend, Northumberland, registered owner of 32-64th shares, and John Crosse Brookes, registered owner of 16-64th shares of the ship *Meggie*, against William Henry M'Creight, the registered owner of 8-64th shares of the said vessel, and the freight earned by her on her

voyage from India to London, ending in March last. From the affidavit of John Crosse Brookes, it appeared that various disagreements had taken place between himself and M'Creight; and on the 4th April last, the *Meggie* having arrived in the London Docks, M'Creight had a stop order put on the freight, by serving a notice on the Dock Company, under the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), whereby a part of the freight, amounting to 1,322l. 6s., had been and was still detained by the Dock Company. The 8th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), is as follows:—"The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit."

Vernon Lushington moved for a citation against M'Creight, the owner of the 8-64th shares of the *Meggie*, and a warrant against the freight. The Court has jurisdiction over freight, the only question is in what way it is to be exercised: s. 35 of the Admiralty Court Act (24 Vict. c. 10) says "either by proceedings in *rem* or by proceedings in *personam*."

DR. LUSHINGTON.—I think the proper course will be a monition against the Dock Company to bring in the freight, and proceedings against the owner in *personam*.

ADMIRALTY.

July 17, 1866.

" THE AALTJE WILLEMINA. "

L. R. 1 A. & E. 107.

The Riga, [1872] E. R. A.; 41 L. J. Adm. 39; L. R. 8 A. & E. 516; 26 L. T. 202; 20 W. R. 927 (Adm.).

Necessaries—3 & 4 Vict. c. 65, s. 6.

SHIPPING. A.v.—A claim for money advanced to a master to pay averages dismissed with costs, such advances not being "*necessaries*" within the meaning of the 6th section of the 3 & 4 Vict. c. 65.

This was a suit by Elkan Teller, for necessaries supplied to the ship *Aaltje Willemina*.

From the petition and the evidence of the plaintiff, it appeared that in April, 1866, the *Aaltje Willemina* was lying in the port of London, under the command of W. J. Jurrema, her master, and bound on a voyage to Bremerhaven; and that the master, being without funds for the necessary use of the ship, and without money or credit, applied to the plaintiff for the sum of 200l., representing that he required the money to pay averages due from the vessel in respect of a collision which had occurred on a voyage from Sunderland to Oporto, and that until such payment was made the vessel could not proceed on her then intended voyage. The plaintiff then advanced the money, deducting 10l. for commission, and the master gave him a bill for 200l., which had since been dishonoured.

Dr. Tristram appeared for the plaintiff.

E. C. Clarkson, for the defendant, the owner of the vessel.

DR. LUSHINGTON.—It is well known that the Court has no jurisdiction as

to claims for money advanced, unless it is perfectly clear that the money was to be applied for the purchase of necessities to be supplied for the use of the ship or crew. This claim cannot come within the definition of "necessaries." I must dismiss it with costs.

E. C. Clarkson asked that the plaintiff might be condemned in damages.

DR. LUSHINGTON.—The suit certainly ought not to have been brought: however, as there was no improper conduct, I am content to condemn the plaintiff in costs.

Wood, V.C., Nov. 4, 6, 1865.

In re JARMAN'S TRUSTS.

L. R. 1 Eq. 71.

Will—Accruing shares—Separate use—Costs of Legatees.

WILL. I.—*On a gift by will to testator's daughters, "the share or shares of such daughters to be for their sole and separate use," followed by a contingent gift over to the survivors:—Held, that the separate use attached to the accrued as well as to the original shares. Where legacies were made payable out of residue which was insufficient, the fund being in Court, the legatees were held entitled to their costs out of the residuary fund.*

Gregory Jarman by his will devised all the residue of his real and personal estates to trustees upon trusts for conversion and for the payment of the income of the trust funds to his wife for her life, and at the expiration of one year from his wife's decease to stand possessed of the trust funds, as to 1,000*l.* part thereof, for his two sons Gregory and John, absolutely in equal shares; and as to 6,000*l.*, other part thereof, upon trust for his three daughters, Mary Ann, Harriet, and Ellen Elizabeth, in equal shares, as tenants in common; and as to the residue of the said trust estate, to pay and divide the same in the following proportions:—To his daughter Mary Ann, 200*l.*; to his daughter Harriet, 300*l.*; and the residue thereof to his daughter Ellen Elizabeth; "the share or shares of his said daughters, under his will, to be for their sole and separate use;" and it was provided that "in case any or either of his daughters should happen to die in the lifetime of his said wife without leaving lawful issue, then as well the original as all surviving or accruing share or shares of her or them so dying, of and in the said trust moneys and premises, should go and belong to the survivors or survivor of them, or her, or their executors and administrators."

The testator died in May, 1838, and the residuary trust estate got in by his executors was invested, and amounted to no more than a sum of 5,361*l.* 2*s.* Consols.

The daughter Ellen Elizabeth died on the 5th of October, 1838, an infant and unmarried. The widow died on the 11th of March, 1865.

During the life of the tenant for life, the daughter Mary Ann, now Mrs. Woods, had mortgaged her reversionary share in 5,600*l.* Consols, part of the fund; and the mortgagees had sold the property so mortgaged to the petitioners, who were also purchasers from the first mortgagees of the other daughter Harriet, now Mrs. Eden, of her reversionary interest in the whole fund.

The petition prayed that out of the sum of 5,361*l.* 2*s.* Consols, and a sum of 36*l.* 13*s.* 5*d.* cash, one-fourteenth might be carried to the account of each son; that a sum of 15*l.* 8*s.* stock (to answer the share in the 31*l.* 2*s.* stock remaining to Mrs. Woods) might be carried to her account; and the residue transferred to the petitioners.

Mr. G. M. Giffard, Q.C., and Mr. B. B. Rogers, for the petitioners.

Mr. Beavan, for a purchaser of the interest of one of the sons, asked for his costs against the petitioners. As a general rule, a legatee's costs, on a petition as in a suit, would be payable out of his legacy, when the fund was in Court; but here the legacy was made payable out of residue. It was immaterial that the residue had failed.

Mr. F. Hoare Colt, for *Mrs. Woods*.—The accrued share should be carried over to the account of *Mr. and Mrs. Woods*, with a view to a settlement. The words "share or shares" in the clause declaring the trust for separate use, do not include an accrued share. It by no means necessarily follows that a qualification attached to an original share applies by implication to accrued shares; *Gibbons v. Langdon* (6 Sim. 260). The accrued share stands on the same footing as a new legacy.

The cases in which the Court has held accruing shares to be subject to the same qualifications as original shares have been either cases of consolidation where there was a gift "of the whole," or "of part and parts 'share and shares' and interest" of the person dying, to the survivor; as in *Sillick v. Booth* (1 Y. & C. Ch. 121, 739), and *Douglas v. Andrews* (14 Beav. 347), or where the qualification is necessary to the validity of the gift of accruing shares, 2 Jarm. on Wills (3rd ed., 671).

Mr. Edmund James, for *Mrs. Eden*, supported the same construction.

Mr. Bagshawe, for an incumbrancer.

Mr. Renshaw for the trustees.

SIR W. PAGE WOOD, V.C.—I think there is no reasonable doubt on this point. The only question is whether these words are sufficiently large to embrace accrued as well as original shares, so as to fix on all a limitation to the separate use. There is no conceivable reason why the testator should have limited the operation of the clause to one portion only of what he was giving to his daughters; and hence there is nothing to be derived from his presumed intention beyond the language of the will. If the words are large enough, everything is in favour of construing them as extending to all the shares. It has been contended that because the direction as to separate use is to be found only in the place where the original shares are given, it is limited to the original shares. But the other is the more natural construction; and without discussing the other question raised upon the authorities, I must decide that the accrued as well as the original shares are subject to the separate use clause.

Mr. Giffard, in reply as to costs.

SIR W. PAGE WOOD, V.C.—I am of opinion that as to the legacies given to the sons, inasmuch as they are payable out of residue, the legatees are entitled to their costs, although the residue has turned out insufficient. I can make no distinction between the brothers' legacy and the others; and thus the whole fund will be subject to one set of costs for the two brothers; to another for *Mr. Bagshawe's* client, and to the costs of the trustees.

I can give no costs to *Mrs. Woods* or *Mrs. Eden* as against their own mortgagees.

Wood, V.C., Nov. 18, 1865.

In re BROWN'S TRUST.

L. R. 1 Eq. 74.

Distinguished, *Carr v. Atkinson*, [1872] E. R. A.; 41 L. J. Ch. 785; L. R. 14 Eq. 397; 26 L. T. 680; 20 W. R. 620 (M.R.).

Power—Appointment—Excess.

POWERS. K.—*By a marriage settlement a fund was limited, after the death of the survivor of husband and wife, to "all and every the children, or child, or more remote issue" of the marriage, as the wife should by deed or will appoint. By will, the wife appointed the fund to three new trustees upon trust to pay the income to her son (the only child of the marriage), for his life, or until he should become bankrupt, or should assign or incur the same, and then to the trustees for his life, "for the benefit of her son, his wife and children, or any of them, as the trustees should think expedient." The son attained twenty-one, and assigned the share:—Held, although the excessive appointment was discretionary only, that the appointment was void in toto, and not merely for the excess.*

Under the marriage settlement of a Mr. and Mrs. Brown, dated in 1840, a fund was limited, after the death of the survivor of husband and wife, upon trust for "all and every the children, or child, or more remote issue" of the marriage, "in such shares and proportions, or for any one or more of such children or other issue exclusively of the others or other of them, at such age or ages, time or times, and subject to such conditions, restrictions, charges, provisions, and limitations over for the benefit of or relating to some or one of the said children or more remote issue, and with such provisions for maintenance, education, and advancement" as the wife "at any time or times during her life, by any deed or deeds, with or without power of revocation and new appointment," or by her last will, should direct or appoint; and "for want of such direction or appointment, or so far as no such direction or appointment should extend," upon trust for all and every the children and child of the marriage who, being a son, should attain twenty-one, or a daughter should attain twenty-one, or marry with consent.

There was issue of the marriage one child only, William Henry Brown, who had attained twenty-one.

Mrs. Brown survived her husband, and married Henry Pritty.

Mrs. Pritty died on the 20th of October, 1864, having by will, "in exercise and execution of the power" given or reserved to her by the settlement, directed and appointed that from and after her decease the trust funds should be in trust for three persons whom she named upon trust to sell and invest as therein particularly mentioned, with power to vary securities, and to pay the interest dividends and annual income to William Henry Brown "during his life, or until he should become outlawed, or be declared a bankrupt, or should assign or incur, or attempt to assign, charge, or incur the income, or until the same, or some part thereof, through his act or default, or by act or process of law, or otherwise, if belonging to him absolutely, become possessed in or payable to some other person or persons;" and from and after the determination of the trust thereinbefore declared for the benefit of the said William Henry Brown, if the same should determine in his lifetime, then, upon trust thenceforth during his life, to pay the income "for the maintenance, education, support, or otherwise, for the benefit of the said William Henry Brown, his wife and children, or any of them, at such time or times, in such proportions, and generally in such manner as the said trustees or trustee for the time being should think expedient;" and, upon trust, to accumulate the surplus; and, from and after the death of the said William Henry Brown, should stand possessed of the trust funds and

accumulations, and the interest thereof in trust for the child, if but one, or all the children, if more than one, of the said William Henry Brown, who, being a male or males, should attain twenty-one, or being a female or females, should attain that age, or marry, equally to be divided between them, if more than one.

On the 19th of October, 1865, William Henry Brown assigned his interest

There was no question as to the appointment by Mrs. Pritty being in excess of the power; and the only doubt that was entertained was, whether the appointment was altogether void, or void only for the excess.

The petitioners were William Henry Brown and his assignee.

Mr. Rolt, Q.C., and Mr. Rendall, for the petitioners, submitted the question to the Court.

The original power, though it extended to more remote issue of the marriage than children, might yet have been exercised in such a manner as not to infringe the rule against remoteness.

But there could be no doubt as to the invalidity of this appointment. Mrs. Pritty had not only nominated new trustees, and given them a wide discretionary power; but she had made her son's life-estate defeasible on any attempt even to incur; she had inserted a discretionary trust for the benefit of her son's wife, a stranger; she had added a trust for accumulation, and had appointed the fund to the children of her son who should attain twenty-one, without restriction as to the time when they should be born.

The only question was, whether, as in the case of *Alexander v. Alexander* (2 Ves. Sen. 640), inasmuch as the gift to the wife of the son was discretionary, that clause might be struck out of the will, and the appointment held good for the life of William Henry Brown, or until his assignment (the effect of which, in the event that had happened, would be to place the income out of his reach for his life); or (which seemed the better opinion) whether the whole appointment was void, and the assignee of William Henry Brown took absolutely.

Mr. Springall Thompson, for the trustees of the settlement.

Mr. Amphlett, Q.C., for the trustees who were appointed under Mrs. Pritty's will.

SIR W. PAGE WOOD, V.C.—I think this case is quite clear. It is obvious that as to some of the objects of it, the appointment is in excess of the power; as to others it may be within it; but as I cannot possibly define the class which may fall within the power, and those which must be without it, I cannot make any distinction, and I must therefore hold that the whole gift fails.

Mr. Amphlett, Q.C., asked for the costs of proving Mrs. Pritty's will.

The VICE-CHANCELLOR.—I cannot give you the costs of proving the will. All the other costs will come out of the fund.

WOOD, V.C., Nov. 18, 20, 1865.

In re BETTY SMITH'S TRUSTS.

L. R. 1 Eq. 79.

Will—Estate by implication—Gift over.

WILL. I.—*Gift of personalty, by will, after the death of J. (to whom an annuity was given out of the fund), to E. during her natural life, but in the case of the death of E. during the lifetime of J., then to M. for life; and after the decease of both E. and M., then over:—Held, that there was sufficient indication of the testator's intention to give a life estate to M. after the death of E., although E. did not die in the lifetime of J.*

Betty Smith, spinster, by her will directed her trustees to invest the

residue of the moneys arising from the sale and conversion of her real and personal estate, and out of the same moneys to pay and apply the sum of 52*l.* annually, by weekly payments of 20*s.* a week, to her brother Joseph Smith, during his life; and then that they "should stand possessed of and interested in the residue of the said trust moneys, and of all other moneys, after the death of her said brother Joseph, in 'trust,' in the first place, to pay unto the Reverend Richard Loxham and the Reverend Thomas Loxham, the legacies or sums of 30*l.* each, but in case of the death of either of them, during the lifetime of the said Joseph Smith, then the same legacy to be paid to the survivor of them, but in case both should die during the lifetime of the said Joseph Smith, then the same to fall in and become part of the residuary personal estate; and in the next place to pay to Emma Fisher, widow, the sum of 60*l.*, but in case of her death in the lifetime of the said Joseph Smith, then to pay and divide the same amongst her four daughters equally; and as to one-fifth part or share of her residuary personal estate after the death of her said brother Joseph, to pay and divide the same equally unto and amongst all the children of the late Betty Molineux, and the issue of such of them as should be dead; and as to two other fifths of the residue of her personal estate after the event aforesaid, to pay the interest thereof unto Ellen Eckersley, spinster, during her natural life, but in case of the death of the said Ellen Eckersley during the lifetime of her said brother Joseph, then she directed the same interest to be paid to the petitioner Mary, then the wife of John Collier, during her natural life, whose receipt should be a sufficient discharge, which interest should be free from the debts or control of the said John Collier; and after the decease of both of them, the said Ellen Eckersley and Mary Collier, then the same interest, and the stocks, funds, and securities belonging thereto, she directed to be paid "in thirds to the persons in the will mentioned.

The testatrix died on the 7th of July, 1848. Joseph Smith, the annuitant, and brother of the testator, died on the 29th of December, 1858; and Ellen Eckersley died on the 16th of May, 1864.

The two-fifths, a life interest in which was bequeathed to Ellen Eckersley, were represented by a sum of 713*l.* 6*s.* 11*d.* stock, the dividends of which had been paid to her during her life.

Mary Collier now claimed the dividends on this sum of stock for her life, from Ellen Eckersley's death; but the trustees declined to pay them over without the sanction of the Court, inasmuch as Ellen Eckersley did not die in the lifetime of Joseph Smith.

This petition was accordingly presented by Mary Collier, for a declaration that she was entitled to the dividends for life, and payment accordingly.

The persons interested in the residuary bequest after the deaths of Ellen Eckersley and Mary Collier had been served, but did not appear.

Mr. Morris, for the petitioner.—The presumption of the Court will be against intestacy during the life of the petitioner, which must be the result, if she be held not entitled. No doubt the Court must go the length of adopting a construction which would be the same thing as striking out of the will the words "during the lifetime of my said brother Joseph;" but thus much it has not hesitated to do, where the words were clearly opposed to the testator's intention: *Hart v. Tulk* (2 D. M. & G. 300), *Pasmore v. Huggins* (21 Beav. 103). The fact of there being no gift over until the death of both Ellen Eckersley and the petitioner raises a presumption in favour of the intention to give them life estates in succession.

Mr. Whitbread for the Duchy of Lancaster, which was entitled in the event of there being an intestacy during Mary Collier's life.—The cases cited are instances of manifest clerical error, which cannot be suggested here. The language is a correct expression of intention so far as it goes, but there is an omission to provide for a particular event which has happened.

Mr. Druce, for the trustees, suggested, in aid of the petitioner's argument,

that inasmuch as Joseph Smith was an annuitant only, and not tenant for life, the Court would read the will as giving to Ellen Eckersley and Mary Collier successive life estates in the two-fifths, subject only to the annuity, as was done in the case of *Key v. Key* (4 D. M. & G. 73).

Mr. Morris, in reply.

Nov. 20.—SIR W. PAGE WOOD, V.C.—This case arises upon the construction of a will by which the testatrix, after giving an annuity to one Joseph Smith, being apparently desirous that the division of her property should not take place till after the death of the annuitant, directs that, as to two-fifths of the residue, the interest thereof shall be paid to Ellen Eckersley during her life; but in case of the death of the said Ellen Eckersley during the lifetime of the annuitant, then that the same interest shall be paid to Mary Collier during her life; and after the decease of both of them, the said Ellen Eckersley and Mary Collier, then the trust funds to go over. The facts are, that Ellen Eckersley received the interest during her life, and survived the annuitant; and the question is whether the Court can construe these words as giving to Mary Collier a life interest by implication.

Though the point is by no means clear, I think there is enough in this will to enable me to collect that this was the intention of the testatrix. It is to be observed that she gives other legacies, and directs them to cease or to go over, in the event of the death of either of the legatees in the lifetime of Joseph Smith; in other words, she refers them all to the death of Joseph Smith, and, in giving the life estate to Ellen Eckersley, she seems to have had in her mind the possibility of Mary Collier being alive at that period, and Ellen Eckersley not; and in that event she makes the gift to Mary Collier.

If the case stood there, it appears to me there would be very great difficulty in holding Mary Collier entitled to a life interest. But I think the fact of there being an actual gift to one of the two persons, and a gift over after the death of both of them, does authorize me to say that Mary Collier took a life interest, although the expressed event in which she was to take was not the event that occurred.

The case of *Key v. Key* (4 D. M. & G. 73) turned only upon this. The testator gave to S. K. certain real estate for life charged with annuities, "but in case the annuitants, or any of them, should survive S. K., he then gave the estate to the eldest surviving son of S. K.: charged with the said annuities." S. K. survived all the annuitants, and the Court read the words "in case the annuitants, or any of them, should survive S. K." as if they had not stood where they were, but had been inserted immediately before the word "charged."

The words in that case were not so difficult to construe as those I find here, though in both cases there is an indication of the contingency of the annuitant surviving the tenant for life, which did not occur.

Another case was that of *Hall v. Warren* (9 H. L. C. 420), in which part of my decision was overruled and part affirmed. In that case there was a gift of residuary real estate to a charity, and, in the event of the inhabitants of the parish not appointing a committee, or declining to carry out the scheme, then a gift over of all the property "so given" to the charity. Of course the gift to the charity failed; there was no parish meeting, and I considered that, the first gift failing by operation of law, I could not hold, as was held by the Vice-Chancellor of England in *The Attorney-General v. Hodgson* (15 Sim. 146), that the limitation over failed also. I considered the true intent and meaning of the testator to be that, if the prior gift was out of the way, then the gift over was to take effect: *Warren v. Rudall* (4 K. & J. 603). The present Lord Chancellor (Lord Cranworth) took the same view, adding that it was not necessary to rely on the cases of *Avelyn v. Ward* (1 Ves. sen. 420), and *Jones v. Westcomb* (Prec. Ch. 316; 1 Eq. Ca. Abr. 245,

pl. 10; Gilb. 74). In those cases the apparent contingency on which the gift over was to take effect never did take place, and the Courts held that, if the prior gift be by any means whatsoever taken out of the case, then the subsequent gift takes effect. It is true that, in *Hall v. Warren* (9 H. L. C. 420), the present Lord Chancellor observed that the actual contingency on which the houses were given to the respondent had happened, for the inhabitants had not met and appointed a committee and trustees; and that if they had done so, a question would have arisen whether the principle of the cases he had referred to did not apply. I confess I have great difficulty in applying that observation; because, if the inhabitants had done the absurd and unnecessary act of meeting to appoint a committee, the gift to the charity must, I should think, have remained in precisely the same condition as it was before.

Upon the whole, therefore, I think, I can collect from this will that the expression of this contingency was simply intended by the testator to imply that the subsequent gift was not to take effect in derogation of the preceding estate; and if so, the Court will give effect to it. I think the circumstances afford a sufficient *indiciu*m to the Court that the object of the testator in mentioning this contingency was only to express the intention that, if Mary Collier took at all, she must not interfere with Ellen Eckersley, and that, when both were dead, and not till then, the estate was to go over. There must be a declaration according to the prayer of the petition.

WOOD, V.C., Nov. 4, 21, Dec. 18, 1865.

BERKHAMPSTEAD SCHOOL CASE.

L. R. 1 Eq. 102.

Charity — "Grammar" School — Scheme — Gift with Conditions — Free School — Gratuitous Education.

CHARITY.—*A school having been founded by letters patent in the town of B., and afterwards incorporated by statute, for "the teaching of children in grammar freely, without any exaction or request of money, not exceeding the number of 144":—Held, that instruction in Latin and Greek was made imperative by the terms of the foundation. The average number of scholars presenting themselves from the town of B. and its neighbourhood having never exceeded 50, the Court refused to adopt a proposal for increasing the number of scholars by throwing the school open to the whole world, and establishing dames' houses in the town, and sanctioned a scheme for enlarging the school by allowing the headmaster to take boarders. An offer of a grant of money to an endowed school, accompanied by conditions that exhibitions to the university of like amount to the interest of the grant should be maintained out of the school revenues, and the capital of the grant applied in restoration and enlargement of the masters' houses, was accepted by the Court. A scheme having been settled in 1857, providing that 5l. a year should be paid to the masters for each foundation boy out of the school revenues, so far as they would extend, and when they failed, then by the parents of such foundation boy; and that 9l. a year should be paid by the parents of each boy not on the foundation. The Court varied the scheme by directing that a fee of 3l. 3s. a year should be paid for each foundation boy, to the number of 50, out of the school revenues, and that 144 foundation scholars should be elected, with preference to town boys, for whom capitation fees were to be paid out of the revenues of the school, so far as the income would extend, but that no town boy should pay more than 3l. 3s. as a capitation fee.*

This petition was presented by the master and usher of the Free Grammar School of King Edward VI., in the parish of Berkhamstead, praying that a

scheme for the regulation and management of the school, which was approved and confirmed in the year 1857, might be amended, and a new modified scheme for the regulation and application of the estates and revenues of the school and charity settled under the direction of the Court.

From the petition and affidavit of the petitioners it appeared that King Henry VIII., by his letters patent, dated the 14th of October, 1541, granted to John Incent, Dean of St. Paul's, London, his royal licence to erect and found a perpetual chauntry within the parish church of Berkhamstead, and also a free school within the town.

John Incent, by deed, dated the 23rd of March, in the 36th of King Henry VIII., pursuant to the above letters patent, named a master and usher of the school, and a chaplain of the chauntry, and granted to them and their successors for ever certain lands and hereditaments in Berkhamstead, and other places, of the value of 40*l.* per annum.

By an Act of Parliament passed in the 2nd and 3rd years of King Edward VI., intituled "An Act for the foundation of a school at Berkhamstead, in the county of Hertford," reciting the above-mentioned letters patent and grant, and that forasmuch as King Edward was informed that the said foundation of the said free grammar school and chauntry was not duly according to the laws of the realm, nor the schoolmaster, usher, and chaplain, perfectly incorporated, the King granted and founded in Berkhamstead one free school for the instruction of children in grammar to the number of 144, and instituted the persons in the Act named to be chief master and usher of the school during the King's pleasure for teaching the children to the number aforesaid, freely, without taking any stipend for teaching them; and that the said free school should thenceforth be called the Free School of King Edward VI., in Berkhamstead, and the master and usher, and their successors, masters, and ushers, were incorporated with a common seal. It was also enacted, that the master and usher should hold to them and their successors the land given by the deed of 23rd of March, 36 Henry 8, and that of the revenues of the charity, 17*l.* 6*s.* 8*d.* should be paid to the master, 8*l.* 13*s.* 4*d.* to the usher, and the residue over and above such yearly stipends be bestowed in and about the relief and help of the poor people of Berkhamstead, and the reparation of the school-house, and of the lands and premises appointed for the stipend of the master and usher, and the other uses in the Act after mentioned. It was by the Act also enacted that the King should appoint the master, and the master appoint the usher, and that the warden of All Souls College, Oxford, should every third year visit the school and master and usher, with power to remove such master and usher.

In the year 1841, by an order of the Court, a new scheme was approved, and certain persons appointed governors of the school, together with the master and usher for the time being.

By an order made on the 1st of April, 1857, a new scheme was established, which at present regulated the management of the school. By this last scheme it was, among other things, provided that the regulation and management of the estates of the charity should continue to be vested in eleven governors, of whom the master and usher should be two.

Clause 5 provided that the annual income of the charity should be expended, first, in the payment of 250*l.* as a retiring allowance to a former master (who had now recently died); secondly, in the repairs and management of the school-house and estate belonging to the charity; thirdly, in payment (in lieu of the moneys formerly applied in the relief of the poor) of the annual sum of 50*l.*, or not exceeding one-sixteenth part of the net income of the charity, towards the maintenance of an infant or elementary school for the teaching of male and female children of the poor of the town of Berkhamstead, in such matters as the governors should direct; fourthly, in paying (after the determination of the retiring allowance aforesaid) 200*l.* to the master yearly, and 100*l.* to the usher, and, in addition to such salaries, as many yearly sums of 5*l.* each as should be

equal to the number of foundation scholars in the proportion of two-thirds to the master and one-third to the usher.

Clause 6 provided that the children in respect of whom such payments should be made, should have the benefit of the school gratuitously, and be free scholars therein; and it was provided that during such time (when it should happen) as the income of the charity should be insufficient to provide such annual sums, that there should be paid to the governors by the friends of every foundation scholar, the yearly sum of 5*l.*, and in respect of every scholar not being a foundation scholar, 9*l.* yearly, such payments by the foundation and other scholars to be paid over to the master and usher in the respective proportions of two-thirds and one-third. Power was given to the visitor or the governors (exclusive of the master and usher) with the sanction of the visitor, to regulate the amounts to be paid to the master and usher from the charity, and the foundation and other scholars, so that the sums paid in respect of the foundation scholars should not be raised above 5*l.* each. Provision was also made for the expenditure of not exceeding 250*l.* towards providing instruction in English literature, history, geography, writing, mathematics, the French and German languages, and such other branches of education, in such manner as the visitor or the governors (other than the master and usher) should with his sanction direct. The scheme also provided (clause 9), that any surplus income should be carried to a reserved fund for repairs, building, rebuilding, or improvements to be effected on the charity estates; (clause 10), that when the reserved fund amounted to 1,000*l.*, or so long as not less than 100*l.* per annum, or such sum as should be enough to make the value of the reserved fund equal to 1,000*l.*, was carried to such fund, the surplus income might be applied in the establishment or maintenance of exhibitions, for the regulation of which provision was made by the scheme. The scheme provided also (clause 15) for the election of 144 foundation scholars (first from children of residents, and then from strangers) who were to be between the ages of seven and fourteen years and not (except with special leave) to remain in the school after attaining nineteen. It was also provided (clause 23) that the master and usher should respectively inhabit the two dwelling-houses adjoining the school-house, without paying rent or taxes, and should be at liberty with the consent, and subject to the regulations, as well as to number as otherwise, to be from time to time made by the visitor, or by the governors (exclusive of the master and usher), with the sanction of the visitor, to take the children into their houses as boarders, and to educate them in the school and to receive payment in respect of such board and lodging; the parents or guardians of such boys paying to the governors for education the sums before provided.

The present gross income of the charity amounted to 1,286*l.* 16*s.*, and the petitioners suggested that the value of the school property might increase in a few years.

The present expenditure was stated in round numbers to be as follows:—

Tuition	...	...	...	...	...	...	...	...	£450
Parochial School	...	...	...	...	...	...	...	...	50
Average of Repairs, Rates, Salaries, &c.	...	...	...	...	...	...	...	...	150
The Fifty Foundation Scholars at 5 <i>l.</i> per head rate	...	...	...	...	...	...	...	...	250
									<hr/>
									£900

The petition proceeded to state that notwithstanding the repeated efforts made to improve the school, there were now only sixty-one boys—namely, thirty-six day boys, and twenty-five boarders; and that “the existing scheme might therefore be considered to have failed, and the only prospect of increasing the reputation and utility of the school was by introducing considerable modifications into it.”

The Earl of Brownlow (one of the governors) had signified his willingness to give 4,000*l.* sterling for the purpose of endowing two exhibitions of 60*l.* a-year, on certain conditions which he had suggested.

The petition stated that that gift would of itself necessitate some modification of the existing scheme, and that it was calculated greatly to facilitate those improvements in the character of the school which the petitioners and the other governors thought desirable; further, that the houses of the master and usher were extremely deficient in accommodation, and that this circumstance checked any increase in the number of boarders, in which direction alone (as experience shewed) the school was capable of, or was at any rate likely to receive, material increase. It was intended, if the proposed modifications in the existing scheme were approved by the Court, to spend, with the sanction and under the superintendence of the Charity Commissioners, such a sum as might be required for enlarging the school premises and adapting the houses of the master and usher for the reception of a greatly increased number of boarders; and "it was intended to apply for this purpose, with Earl Brownlow's consent, the 4,000*l.* given by him for founding exhibitions."

The proposed supplemental scheme was set out in the petition, and the material alterations from that in force were as follows:—

(a) Provision was made for repaying by annual instalments money to be borrowed for improving, enlarging, and rebuilding the school buildings.

(b) The head-master and usher, who, under the existing scheme, were to receive from the endowment the fixed annual stipends of 200*l.* and 100*l.* respectively, were, under the proposed amendments, to receive from the same source such fixed annual salaries, being not less than 200*l.* and 100*l.* respectively, as the governors other than the master and usher, with the consent of the visitor, should from time to time direct and appoint. The head-master was to receive two-thirds and the usher one-third of the capitation fees payable by the scholars; and the head-master was to receive two-thirds of 5*l.*, and the present usher one-third of 5*l.*, from the rents of the estates in respect of every foundation scholar appointed previously to the establishment of that scheme.

(d) The school was to be open to all boys not less than eight nor more than fifteen years old, who could read and write, and were acquainted with the first four rules of arithmetic, on payment to the governors in advance in each term of such capitation fee in respect of all instruction (other than classical and religious instruction) as the governors, with the consent of the visitor, should from time to time require and approve; provided that boys whose parents or guardians should be resident in Berkhamstead or Northchurch such boys being qualified as before mentioned) should be entitled to be admitted to and attend the school on payment of a fee of 3*l.* 3*s.* annually. Provided also, that no capitation fee should be required from boys who were free foundation scholars prior to the establishment of the supplemental scheme.

(e) No boy lodging in any house in Berkhamstead, or in the neighbourhood, not being the house of his parents, or of persons *in loco parentis*, was to be admitted to the school unless such house should be approved by the governors.

(f) In consideration of the 4,000*l.* to be paid by Lord Brownlow, the governors were to establish and maintain in perpetuity, out of the charity estates, two exhibitions of 60*l.* a-year each. They were also to be at liberty to establish any more exhibitions, not exceeding 60*l.* each, which the funds of the charity might at any time enable them to establish; such exhibitions to be tenable by boys educated at the school and proceeding to Oxford, Cambridge, or Durham, or to any other university, college, hospital, or institution approved by the visitors. The last-mentioned provision was proposed to be in substitution for clause 10 of the existing scheme, which latter it was proposed should be abrogated.

(g) The governors, when in their opinion the funds should be sufficient, were to be at liberty, with the approbation of the Charity Commissioners, to establish one or more scholarships, tenable at the school by boys, subject to such rules as the governors, with the sanction of the visitor, might prescribe.

(h) Power was to be given to the visitor, on the application of the governors,

to appoint examiners, and to pay them such sum as the governors should think fit.

(j) Except so far as the existing scheme might be varied by the provisions of the supplemental scheme, the existing scheme was to continue in full force.

The result, so far as capitation fees or payments of head-money to the master were concerned, appeared to be that, in respect of all boys, 5*l.* per boy should be paid out of the endowment, and in addition, for boys from the town, 3*l.* 3*s.* per annum by their parents, which sum of 3*l.* 3*s.* might, as to boys strangers to the town, be increased at the discretion of the governors and visitor without limit; but that, as to boys who were free foundation scholars prior to the establishment of the supplemental scheme, no capitation fee should be taken.

The petition stated that a copy of the proposed scheme was, in pursuance of the recommendation of the Charity Commissioners, deposited in the town-hall in Berkhamstead, in order that the inhabitants of the town might be able to consider it. Several meetings of the inhabitants were held to consider it, and at the last of the meetings, held on the 10th of January, 1864, a resolution was passed that no scheme would be satisfactory to the inhabitants which did not provide sufficient funds for the free education of 144 boys before applying any portion of the funds of the charity to any other purpose.

The petition further stated that the Charity Commissioners had granted their certificate, authorizing the petitioners, with the concurrence of the other governors, to apply for an order establishing a new scheme, altering and amending the existing scheme, and for any further or other order or relief properly incidental to the application; and that the governors other than the petitioners fully concurred in the application.

A memorial in opposition to the scheme, dated the 20th of February, 1865, had been presented to the Charity Commissioners by two inhabitants of Berkhamstead—Alfred Healey and Alfred Compigné—and this memorial was further confirmed by the signatures of 131 other inhabitants of the town.

The memorialists called attention to the object of the foundation of the school as stated in the letters patent to King Henry VIII., which was "the teaching of children in grammar, freely, without any exaction in regard of money for the teaching of the same children, not exceeding the number of 144."

They also stated that in the interval between 1841 and 1857, with the consent of the then master, Mr. Willcocks, and under his sanction, a suitable house was taken by a Mrs. Hawkins for the reception of boarders, at a moderate rate of payment. This house was soon filled, and boarders attended the school to the number of twenty, until Mr. Willcocks, having succeeded to an estate elsewhere, resigned his office, and another master was appointed. The boarding-house was discouraged, and soon closed; Mrs. Hawkins left the town, and the boarders were lost to the school.

They submitted that the so-called supplemental scheme was one that would override the letters patent of King Henry VIII., the governing statute of King Edward VI., and the orders in Chancery; for that the object of the statute and orders was to carry into effect the original and apparently chief object of the donor and royal founder, namely, the teaching of children "in grammar," or, since the decree in 1841, the teaching of children "as well in grammar as in other branches of education, sanctioned by the visitor," and free of expense; and not to provide for the master and usher by allotting the greater portion of the rents and profits for their benefit; whereas the supplemental scheme, after the present foundation list was exhausted, utterly rejected all free scholars, even from instruction in Latin and Greek, and directed that the inhabitants should pay in respect of every child the sum of 3*l.* at least, or any other sum the governors might impose, with the certainty that such child would be regarded by the master and usher, as the boarders were at Mrs. Hawkins's, in the light of an incumbrance. They contended that the scheme allotted the rents and profits entirely for the benefit of the master and usher: for, having first excluded

all free scholars in future, it gave to the master, in addition to the school and school buildings, a stipend of 200*l.* a-year, and to the usher 100*l.* a-year, or such larger sum as the governors might choose, provided for their retiring salaries, for under-masters to the extent of 150*l.*, gave 120*l.* annually for two exhibitions, and then proposed to borrow 4,000*l.* (if necessary) to build boarding-houses for seventy boarders, thus enriching the master and usher out of the funds of the charity.

They further expressed their convictions that the town and neighbourhood would supply 144 scholars, if proper encouragement were given to pupils by the introduction of boarding-houses, and by the removal of the necessity imposed upon scholars of learning Latin and Greek; and opposed the expenditure of the funds to build houses, the foundation of exhibitions, and the granting of borrowing powers. They pointed out that the governors had the power of raising the salaries of the master and usher, if the revenues of the charity permitted; and they thought this mode of direct remuneration better than the erection of buildings for private boarding-houses.

Mr. Amphlett, Q.C., and *Mr. Wickens*, supported the prayer of the petition.

Mr. W. M. James, Q.C., and *Mr. Freeling*, opposed on behalf of Messrs. Healey and Compigné.

Mr. Daniel, Q.C., and *Mr. Melville*, for other parties in the same interest.

Mr. T. H. Terrell said that the supplemental scheme had met with the full sanction and approbation of the Attorney-General, for whom he appeared.

Nov. 21.—*SIR W. PAGE WOOD, V.C.*—The questions that arise upon this scheme relate to the better regulation of the school at Berkhamstead. The school was originally founded in the time of King Edward VI., and the foundation deed originally provided for a grammar school, with one master and one usher, for teaching 144 children in grammar, at Berkhamstead. It was found that the school had failed in answering the purposes which one may deem the founder to have originally had in view, especially with regard to the number of scholars, there never having been anything like the number of 144 requiring admission into the school. The consequence was that first an attempt was made in 1841, and afterwards a series of attempts were made up to 1855, for the purpose of giving more life to the school by making some change in the arrangement and management of the establishment.

Among other things, the scheme of 1855 (which was confirmed in 1857) provided that, inasmuch as, apparently, the revenues were not sufficient for making an effective school—such as, I may safely assume, was supposed by the Court to have been the intention of the founder to establish—two or three things should be done, which might, it was supposed, have some effect in advancing the interests of the school.

In the first place, the property had been vested originally in the master and usher as a *quasi* corporation. There appears to have been a set of governors established, and instead of this scheme of vesting the property entirely in the master and usher, a retiring allowance was given to the then master, under whom the school seems to have greatly languished. It was then considered that the revenues of the school might be employed in paying a capitation fee to the master—the scholars being free—so as to make his salary dependent, in a great degree, on the number of boys who might be in the school. That was, no doubt, one mode of inducing the master to use his utmost efforts to secure a larger attendance. Accordingly, the 5th clause of the scheme provided, with regard to the rents and profits, as follows: That after deducting the quit rents, the revenues should so far as the same would extend, be applied in manner following—first, in payment of the retiring person (which I may observe was a matter not provided for by the deed); secondly, for keeping in repair the school-house and the buildings and appurtenances connected therewith, and in payment of all the costs, charges, and expenses of, or incident to, the management, repairs, and maintenance of the estate and premises belonging to the school; thirdly, in payment in lieu and satisfaction of the moneys formerly

to be paid and applied in and about the relief of the poor people of the town of Berkhamstead of the yearly sum of 50*l.* (that being one of the trusts of the residuary property in the original deed), or such larger sum as the governors should think fit, not exceeding one-sixteenth part of the net income of the estates during the year last aforesaid. That scale was fixed on a view of the income of the property when the foundation first took place, and of the relative proportion which it was supposed the town of Berkhamstead would be entitled to, if an apportionment of the income were made as it then stood; and the fund was appropriated to the maintenance of an infant or elementary school, which has been established. Then, fourthly, to pay to the master of the school for the time being a salary of 150*l.* during the continuance of the retiring annuity, and to the usher 75*l.* a-year; and when the annuity to the retiring master ceased, the salaries were to be increased to 200*l.* and 100*l.* respectively. Then comes the provision as to paying the capitation fee. As many yearly sums of 5*l.* each as should be equal to the number of foundation scholars were to be paid, in the proportion of two-thirds to the master, and one-third to the usher, together with their respective salaries. The children who were thus paid for were to have the benefit of the school gratuitously, and were to be free scholars therein; but "in case the income of the school" (and this is a very important provision) "should not be sufficient to admit of the payment of as many additional sums as should be equal to the full number of the foundation scholars in the school, namely, 144, then there should be paid in manner aforesaid as many of such sums as the income would suffice to pay, and such payments should be applied in respect of the foundation scholars according to the priority of their respective admissions as foundation scholars into the school; and during such time as the income should be insufficient to provide such annual sums in respect of all the foundation scholars, there should be paid to the governors by the friends of every foundation scholar, in respect of the increased benefit to be afforded him in the school, the like yearly sum of 5*l.* by equal half-yearly payments."

So that, in truth, that scheme departed from the original scheme of gratuitous instruction to this extent. It was said, We must first get rid of the inefficient master by pensioning him off; then, in order to make effective the salary for competent masters, it is provided that 5*l.* should be paid for every boy on the foundation—nothing like the number of 144 had presented themselves—leaving a considerable number of boys subject to the payment of the capitation fee of 5*l.* So far it seems to have departed from the scheme of gratuitous education, because it took out of that fund which might be applied in paying capitation fees, in the first place, the salary of the retiring master; and in the next place, such sums as were thought by the Court competent to secure efficient masters; and out of those enlarged salaries to the master and usher it would be necessary that deductions should be made in respect of the 144 scholars, if any such number presented themselves. In point of fact, payment had never been made for that number. It had been made for somewhere upon the average of fifty scholars, amounting altogether to 250*l.*; leaving, therefore, ninety scholars of the 144, who would have had to pay this 5*l.* each, if they had presented themselves.

Then, after having provided for these matters, it says, "For providing such instruction for the scholars in the said school as after mentioned, the governors shall from and after the 1st of April, 1856, out of the yearly rents, issues, and profits of the estates of the said school and charity, pay to the master and usher such sum and sums of money, if any, as the visitor of the school, or the governors, other than the master and usher, with the sanction of the visitor, shall direct, not exceeding the sums hereinafter mentioned—that is to say, whenever the number of foundation scholars in the school shall be less than forty-one, not exceeding the yearly sum of 100*l.*; when the number of such scholars shall be more than forty, and less than seventy-one," so much; and so it goes on, giving a scale according to the number of foundation scholars that might possibly be admitted, up to seventy, which I suppose it was then

considered likely to be the highest number of those 144, who, abstractedly considered, would have had the right to present themselves. Then there was to be instruction provided in "English literature, history, geography, writing, mathematics, the French and German languages," and so on.

This being the scheme, (I need not go through the other parts of it), I will mention simply this, that exhibitions were contemplated in the scheme of 1855, whenever the funds should allow; and this seems to have been a matter in the contemplation of the visitor originally. Then the governors, by the 15th clause, were to elect 144 foundation scholars, the children of persons being at the time of such election resident inhabitants of the town of Berkhamstead, or persons who, if then deceased, should have been resident inhabitants of the town; in the first instance; and in default of them, then the children of any persons throughout the United Kingdom; and the number was to be made up to 144. Then there was a provision for the payment of a fee to the examiners, and other small matters. I should mention also that boarders were allowed by the scheme to be taken by the master in the house appropriated to the master, and by the usher in the house appropriated to the usher.

Now that which has occasioned this supplemental scheme to be brought forward is, that in the first place, the master who had the retiring allowance of 250*l.* a-year, has recently died, and that has brought in an additional income of 250*l.* a-year to the school. It further appears that notwithstanding all the efforts which are said to have been used from time to time to improve the school (and this, I think, is fully made out by the affidavits), the number of boys in course of education is comparatively small, there being at present only sixty-one boys at the school, of whom thirty-six are day boys, and the remaining twenty-five are boarders, and that is about the average of the last few years. There are only thirty-six boys, therefore, who have come into the school as persons resident in the town of Berkhamstead or the neighbourhood. There are boarders in the town as well; but not children whose parents or those who stand *in loco parentis* to them, are inhabiting Berkhamstead. It cannot be said, therefore, certainly, that this school has attained to any such state as that which the founder himself intended; and as to getting anything like 144 boys to take advantage of this free education, it appears that at the utmost now there are only sixty.

In this emergency Lord Brownlow has offered a munificent gift to the school of 4,000*l.*; but he offers it on this condition, that exhibitions be provided with this 4,000*l.*, which, taken at 3*l.* per cent. would produce about 120*l.* a-year; and he also stipulates that, in that case, the school itself shall provide 120*l.* a-year out of its funds for the purpose of exhibitions. On that part of the case I should not have the slightest doubt. The original scheme of 1855 contemplates exhibitions, if the funds should be sufficient; but here is a great improvement offered to the school by this donation of 4,000*l.* towards the permanent increase of its funds, which is to be for the permanent benefit of the school, if exhibitions are provided of the like amount. That is an offer which it appears to me impossible for the Court to decline.

The remaining questions are these:—It is proposed by the governors that the master's house and the usher's house should be improved, so that there should be a greater accommodation for boys; and it is proposed to apply the whole of this 4,000*l.* in such improvements; and then, for the future, it is proposed that there should not be any foundation boys, properly so called (that is to say, boys paying nothing, and admitted gratuitously to their education), but that hereafter all alike should pay three guineas—that is to say, all belonging to the town or to the neighbouring district of Northchurch, and that all other scholars should pay such sum as should be fixed by the governors, and which was contemplated to be about nine or ten guineas.

That portion of the supplemental scheme is certainly a large inroad upon the original scheme of the founder of having some boys (he said 144) who should have entirely gratuitous education. On that part of the case I have felt very

considerable difficulty. It is exceedingly probable, I think, that such an alteration would greatly improve the school by making it a good and valuable school, though up to the present time it seems to have been in a state of great abeyance as regards the benefits which have been conferred on those who have attended it. Nevertheless, I was glad to find that one gentleman, who takes a view adverse to the views of the governors, says in his affidavit he was himself educated at that school, and that he received such an education as would have fitted him for the university.

Now as regards those who oppose any alteration whatever, they say: "Let 144 free scholars be freely admitted from all parts of the world, and let them be admitted in this way, by being invited by this free education to come and lodge in the town, at dames' houses and the like, under such discipline, or absence of discipline, as prevails in such establishments." But they couple the proposal—as one cannot help seeing very strongly and explicitly throughout the affidavits—with this, that it ought to be something for the benefit of the people of Berkhamstead, in the shape of a commercial school, and ought not to be a grammar school at all. That is, as I have observed, a prevalent view in the affidavits; but it is as contrary to the view of this founder as can well be conceived; and when they speak of the astonishment which the founder would have felt at not finding 144 boys being admitted gratuitously, I am quite sure he would be more astonished if he found that those put on this foundation were not to be instructed in the learned languages. As far as that view is put forward, I cannot adopt it for a moment.

Looking to what has actually happened up to the present time, it appears to me to be an abundant compliance with the scheme of the founder to provide as follows. Seeing that, from all time as far as we have any history about it, this school has had nothing like 144 children coming into it gratuitously, and seeing also that the only persons who can come into it, except through the medium of lodging at dames' houses, or at other lodging-houses which may set up at Berkhamstead, must be those who are confined to the immediate district (although it is quite true that there is nothing in the original scheme which says the immediate district is to be the district benefited), I think that if abundant provision is made for all those who can come to take the benefit of the school gratuitously from the immediate neighbourhood, the Court would not much regard the interest of the rest of the inhabitants of England who might be sending their children to Berkhamstead to lodge in places where they would be under no discipline or charge whatever beyond that of the owner of the house, and so brought to take advantage of the school. I do not think there would be many such persons, nor does experience show that there have been. There is some evidence of a lady having set up an establishment which was discouraged, and which, therefore, is said to have been put an end to; but with all that has been done, even including the boarders and everybody else, we have only sixty children in the school now.

As regards the master's house, I have not the slightest doubt that that is in a state which, if he is to have boarders at all (and that is provided for by the scheme of 1855), requires to be thoroughly reorganized. I cannot read the report of Mr. Martin, the Inspector of Charities, and have any doubt that the master is not put on a fair footing as regards the reception of boarders if the house is to remain as it is. The question of how much should be spent is a matter that requires more consideration at Chambers than I can give to it in Court. It is contemplated that he should have some thirty or forty boarders. It appears to me, regard being had to the small funds of this school, there may be a great deal of doubt as to whether the enlargement should be on so large a scale.

On going over the scheme; the conclusion I have come to is, to introduce a number not exceeding fifty (I question if the number will reach so many) of the local children who shall be free. Then to say, if they ever should exceed fifty (to keep that part of the present proposed scheme), that those living in

the town shall not pay more than three guineas. Then to let the governors, if they please, elect foundation scholars not exceeding 144; and if in process of time there should be an improvement of the property, let them be provided for. The scheme as I propose to amend it will run thus:—I take up the supplemental scheme at that which is the important part, namely, as to the appropriation of funds. I say they are to be applied—1. "In repairing and keeping in repair the school-house and the buildings." 2. "In payment of the yearly sum of 50*l.* as a fund for the education of the poor." 3. "In payment of the salaries or stipends of the head-master and usher, and of the allowance for an assistant-master, and of any retiring pensions granted to any head-master or usher." Then I add to that clause 3 the following words: "including in the salaries a payment of three guineas each in respect of fifty foundation scholars, in the proportion of two guineas to the head-master and one guinea to the usher." They will be paid for out of the funds of the school just as the others, to make them free. Then, 4. "In providing by annual instalments for the repayment of any sum or sums of money," here I say "not exceeding in the whole the sum of *l.*," (that must be filled up at Chambers), "which may be borrowed by the governors, with the authority of the Charity Commissioners, for the purpose of improving, enlarging, or rebuilding the school buildings, and in payment of the interest on such principal loan," and so forth as it stands. Then, 5. "In payment of the stipends of the holders of any exhibitions." Then I leave clauses B and C as they stand. Then I bring in, before clause D, clause 15 of the old scheme thus modified: "The governors shall from time to time elect foundation scholars not exceeding 144 in number, to be admitted into the said school, preferring, in the first place, children who shall be residing with parents, or with some one *in loco parentis* at the time of such election, in Berkhamstead or Northchurch, or partly in one and partly in the other; and in default of such children aforesaid, then the children of parents throughout the United Kingdom." That is the provision for the election of scholars not exceeding 144.

Now, in clause D, I proceed in this way:—The proviso, as it at present stands, is a proviso that the Berkhamstead and Northchurch boys shall not pay more than three guineas, but making them all pay three guineas. That I alter thus: "Provided that foundation scholars, whose parents, or the persons acting *in loco parentis* to whom shall be resident in Berkhamstead or Northchurch, or partly in one and partly in the other, to the number of fifty such scholars, and according to the date of their admission, shall be admitted to and attend the said school gratuitously; and if there are more than fifty such scholars, then, after the first fifty, at a capitation fee of three guineas annually; provided always that no capitation fee shall be required from boys who are free foundation scholars"—that is, prior to the establishment of the supplemental scheme.

Clauses E and F will stand as they are. Then clause G will have considerable alteration: "When, in the opinion of the governors, the funds of the charity shall be sufficient" (here I add this), "they shall make provision for the payment of the capitation fee in respect of each foundation scholar over and beyond fifty Berkhamstead and Northchurch scholars, and without any restriction as to the residence of the parents, or persons acting *in loco parentis* to such scholars" (that is, after all these other exhibitions. I am afraid it may be the Greek Kalends, possibly; but there it is, if the funds should ever increase), "so far as the funds will permit; and thereupon the foundation scholars on whose behalf such payments shall be made, shall be free from any other capitation fee in respect of education at the school" (of course they will pay everything else like any other scholar). "The number of such scholars shall not amount to more than 144." That is what I have inserted. Then, after that, they shall be at liberty to establish one or more scholarships.

Then as to the scholarships at the school, it appeared to me doubtful whether I could provide for them before I had provided for these foundation scholars. 120*l.* a year for exhibitions we have—that is to meet the exhibitions

provided for by Lord Brownlow; but I confess I doubt whether scholarships should be added. These are scholarships that are to be held at the universities. However that portion of the scheme is in the nature of a free education, and will come after the other.

The alterations, then, that I have made come to this—that I provide for fifty free scholars; and if there should be more than fifty belonging to Berkhamstead, I provide for them also. I do not think it necessary to provide for those who shall be residing with dames, and the like, and I retain that provision which says that any boarding or lodging house must be with the approbation of the governors, for it appears to me discipline cannot possibly be maintained in the school unless some such provision be observed. As regards the building, I do not feel disposed to make it quite so large as contemplated. That will be considered at Chambers.

The scheme will go back to Chambers with these alterations, and the costs of all parties will be allowed.

Dec. 18.—The minutes of the decree, so far as it related to the capitation fee for the masters, were settled in the following form:—

“ That payment be made out of the funds of the said charity of a capitation fee of 3*l.* 3*s.* per annum (in the proportion of 2*l.* 2*s.* to the master, and 1*l.* 1*s.* to the usher) in respect of foundation scholars, not exceeding fifty in number, remaining with their parents, or with some one *in loco parentis* in Berkhamstead or Northchurch, in the petition mentioned, and which boys so paid for shall be admitted gratuitously.

“ And let 144 foundation scholars be elected, with preference of their residing at Berkhamstead or Northchurch aforesaid, with their parents or persons *in loco parentis*, and provision be made out of the income so far as the same, after the above provisions, will allow it, for capitation fees in respect of such foundation scholars.

“ And let no foundation scholar residing with his parents or some one *in loco parentis* in Berkhamstead or Northchurch pay more than 3*l.* 3*s.* per annum as a capitation fee.”

Wood, V.C., Dec. 18, 1865.

In re WYNDHAM'S TRUSTS.

L. R. 1 Eq. 290.

Referred to, *Stockdale v. Nicholson*, [1867] E. R. A.; 36 L. J. Ch. 793; L. R. 4 Eq. 359; 16 L. T. 767; 15 W. R. 986 (V.C.); *In re Thompson*, 1886, 55 L. T. 85 (Ch. D.).

Will—“ *Personal Representative* ”—“ *Issue* ”—*After-acquired Property*.

WILL. I.—*Gift to daughters for life, with remainder to the child or children of such daughters, as they should appoint; in default of appointment, equally. And on the death of such of the said daughters after attaining the age of twenty-one years as should die without issue, her share to be paid to her personal representative:—Held, that “issue” meant issue who would be entitled under the former gift, i.e., children. “Personal representative” meant executor or administrator.*

HUSBAND AND WIFE. C.—*The husband of one of the daughters, after the death of the testatrix, by postnuptial deed covenanted with a trustee that all the real and personal property which might thereafter at any time during the joint lives of himself and his wife devolve on her, should be held and disposed of by her as her separate property, notwithstanding coverture:—Held, that the before-mentioned property, on the wife's death without children, was not subject to the covenant, and did not pass by her will, but went to her husband as general administrator. Grafftey v. Huinpage (1 Beav. 46), distinguished.*

Lætitia Wyndham, by her will, dated the 6th of January, 1832, appointed

a sum of 36,000*l.*, out of property over which she had a power of appointment, to trustees, upon trust for her six daughters, Lætitia Codrington, Mary Ann Biggs, Louisa Elizabeth Knatchbull, Ella Wyndham, Charlotte Wyndham, and Henrietta Sophia Patient, for their separate use respectively for life, and after the death of each in trust, as to her share to pay the principal thereof to or for the use of the child or children of such daughter in such manner as she should by deed or will appoint; and in default of such appointment, to her child or children, if more than one, in equal shares absolutely. "And on the death of such of her said daughters after attaining the age of twenty-one years, as should die without issue, her share to be paid to her personal representative;" but if any of her daughters should die under age without having been married, then she gave and appointed the shares of all such as should die, as well accruing as original shares, to the survivors or survivor of the said daughters, in like manner as she had thereinbefore given them their shares of the said 36,000*l.* And she gave all the residue of the property subject to the power, to and amongst her five younger sons and her said six daughters, equally, share and share alike.

She died on the 7th of December, 1837, leaving six sons and the six daughters above named.

The question for decision arose as to the share of Henrietta Sophia Patient, who died on the 1st of September, 1862, without ever having had issue, but having attained the age of twenty-one. Her share had been paid into Court under the following circumstances.

By an indenture, dated the 30th of December, 1854, made between Ambrose Patient, the husband of Henrietta Sophia Patient, of the one part, and William Wyndham her father, and herself, of the other part, Ambrose Patient covenanted with William Wyndham that all the clothes, jewels, and other effects which belonged to Mrs. Patient before her marriage or which were at the date of the indenture now in statement, used by her, or reputed to belong to her, and all other real and personal estate and effects which should or might at any time thereafter during the joint lives of her said husband and herself, descend, devolve upon, or be given, devised or bequeathed to, or in trust for her, should and might be absolutely held and enjoyed and be disposed of by her for her sole and separate use, as she, notwithstanding her coverture, should think fit.

Mrs. Patient made her will, dated the 14th of October, 1861, and thereby after appointing other moneys, over which she had power, and reciting the above indenture, gave all the residue of her estate, over which she had any control or disposing power, to her brother, Charles Henry Wyndham, whom she appointed executor.

Probate of the will was granted to the said Charles Henry Wyndham, limited to the property subject to Mrs. Patient's several powers of appointment and appointed by her accordingly.

Administration *cæterorum* was granted to Ambrose Patient.

On the 5th of March, 1865, Mrs. Patient's share in the 36,000*l.* appointed by the will of Lætitia Wyndham, was paid into Court under the Trustees' Relief Act.

A petition was presented by Ambrose Patient, and some incumbrancers claiming under him, praying for payment of the fund in Court to the petitioners.

The prayer of the petition was contested by the executor of Mrs. Patient under the limited probate.

Mr. Rolt, Q.C., and M. Wickens, for the petitioner.—The gift to the "personal representative" was not too remote, for in the preceding words "on the death of such of my daughters after attaining the age of twenty-one years as shall die without issue," the word "issue" must be limited by the preceding gift, to issue who would be entitled to take under that gift. Prior on Issue (p. 180), *Pride v. Fooks*, per Turner, L.J. (3 De. G. & J. 280), *Hedges v.*

Harpur (3 De. G. & J. 129), *Re Crawford's Trust*, per Kindersley, V.C. (2 Drew. 234), *Chapman v. Chapman* (33 Beav. 556), *Dixon v. Dixon* (24 Beav. 129).

The words "personal representative" must be taken in their usual and proper sense. The cases in which a different construction has been given were all cases in which there was an incompatibility in the form of the gift with the character of representation, as, for instance, where words of severance, such as "personal representatives share and share alike," or the like, were introduced; *Palin v. Hills* (1 M. & K. 470), *King v. Cleveland* (4 De. G. & J. 477).

Mr. Charles Hall, for the trustees of the will.

Mr. Freeling, for some of the residuary legatees and of the next-of-kin, did not oppose.

Mr. E. R. Turner, for others of the next-of-kin and residuary legatees and also for Charles Henry Wyndham, the executor under the limited probate of Mrs. Patient's will, submitted the case of the next-of-kin and residuary legatees to the Court, and in favour of the next-of-kin cited *Robinson v. Smith* (6 Sim. 47); and he referred also to *Smith v. Barneby* (2 Coll. 728), and *Re Hughes* (4 Giff. 432). He contended that "personal representative" meant the limited executor: *Graffey v. Humpage* (1 Beav. 46). The only words which seemed to contradict this contention were the words in the deed of the 30th of December, 1854, limiting the property which was thereby settled to Mrs. Patient's separate use, to real and personal property, which might thereafter during the joint lives of Mr. and Mrs. Patient descend, devolve upon, or be given, &c., to her. In the case of *Graffey v. Humpage*, the words were very similar, and it was there held, that the right, which did not ripen till the death of the wife, accrued by the coverture.

SIR W. PAGE WOOD, V.C.—Two of the points raised in this case seem to me concluded by authority. In the first place, where there is a devise to children of the first taker, and then a gift over on the death of such first taker, "without issue," the word issue is confined to issue who could take under the former limitation, and the reason of this rule is well expressed by the Lord Justice Turner in the case cited of *Pride v. Fooks*. It seems also well settled that the words "personal representative" must, in the absence of other controlling words, which do not appear in this case, be taken to mean person claiming as executor or administrator. Some difficulty, however, arises in this case, as between the executor of Mrs. Patient, under her testamentary appointment, and the petitioner, Mr. Patient, as her general administrator.

The case of *Graffey v. Humpage*, relied on by Mr. Turner in support of the claim of the executor, is, however, distinguishable in what seem to me material points from the present case; it was a case of ante-nuptial settlement, and the apparent intention of the settlement was to give all future property which should accrue to the wife, or in her right, to her disposal; and Lord Langdale, admitting the difficulty thrown in his way by the words in that case, which were, "in case the intended wife, or the husband in her right, should at any time or times thereafter, during the said coverture, succeed to the possession of, or acquire any property," though the effect of those words might be obviated by the construction which he suggested, that the inchoate right vested in the husband by the coverture, continued during the coverture, and was only completed by the death of the wife into a possessory right, which must have relation to the inchoate right. In the present case this principle is inapplicable, for the deed of December, 1854, refers only to property which should thereafter devolve on the wife during the joint lives of the husband and wife; it could not have been intended to refer to any property in right of the wife, which had already devolved; for if so, such property might have been already spent by the husband. All the interest which the husband obtained in the present case accrued after the determination of the joint lives, if we exclude the inchoate right to take administration, which had accrued before the date of the deed of

1854, and which, therefore, could not have been intended to pass by that deed. The power to devise, given to Mrs. Patient by that deed, was limited to property acquired after the date of the deed and during the joint lives. This is not property which can fall under that designation, and is therefore excluded from the power. The petitioner is therefore, on the true construction of the will of Mrs. Wyndham, entitled, as the personal representative of Mrs. Patient, to the trust fund in Court.

Wood, V.C., Nov. 18, 1865.

In re HUNTER'S TRUSTS.

L. R. 1 Eq. 295.

In re Hill to Chapman, [1884] E. R. A.; 53 L. J. Ch. 541 (Ch. D.): affirmed, [1885] E. R. A.; 54 L. J. Ch. 595; 52 L. T. 290; 33 W. R. 570 (C. A.).

Will—Vesting—Survivors—Period of Distribution—Share by representation.

VESTED, CONTINGENT AND FUTURE INTERESTS.—*Testator directed his trustees to apply the rents of a certain real estate towards the maintenance and education of his daughters (naming seven), until his youngest daughter should attain twenty-one. He then directed the property to be sold and the proceeds to be divided equally amongst his daughters, share and share alike; "but if any of his said daughters should die before his youngest daughter arrived at twenty-one years, her or their share or shares to be divided amongst his surviving daughters, share and share alike; but if any of his said daughters should marry and die before the said youngest daughter attained twenty-one and leave a child or children, it or they should receive their mother's share equally among them":—Held, that there were no vested interests until the youngest daughter attained twenty-one.—Held, further, that by the words "mother's share" was meant the share which the mother would have taken had she survived the period of distribution.*

Anthony Hunter, by his will, dated the 11th of April, 1833, after making a contingent bequest to his daughters, Anne, Elizabeth, Margaret, Mary, Isabella, Alice, and Sarah, gave and bequeathed the remainder of his personal estate, after payment of debts, &c., to two trustees upon certain trusts. He then devised two estates in the parish of Ravenstonedale, in trust, for the use and purpose thereafter mentioned. He directed his trustees to receive the rents and profits of the said estates every year until his youngest daughter should attain the age of twenty-one years, to be applied towards the maintenance and education of his said daughters until his youngest daughter should attain the age of twenty-one years. He then ordered and directed that his trustees should sell the two estates, and that the moneys arising from said sale or sales, after paying all necessary expenses, should be equally divided amongst his daughters share and share alike; "and if any of his said daughters should die before his youngest daughter arrived at twenty-one years, her or their share or shares to be divided amongst his surviving daughters, share and share alike; but if any of his said daughters should marry and die before the said youngest daughter attained the age of twenty-one, and leave a child or children, he ordered that it or they should receive their mother's share equally among them."

The testator died shortly after the date of the will, leaving his said seven daughters surviving. Sarah Hunter, the youngest daughter, attained twenty-one on the 5th of December, 1848. In the meantime four of the daughters had died.

Anne married Henry Eglin, and died on the 2nd of October, 1839, without having any issue.

Elizabeth died on the 25th of October, 1836, a spinster.

Isabella died on the 20th of March, 1846, also a spinster.

Margaret married Thomas Dent, and died on the 11th of February, 1844, leaving one child, Stephen Dent, surviving her.

Of the two remaining daughters who survived the period of distribution, Alice married Anthony Dawson, and was now a widow; and Mary, in the year 1851, married John Knewstubb, upon which occasion her fourth was put into settlement.

Sarah Hunter, the youngest daughter, in 1852, married James Knewstubb, and her share also was settled.

Stephen Dent attained twenty-one, and died in May, 1863, leaving his father, Thomas Dent, his only next-of-kin.

The petitioners were the trustees of the marriage settlements of Mary and Sarah Knewstubb; and the contest that arose was between them and the representatives of the three daughters who had died without issue before the period of distribution.

The first question was, whether the survivors, from time to time, of daughters dying without issue before the period of distribution, took vested interests in the shares accruing to them by such deaths respectively; or whether nothing vested until the youngest daughter attained twenty-one?

The second question was, what was meant by the words "their mother's share?"

Mr. Dickinson, for the petitioners.—The only gift of the *corpus* of the estate was to be found in the direction of what was to be done with the proceeds of the sale, and this was not to take place till the youngest daughter should attain twenty-one. Hence there was nothing to shew that any daughter was to take anything before the youngest attained twenty-one. Upon the words of the will simply, the subject which was most present to the mind of the testator as to the period of survivorship, was the coming of age of his youngest daughter. If it were held that all the accrued shares vested before the period of distribution, the absurdity would follow that whilst the representatives of the first daughter who died would take nothing, those of the second would take a small fraction, those of the third a large fraction, and so on; whereas there was no reason to believe the testator intended there should be any inequality between them. Moreover, the final division would have to be in 210ths, instead of in sevenths, which was inconvenient.

Prior to the decision in *Cripps v. Wolcott* (4 Madd. 15), the law was in favour of vesting before the period of distribution; but that case altered the current of the decisions. It had been followed by *Vorley v. Richardson* (8 De G. M. & G. 126).

As to the share of Stephen Dent, it could not have been the intention of the testator that he should take nothing. The words "mother's share" must be held to mean the share originally given to the mother, namely, one-seventh.

Mr. North, for the representatives of the infant son.

Mr. J. W. Chitty, appearing for the trustees, the Vice-Chancellor appointed him to represent the estates of the three daughters who had died without issue before the 5th of December, 1848, and who had no legal personal representatives.

He accordingly submitted that the survivorship was intended by the testator to be a survivorship amongst all his daughters *inter se*; *White v. Baker* (2 D. F. & J. 55). The words "if any of my said daughters shall die before my youngest daughter arrives at twenty-one" had reference not to death generally, but to death in the testator's lifetime.

SIR W. PAGE WOOD, V.C.—I think the testator's meaning is sufficiently apparent, because the scheme of his will is this. He does not intend that any division shall take place before his youngest daughter attains twenty-one.

Notwithstanding the principle laid down by Sir W. Grant, in the case of *Hanson v. Graham* (6 Ves. 249), there can be no vested interest in this case, because the income is given as a common fund towards maintenance and education; and he postpones altogether any division of the property until his youngest daughter attains twenty-one.

[His Honour read the provisions of the will.]

I think the clear meaning of the words "surviving daughters," is, that if any daughters are found *in esse* at the time when the distribution is to take place, then the share or shares of one daughter, or of two or more daughters who may have died without leaving issue, all are to go over among the surviving daughters.

Then the testator proceeds to provide for the case of any of his daughters marrying and dying leaving issue before his youngest daughter attains twenty-one.

[His Honour read the clause.]

No doubt here, if anywhere, some difficulty arises. Mr. Dickinson says you must take the property as divisible into sevenths, and then says that one of those sevenths is the ascertained share of any daughter dying before the youngest attains twenty-one, so that the child of that daughter is only to have one-seventh, leaving the rest to be divided amongst the three survivors. But I think the testator's meaning was this: he directs payment at a certain period amongst all his daughters, if alive; if not, then amongst his surviving daughters, share and share alike, regard being had to this, that if any daughter dies leaving a child, that child is to have the "mother's" share, by which I understand the share which the mother would have received had she been alive. That being so, the representatives of the child in this instance are entitled to one-fourth. The case of *White v. Baker* appears to have turned wholly on the particular language of the will. Not only did the words "executors, administrators, and assigns" occur, but the intention of the testator seems to have been to give vested interests. All these cases must depend upon the particular wording in each instance, and in this will the language is very peculiar.

I think there was no gift until the period of distribution; and the only possible doubt would be whether it is correct to give one-fourth to the child, with the three surviving daughters. But any other construction would, I think, be irreconcilable with the intention, which seems to have been to put a child by representation in no worse position than the mother would have been had she survived.

Declare that the fund is divisible in fourths.

Wood, V.C., Nov. 15, 1865.

LEATHER CLOTH COMPANY v. HIRSCHFIELD.

L. R. 1 Eq. 295.

Cairns' Act (21 & 22 Vict. c. 27)—*Measure of Damage—Trade Mark—Onus probandi.*

TRADE MARK.—*On an inquiry whether any and what damage has accrued to the plaintiffs from the unlawful use by the defendant of their trade-mark, the onus lies on the plaintiffs of proving some special damage by loss of custom or otherwise, and it will not be intended in the absence of evidence that the amount of goods sold by the defendant under the fraudulent trade-mark would have been sold by the plaintiffs but for the defendant's unlawful use of the plaintiffs' mark.*

The bill in this cause had been filed to restrain the infringement of the plaintiffs' trade-mark, and a decree had been obtained for an injunction. A

decree for an account of profits had been offered by the Court, and refused by the plaintiffs, who elected to take in lieu thereof an inquiry as to damages arising from the use by the defendants of their trade-mark.¹

The present application was a summons adjourned from Chambers upon the inquiry.

There was evidence to prove that the defendants manufactured several different qualities of leather cloth, and that they had at times sold pieces of cloth of three qualities impressed with the pirated trade-mark, but no evidence could be obtained by the plaintiffs, or was offered by the defendant, to show on what number of pieces the mark had been impressed. There was evidence to shew what number of pieces of the different qualities was sold by the defendant and the profit made by him on such sale, and it was shewn that the prices were lower than those which used to be received by the plaintiffs for the goods marked with their marks, and that the profit was less.

There was contest on the evidence even on some of these points, but the above seem to have been the conclusions of fact so far as they can be supposed to have been determined.

Mr. Dickinson, for the plaintiffs.—As it is shewn that the defendant sold some pieces of each of the three qualities impressed with the plaintiffs' mark, the onus is thrown on him to shew how many were so impressed, and if he do not, it must be inferred that all he has sold of those qualities were so impressed. The principle is that damage once proved arising from the wrongful act of the defendant, must, as against the wrongdoer, be intended to be the greatest possible under the circumstances, unless he shews the amount to which it is limited: *Armory v. Delamirie* (1 Str. 504; 1 Sm. L. C. 256, 4th ed.); *the Duke of Leeds v. Amherst* (20 Beav. 239); *Walmsley v. Walmsley* (3 J. & Lat. 556).

[The VICE-CHANCELLOR inquired what the plaintiffs claimed as the measure of their damage.]

The measure claimed is the amount of profit which the plaintiffs would have made had the pieces of cloth sold by the defendant under the fraudulent trade-mark been sold by the plaintiffs.

[The VICE-CHANCELLOR referred to the cases of *Sykes v. Sykes* (3 B. & C. 541; 5 D. & R. 292) and *Blofield v. Payne* (4 B. & Ad. 410); in the former, special damage had been proved, in the latter the jury, no special damage having been shewn, had found one farthing damages, and the finding was affirmed.]

In *Blofield v. Payne* it does not appear on what grounds the jury found one farthing only, and the case seems in nowise adverse to our contention, for the motion was not by the plaintiff to set aside the verdict as having given too small damages, but by the defendant to enter a verdict for him, and on that motion the finding was affirmed which only shewed that there was damage intended by the law from a fraudulent act of the defendant even where no special damage was proved, but was no authority for holding that special damage must in every case be proved.

Mr. Locock Webb, for the defendant, was not called upon.

The VICE-CHANCELLOR adverted to the strange position in which the case stood, owing to the circumstances mentioned in the footnote, which, he said, would have left him no course had he arrived at a decision adverse to the defendant on the present application, but to allow him leave to appeal from the whole decree, and continued:—In the case as it stands, however, I am not driven to that course; there is fortunately no declaration of right in the original decree, but merely an inquiry whether any and what damage has accrued to the plaintiffs from the defendant's use of their trade-marks. The plaintiffs had their election to have taken an account of profits or of what damages had accrued, and preferred the latter alternative; they now require

(1) After the decree in this cause had been obtained, the House of Lords had in another suit decided that the plaintiffs had no property in the trade-mark, the subject of this suit. [See *Leather Cloth Co. v. American Leather Cloth Co.* [1866] E. R. A. 60 (Ed. E. R. A.).]

the Court to assume that they would have sold all the pieces of cloth which the defendant actually did sell. But how can the Court assume that the persons who bought what the plaintiffs aver were inferior articles at an inferior price, would necessarily, if they had not done so, have bought the superior articles at the higher price? Surely this would be an absurdly strong assumption, and that in the absence of any evidence that any of the purchasers had at any time been customers of the plaintiffs. But even supposing that such an assumption were possible, why is the Court to assume that, even if the purchasers would have bought the higher priced article, they would have bought it of the plaintiffs. There were or there may have been persons licensed by the plaintiffs to use their trade-mark and to sell goods manufactured by their process, or there may have been, and doubtless were, persons who had purchased from the plaintiffs, with a view of selling again, how can the Court assume that the supposed purchasers would have passed by all these persons and have purchased direct from the plaintiffs? Yet this is what the Court is called on to infer from the mere fact that certain goods were sold by the defendant, and that some of those goods were marked with imitations of the plaintiffs' marks. Principle would seem to determine that no such assumption can be made, and that it lies on the plaintiffs to prove some distinct damage from the use of their trade-mark by shewing loss of custom or something of that kind, which has not been done in this case. Authority, so far as it goes, seems to be to the same effect; in *Sykes v. Sykes*, special damage was actually proved, and in *Blofield v. Payne*, where it was not proved, the verdict was a merely nominal one; and though fraud was shewn, one farthing damages was held to have satisfied the requirements of the law. I must therefore hold that the plaintiffs have suffered no damage by the defendant's use of their trade-mark.

WOOD, V.C., Dec. 14, 19, 1865.

BOVILL v. CRATE.

L. R. 1 Eq. 388.

Injunction—Patent—Laches.

PATENT. E.—Where an interlocutory injunction to restrain infringement of a patent was moved for in a suit in which the bill was filed in July, and it appeared that the plaintiff wrote complaining of the infringement in the preceding November, and knew of the defendant's proceedings in the previous August, the injunction was refused on the ground of delay. Observations on the course to be pursued by a patentee seeking a remedy against numerous persons who are all alleged to be infringing the patent at the same time.

This was a motion on behalf of the plaintiff, George Hinton Bovill, for an injunction to restrain the defendant, Augustus Crate, for the residue of a term of five years from the 5th of June, 1863, from using an invention and improvements for which a patent had been granted to the plaintiff in 1849, and renewed in 1863.

The subject of the patent was an improved method of grinding corn. The bill was filed in July, 1865, and the defendant, by his answer, denied the validity of the patent on the ground of want of novelty, and also denied infringement.

The plaintiff in his affidavit in support of the motion said that the validity of his patent had been established in numerous actions and suits which he described, and that his application in 1863, for prolongation of the patent, was opposed by a combination of millers, sixteen caveats having been entered

against the petition, upon which—except two—the parties appeared, and evidence was entered into on their behalf. Also that "several millers and other persons, including the defendant, had formed themselves into an association or combination" for the purpose of using his invention, and of opposing his letters patent, and preventing persons from taking licenses; and that they had issued circulars and reports to the defendant and other millers, indicating modes by which, as they alleged, certain processes might be used in mills without infringing the patent, and requesting such persons to apply to Mr. Collins, as the secretary of the association, and to Messrs. Sale & Co., of Manchester, the solicitors, for information and assistance. Further, that the documents issued by the association clearly shewed that the processes recommended by them to be used were an infringement; and that the defendant, as plaintiff believed, was defending this suit at the instance and under some indemnity from the association, or some of its members.

The defendant, by his affidavit in reply, admitted that he was a member of an association of millers originally formed in September, 1864, in the neighbourhood of Manchester, who issued a circular which he set forth. It was headed "Bovill's Patent," and stated that a number of persons having a common interest in shewing the invalidity of Mr. Bovill's claim, had, with a view as far as possible to save the expense of various actions at law, entered into an agreement to jointly defend any action which might be brought against any one of their number, each person or firm contributing towards the expenses in proportion to the number of pairs of stones to which the process was applied. The defendant also admitted that the association had, through its secretary, agreed to pay any costs incurred in defending the suit, and that he had paid the association 32*l.* in several calls.

Sir H. Cairns, Q.C., Mr. Druce, and Mr. Theodore Aston, for the plaintiff.

Mr. Rolt, Q.C., Mr. Little, and Mr. W. N. Lawson, for the defendant.—It is not questioned that where a patent has been once fairly established, and there is a clear case of infringement, the Court will, even before the hearing, grant an interlocutory injunction—*Davenport v. Jepson* (1 N. R. 173). But in this case the patentee has shifted the ground upon which he established his claim in the former litigations in which he was successful. Having formerly succeeded in sustaining a patent for a combination of two processes, he now seeks relief against the infringement of one only of those processes. [This part of the case was argued at length.]

The plaintiff knew of the defendant's proceedings in July or August, 1864, and wrote to him on the 9th of November, stating that he had ascertained that the defendant had been infringing the patent for a year and ten months previously. A correspondence ensued; and after that period of delay and amount of negotiation, it is out of the question for the plaintiff now to apply for a summary and speedy remedy.

The VICE-CHANCELLOR asked how it was possible, after that correspondence, to ask for an interlocutory order?

Mr. Druce said it was impossible for the plaintiff to proceed at once against every one who was infringing. The parties to the agreement for a combination were no less than eighty-nine ten days ago, and they might be more numerous now. Was the plaintiff at once to file eighty-nine bills against these persons? After the observations that had been made in *Foxwell v. Webster* (3 N. R. 103, 180) it was very difficult for a patentee to know how he was to proceed when his patent was being invaded by a great number of infringers at the same time.

SIR W. PAGE WOOD, V.C.—There is some difficulty, no doubt, but the case stands thus. The plaintiff selects his man in November of last year; he enters into correspondence, and tells him he will proceed immediately if he does not accede to the plaintiff's views. Then, though the parties may be as numerous as has been suggested, the difficulty is this—that if a patentee

lies by, allowing a person during that time to continue doing that which he says is an infringement of his patent, the observation arises which was made by the learned Judge in *Bridson v. Benecke*, that if the plaintiff had only proceeded as he said he would, the cause would now be at the hearing, instead of at the interlocutory stage; and, instead of having to consider questions of convenience or inconvenience, and the propriety or impropriety of proceeding on an interlocutory application, the Court would have the opportunity of forming a decided view of the case, and concluding the right.

I do not think the plaintiff is put in so great a difficulty as he alleges with reference to filing bills. That the plaintiff should desire to obtain an interlocutory injunction, I can easily understand, because, by taking this course, he has a very reasonable mode of compensating himself by way of royalty, but his object will be attained by having an account kept, always supposing the defendant to be honest. And as to the other difficulty which the plaintiff suggests, it seems to me there is a way of avoiding it.

Every patentee is subjected to difficulties of a very serious character in all the litigations he carries on; but it appears to me instead of filing many bills—and I see something of the kind was said in *Foxwell v. Webster* (1 N. R. 172)—he might take this course: After getting information of case after case of infringement, he might select that which he thought the best in order to try the question fairly, and proceed in that case to obtain his interlocutory injunction. He might write at the same time to all the others who were *in simili casu*, and say to them: "Are you willing to take this as a notice to you that the present case is to determine yours? Otherwise I shall proceed against you by way of interlocutory injunction; and if you will not object on the ground of delay, I do not mean to file bills against all of you at once. Am I to understand that you make no objection of that kind? If you do not object, I shall file a bill against only one of you." I do not think any Court could complain of a patentee for taking the course I am suggesting. That is one way in which the difficulty might be avoided.

On the other hand, it is very important to the practice of the Court, not to have it cited as authority hereafter, that the Court will grant such relief as is here asked, upon an application made in July, 1865, when it is informed that the plaintiff certainly, as early as in August, 1864, and, probably in July, 1864, knew what he knows now of the defendant's proceedings. Knowing everything in August, 1864, he enters into communication with the proposed defendant in November, 1864, and is told by him exactly what he is doing, and that within a fortnight after his applying to him. He does not take any further step until the month of January, when he writes, and receiving no answer, he again writes in April, and says, "I shall file a bill if you do not answer within a week," to which the solicitor replies that he will accept service. He then does not file a bill until July. In that state of things it would be contrary to all that this Court is in the habit of doing if I were to grant an interlocutory injunction.

It is solely upon that ground that I decline to make the order in this interlocutory stage. Of course the defendant must keep an account, and the costs will be costs in the cause.

WOOD, V.C., Jan. 13, Feb. 19, 1866.

PENN v. BIBBY.

L. R. 1 Eq. 548.

Patent—Practice—Particulars of Objections—Amendment.

PATENT. E.—*Particulars of objections filed by a defendant were ordered to be amended by the insertion of words specifying "the persons by whom, the places where, the dates at, and the manner in which," there had been*

the alleged user prior to the date of the plaintiff's patent. In complying with this order, the defendant was permitted, in his amended particulars, to preface his statement of the specific instances of alleged prior user with the words "amongst other instances," in order to give him an opportunity of applying for leave to re-amend by inserting any further instances of prior user which he might discover. Upon an application by defendant for leave to re-amend objections by inserting certain further specified instances which had come to his knowledge, he was ordered to pay the costs of the application, and the costs arising out of and consequent upon the re-amendment were reserved.

This was an adjourned summons. The suit was for the infringements of a patent; and the defendant had filed particulars of objections.

On the 17th of November, the defendant had been ordered, upon the application of the plaintiff, to file amended particulars stating "the names and addresses of the persons by whom, and the places where, and the dates at, and the manner in which," wood was alleged to have been used, prior to the date of the plaintiff's patent, in the construction of, &c. (following the words of the original particulars), and also stating "the names and addresses of the persons by whom, and the places where, and the dates at, and the manner in which," pieces of wood, prior to the date of such patent, were alleged to have been fixed, &c.

The defendant had accordingly filed other particulars, which, as far as is material, were as follows:—

"The alleged invention, the subject of the plaintiff's alleged patent, was not new at the date of such patent, inasmuch as wood had, prior to the date of such patent, been used in the construction of, &c., in the following, amongst other instances, namely, in the year 1851," &c.

"The alleged invention, &c., was not new, &c., inasmuch as pieces of wood had, prior to the date of such patent, been fixed, &c., in the following, amongst other instances, namely, &c.

The present application was on behalf of the plaintiff, that the defendant might be ordered to comply with the order of the 17th of November. Several objections were raised, the only one of general interest being to the insertion of the words "amongst other instances."

Mr. Theodore Aston, for the plaintiff, said that the insertion of these words nullified the particularity of the instances of the breaches which were specified.

Mr. E. E. Kay, for the defendant, justified the use of the words "amongst other instances," by reference to the report of *Curtis v. Platt* (8 L. T. 657).

SIR W. PAGE WOOD, V.C.—I think these words "amongst other instances" may be permitted to remain, in order to give the defendant the benefit of a general saving, and liberty to apply for leave to give particulars of other instances of prior user, if and when he may find them; but expressions like this are often introduced into particulars for no useful or legitimate purpose, and their insertion is not generally desirable, as they tend only to obscure the record, and to confuse the case when it comes before the judge and jury.

The other objections were allowed.

Mr. Aston asked for the costs of the application.

Mr. Kay asked that the costs might be costs in the cause as was ordered in *Curtis v. Platt*.

The VICE-CHANCELLOR.—The defendant has been ordered to do a certain thing, which he has failed to do effectually, and I must give the plaintiff the costs of this application.

Feb. 19.—The defendant now applied by summons (adjourned into Court this day) that he might be at liberty within a week to amend the amended particulars of his objections, by adding to the second paragraph thereof "and

also in the following instances, that is to say, &c." (specifying seven instances).

Mr. Kay, for the defendant, referred to the 41st section of the Patent Law Amendment Act, 15 & 16 Vict. c. 83.

[The VICE-CHANCELLOR observed that the application was not one which the Court would regard with favour, as it looked very much like an indirect mode of gaining time. If that had been desired, the defendant should have moved for leave to extend.]

The Court had permitted the words "amongst other instances" to remain for the express purpose of such an application as this. In *Renard v. Levinstein* (13 W. R. 229) leave was given to a defendant, even during the progress of the trial, and after the plaintiff's case had been concluded, to amend his particulars of objection by stating a prior publication of the invention, on the terms of his payment of the costs occasioned by the amendment.

Mr. Aston, for the plaintiff, opposed the application. *Renard v. Levinstein* was a question of prior publication by way of specification, involving no great additional expense, whereas here the instances of alleged prior user were taken at various detached spots throughout the United Kingdom. If in the view of the Court these instances of user should be necessary, the plaintiff could not oppose the application, but the plaintiff must have his costs of, and consequent upon, the application.

The VICE-CHANCELLOR said he thought he must grant leave to amend the particulars of objections by introducing the instances mentioned in the summons, and also three other instances which had been mentioned by *Mr. Kay* at the bar; but on the terms that the defendant pay the costs of the application; and any additional costs occasioned by the introduction of the instances now proposed to be introduced must be reserved specially.

LORD ROMILLY, M.R., March 15, 1866.

In re HILL POTTERY COMPANY.

L. R. 1 Eq. 649.

See, *Ex parte Milwood Colliery Co.*, 1876, 24 W. R. 898 (C. A.).

Company—Winding-up—Execution issued before Petition presented—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 85.

COMPANY. M.—After a petition has been presented for the winding-up of a company, the Court has jurisdiction under the 85th section of the Companies Act, 1862, to restrain the sale by the sheriff of property of the company, seized under a writ of fi. fa. before the presentation of the petition.

This was a motion under the 85th section of the Companies Act, 1862, on behalf of the Hill Pottery Company, Limited, a company formed and registered under that Act, and five of its directors, who, together with the company, had presented a petition for the winding-up of the company, for an injunction to restrain the Merchant Banking Company of London from taking or continuing any further or other proceedings under a judgment and execution obtained and issued by them against the Hill Pottery Company, and to restrain the banking company and the Sheriff of Staffordshire from selling any goods of the Hill Pottery Company, which had been seized under the execution, until further order.

On the 5th of March, 1866, the banking company obtained a judgment against the Hill Pottery Company for 3,052*l.*, upon which execution issued, and the goods were seized by the Sheriff on the 6th of March, and the sale

was advertised to take place on the 14th. The winding-up petition was presented on the 13th, and on the same day the petitioners obtained an *ex parte* injunction restraining the sale until the 16th, with leave to give notice of the present motion for the 15th.

It appeared from the affidavits of the manager of the works and others that the stock-in-trade, though worth from 10,000*l.* to 13,000*l.*, being for the most part in an unfinished state, was not likely at a forced sale to produce more than 2,000*l.* or 3,000*l.*, and that the works of the company would sell much better as a going concern. After the judgment and execution, one of the directors of the Hill Pottery Company had given the Merchant Banking Company an equitable mortgage of a leasehold house and a bill of sale of furniture, which he estimated to be worth 3,000*l.*, as a further security for the same debt.

On the 15th of March, before this motion was heard, the petitioners obtained an order for the appointment of a provisional official liquidator.

Mr. Baggallay, Q.C., and *Mr. Hemming*, in support of the motion.—The property of the company is amply sufficient to pay the judgment debt. The creditor will gain nothing by an immediate sale, and it will be ruinous to the company and the other creditors. It is, therefore, a case in which the Court will exercise the power given to it by the statute to prevent one creditor from exercising his rights so as to destroy the estate.

Mr. Selwyn, Q.C. (with him, *Mr. Eddis*), for the Banking Company.—The creditors having recovered judgment, and the execution having been perfected by seizure before the petition was presented, the Court will not, even if it can, prevent them from reaping the fruits of their diligence—*In re The Great Ship Company* (33 L. J. Ch. 245).

Mr. Birley, for the Sheriff.

LORD ROMILLY, M.R.—Will the execution creditors consent to give up the execution upon the Court declaring them entitled to the first charge on the property for the amount of their debts and costs?

Mr. Selwyn said that he was not instructed to consent.

LORD ROMILLY, M.R.—Then the order will be this. The Court having offered to give the execution creditors the first charge on the goods seized for the amount of the debt and costs, and they having refused to accept such offer, order injunction restraining the sale; the Sheriff to go out of possession; the provisional liquidator to pay the Sheriff's costs of this application. Order the provisional liquidator to sell the property the subject of the execution, the proceeds of the sale to be brought into Court and carried to a separate account, and not to be paid out without notice to the execution creditors. The execution creditors to have liberty to accept the offer of the Court before appealing, and in that case, but not otherwise, to have their costs of this application added to their security.

Mr. Selwyn subsequently stated that he was instructed to accept the terms offered by the Court, but asked that the sale might be ordered to be made within a time to be fixed by the order.

LORD ROMILLY, M.R.—I wish the property to be sold as speedily as possible, provided it is not a forced sale. You can apply for the conduct of the sale, if it does not take place with reasonable speed. I will make the declaration I mentioned, and the rest of the order will be by consent.

LORD ROMILLY, M.R., June 11, 12, 1866.

In re PATENT CARRIAGE COMPANY. GORE AND DURANT'S CASE.

L. R. 2 Eq. 349.

Distinguished, *In re* Brentwood Brick and Coal Co., [1877] E. R. A.; 46 L. J. Ch. 554; 4 Ch. D. 562; 36 L. T. 343; 25 W. R. 481 (C. A.).

Company—Contract—Payment in Shares—Vendor's Lien—Winding-up—Contributory.

COMPANY. M.—*Two persons agreed to sell certain property to a company for a price to be paid, part in fully paid-up shares, part in shares partly paid-up, and the remainder in cash, as and when the company should receive any money in respect of shares subscribed for over and above the first 1,000l.; and it was provided that if the shares and cash should not be paid within two years from the date of the agreement, the agreement should be void, and that any monies and shares paid thereunder should be retained as liquidated damages for breach of the agreement. The shares were issued to the vendors and their nominees, but the event on which the cash was to be paid never happened, and the company was wound up within two years from the date of the agreement:—Held, that the vendors must be placed on the list of contributories in respect of their shares; but that they were entitled to a lien on the property sold for the amount of cash which had not been paid.*

The Patent Carriage Company, Limited, was incorporated in March, 1864, The capital was divided into shares of 10l. each.

By articles of agreement, dated the 14th of April, 1864, and made between Messrs. Gore & Durant of the one part, and the company of the other part, the company agreed to purchase, and Gore & Durant to sell, all the interest of Gore & Durant in certain letters-patent therein mentioned (being for improvements in the construction of cabs and carriages), so far as related to the use of the invention in England, at the price of 20,000l.; and it was agreed that 13,500l., part thereof, should forthwith be paid to Gore & Durant in shares of the company, on 500 of which 10l. each should have been fully paid up, and on 1,700 of which 5l. each should have been paid; that the company should pay the balance of 6,500l. in cash as and when the company should receive any money from payments on shares subscribed in the capital of the company, after the first 1,000l. should have been paid in to the company's bankers, in the proportion of one-third of all such cash; and that when and so soon as 3,000l., part of the 6,500l., should have been paid, Gore and Durant should execute a proper assignment of the patents to the company. And it was also agreed that if the said sums of 6,500l. and 13,500l. worth of fully (*sic.*) paid-up shares should not be fully paid and satisfied within the space of twenty-four calendar months from the date thereof, then the articles of agreement, and the agreement for assignment therein contained, should be utterly void and of none effect, and all monies and shares so paid thereunder should be forfeited to and retained by Gore and Durant, by way of liquidated damages for the breach of the agreement by the company.

The 500 fully paid-up shares were issued to Gore and Durant: the remaining 1,700 shares were issued partly to them, and partly to their nominees: and they and their nominees were duly placed on the register of shareholders in respect of the shares. No part of the 6,500l. cash was paid, in consequence of the company never having received 1,000l. on shares subscribed for. On the 1st of July, 1865, an order was made for winding-up the company.

Under these circumstances Gore & Durant were desirous to return the shares allotted to them and their nominees, and to retain their patents, which had never been assigned; the official liquidator, on the other hand, desired to

place them on the list of contributories, in respect of the shares standing in their names. The matters in dispute were now brought before the court, upon a statement of facts agreed to by all parties. No question was raised as to the shares standing in the names of the nominees of Gore & Durant.

Mr. Jessel, Q.C., and Mr. Cottrell, for the official liquidator.—Messrs. Gore & Durant took the shares as part of the price paid to them for the patents, they have been put on the register of shareholders, and they cannot now repudiate the contract.

Mr. Southgate, Q.C., for Durant, and *Mr. Baggallay, Q.C.*, for Gore.—The consideration for which Messrs. Durant & Gore agreed to sell their invention has failed: they have never parted with their property at law, and they are entitled to retain it. The contract has never been completed, and it is impossible to make them contributories in respect of the shares: *Coleman's Case* (1 D. J. & S. 495).

Mr. Jessel, in reply.—To relieve these gentlemen from being contributories would be to rescind the contract, which the court has no power to do. *Coleman's Case* is distinguishable: there Coleman insisted on having his name removed from the register before the winding-up order was made.

June 12.—LORD ROMILLY, M.R.—In this case I do not think it is possible to comply with the request made by Messrs. Gore & Durant that I should relieve them from being placed on the list of contributories. In fact they have entered into a valid agreement to sell certain property for 6,500*l.* in money, 500 fully paid-up shares, and 1,700 shares on which 5*l.* has been paid up. Now all has come to a close: but I cannot set aside the contract; neither can I give one side all the benefit of it while I give none to the other. I must therefore declare these gentlemen to be contributories; but in respect of the 6,500*l.* they are entitled to a first charge on the property sold to the company; for though that sum was not to be paid except on an event which cannot now happen, I must carry out the contract as nearly as I can, and that is by giving them a lien for the unpaid purchase money on the property sold by them to the company.

Wood, V.C., June 20, 1866.

BOVILL v. SMITH.

L. R. 2 Eq. 459.

See, *Crossley v. Tomey*, 1876, 2 Ch. D. 533; 34 L. T. 476 (V.C.).

Pleading—Exceptions to Answer—Discovery.

PATENT. E.—*In a suit to restrain an infringement of a patent which is contested on the ground of anticipation by prior user, the plaintiff is not entitled to discovery from the defendant in answer to a general interrogatory as to the instances of prior user on which he relies.*

Exceptions to answer. The bill was one of several which had been filed for the purpose of restraining alleged infringements of the plaintiff's patent for an improved method of grinding corn, obtained in 1849, and extended for five years by the Privy Council in 1863, in the face of sixteen caveats, which were filed by a combination of millers, who appeared and resisted, but without success, Mr. Bovill's application for an extension of his patent.

The bill stated a variety of proceedings, both at law and equity, in which the plaintiff had obtained perpetual injunctions and recovered damages against persons who had infringed his patent, notwithstanding repeated attempts to invalidate the patent on the ground of prior user. The bill charged that the

defences as to prior user, &c., relied on by the defendant, were the same as those which had been relied on in some of the previous cases in which the plaintiff's patent had been established, and that the same would appear if the defendant would discover the place or places, and the manner in which he alleged the plaintiff's invention was tried within this realm before the date of the patent.

Interrogatories had been filed, in which the defendant was asked :

" (1.) Who does the defendant allege to have been the true and first inventor."

" (11.) Does not the defendant allege that the plaintiff's invention was publicly used within this realm before the date of the plaintiff's patent? Set forth particularly when, and in what place or places, and in what manner, does the defendant allege that the plaintiff's invention, or any or what part thereof, was publicly used within this realm before the date of the plaintiff's patent."

In answer to interrogatory 1, the defendant stated his belief that the question who was the first and true inventor was now in course of being inquired into by his solicitor, and the facts in that behalf had not yet been fully ascertained; " but such facts, so far as the same were known to me, or so far as I have the means of ascertaining the same, relate exclusively to my defence to plaintiff's bill; and I am advised that the plaintiff is not entitled to any discovery from me in this my answer respecting the same, and under the circumstances herein stated I decline to set forth whom I do allege to have been the first and true inventor of the said alleged invention."

In answer to interrogatory 11, the defendant stated that he did allege that the plaintiff's alleged invention was publicly used within this realm before the date of the patent; that the particulars of such prior user were being inquired into by his solicitor, and, as in his answer to the first interrogatory, defendant declined, as matter relating exclusively to his defence, to set forth when, and in what place or places, he alleged prior user.

To this answer the plaintiff excepted for insufficiency.

Mr. Druce, in support of the exceptions, contended that the plaintiff ought not to be compelled to try his right *ab initio* against every separate infringer, and that he was entitled to discover whether the defences set up by the defendant in this suit were those which the plaintiff had already succeeded in disproving, as such discovery, when obtained, would in effect support his (plaintiff's) case.

He cited *Bovill v. Goodier* (L. R. 1 Eq. 35), *Davenport v. Goldberg* (2 H. & M. 282), *Attorney-General v. Corporation of London* (19 L. J. Ch. 314).

Mr. W. M. James, Q.C., and Mr. Little, for the defendant, were not called upon.

SIR W. PAGE WOOD, V.C., overruled the exceptions, observing that the plaintiff was not entitled to inquire generally into the way in which the defendant shaped his case in order to find out whether some of the persons alleged by him to have used the process before the date of the patent, were the persons against whom the plaintiff had succeeded in other suits, though he might have asked if his process was the same as that used by A. B., or any one person specifically named, who had been a defendant in some former suit.

Wood, V.C., June 21, 1886.

DIXON v. FRASER.

L. R. 2 Eq. 497.

Exception—Specific Performance—Discovery—Account of Intermediate Dealings.

DISCOVERY. B.—A bill for specific performance of a contract to sell to the plaintiff certain premises and machinery, alleged that defendants, the vendors, had since the date of the contract let the premises to third parties, and the defendants were required by the interrogatories to set out the names of such persons, the particulars of the selling, and an account of the rents of the premises, and also to state whether the plant was not being deteriorated by the user thereof by the defendants' tenants. The defendants having refused to give the discovery sought by the interrogatory:—Held, on exception to the answer for insufficiency, that the plaintiff was entitled to know to whom the property had been let, and for what term.

Exception to answer.

Bill for specific performance of a contract by defendants to sell an oil mill, with the plant and machinery, to the plaintiff. The memorandum of agreement (dated the 14th of March, 1865), fixed the 13th of May as the time for completion of the purchase, but provided that the purchaser should be at liberty to enter upon the premises for all purposes of use, except alteration and removing of the plant and machinery, immediately after signing the contract; notwithstanding this proviso the plaintiff had been unable to obtain possession, and the contract, from various difficulties that had arisen, still remained uncompleted.

The bill, which was filed for specific performance of the agreement, alleged that the defendants had never furnished the plaintiff with a complete abstract, or made out their title to the premises, and it was alleged by way of amendment, that the defendants had let the premises to other persons at 40l. a month, and that they ought to account to the plaintiff for the rents and profits thereof at that rate, at least from the 14th of March, 1865; and that the plant was daily being deteriorated and worn out by the improper user thereof by the tenants of the defendants.

The amended bill, in addition to relief by specific performance, prayed an account of rents and profits of the premises from the 14th of March, 1865.

The third interrogatory to the amended bill asked, whether the defendants had not let the premises to certain persons, and allowed them to use the machinery? and it called upon the defendants to set forth the particulars of such letting, and an account of all moneys received by them, or on their behalf, in respect of the rents, issues, or profits of the said premises, or any part thereof, since the 14th of March, 1865. The interrogatory also asked, whether the plant was not daily being deteriorated in value and worn out by the user by the tenants of the defendants.

The defendants answered this interrogatory as follows:—"We have not entered into any other contract or engagement which will have the effect of preventing us from delivering up possession of the premises to the plaintiff, if this honourable Court shall decide that he is entitled thereto; and moreover, before we entered into any contract or engagement whatever affecting the premises, the plaintiff had registered this suit as a *lis pendens*, so that no contract which we could enter into could in any manner affect his rights in relation thereto; and we submit that the plaintiff is not entitled to any further answer to the third interrogatory to the amended bill, and we respectfully decline to gratify his curiosity by setting out the particulars inquired after by that interrogatory."

To this answer the plaintiff excepted for insufficiency.

Mr. Davey, in support of the exception, contended that the plaintiff was entitled to discovery upon every part of his case that was properly pleaded, and that it was essential for him to know who was in possession of the premises, and on what terms. The bill and answer should form a record upon which a complete decree could be made, and he ought to get from the defendants such an answer as would entitle him (assuming him to establish his right to specific performance and an account of intermediate rents) to take, if he preferred it, an immediate decree for payment of the sum admitted by the answer, without taking the account: *Rowe v. Teed* (15 Ves. 376, 378); *Robson v. Flight* (3 N. R. 183).

Mr. A. E. Miller, for the defendants.—The interrogatory is a mere fishing interrogatory, and has nothing whatever to do with the question at issue between the parties, which is, whether or not the contract has been rescinded. That is the sole question for trial, and it is an elementary principle that the "right of a plaintiff to discovery is in all cases confined to the questions in the cause which, according to the pleadings and practice of the Courts, are about to come on for trial" (Wigram on Discovery, Prop. i.).

[The VICE CHANCELLOR.—Assuming that the plaintiff establishes his right to specific performance, the decree will go on to direct an account of intermediate rents.]

That may be, but the information required is on a merely subordinate point, and is unnecessary for the purpose of the hearing; and following *Swabey v. Sutton* (1 H. & M. 514), and *Lett v. Parry* (1 H. & M. 517), even though the plaintiff may shew a *prima facie* right to the account of intermediate rents, the Court will not compel discovery when the result of the discovery cannot affect the question to be decided at the hearing. In the cases cited on the other side, the plaintiff was in any view of the case entitled to some interest in the property. [He also cited *Daw v. Ely* (2 H. & M. 725).]

SIR W. PAGE WOOD, V.C.—The exception must be allowed. The allegation of a contract between the parties is not denied, and I must assume, as against the defendants, the possibility of the contract being established. It then becomes a very grave question for the purchaser, who may suffer from any damage resulting from a deterioration of the plant, to know who the persons in possession and using the machinery and plant are, and what is the nature and extent of their interest.

It may be a question whether the plaintiff may not prefer to introduce them as parties to the suit by amendment, and therefore he is entitled to know who they are, the extent and duration of their interests, and generally, what sort of claims will be set up against him by them. As to an account of rents, some difficulty, no doubt, arises from a conflict of decisions as to the right to an account of this description, which must require time and trouble, and whether it may not be better that any account of intermediate rents should stand over until the hearing.

There is great force, however, in the observations of Lord Eldon, in *Rowe v. Teed* (15 Ves. 378) and of the Master of the Rolls in *Robson v. Flight* (3 N. R. 183). I hold that the simple question, to whom the property has been let and for what term, is one that ought to be answered, and the matter of the rents is really so small that I can make no distinction, but allow the whole of the exception; and as it seems to be now settled that unless some direction be given the simple allowance does not carry costs, I allow it with costs.

LORD ROMILLY, M.R., June 21, 22, 1866.

DISNEY v. CROSSE. EYRE v. PARKER.

L. R. 2 Eq. 592.

Will—Appointment—Demonstrative Legacy.

WILL. I.—A testator being entitled to real and personal estate absolutely, and having a power of appointment over certain settled personal estate in favour of his children, gave by his will certain pecuniary legacies to the children, and then appointed the settled property subject and charged with the legacies to his children. He also bequeathed and devised his residuary personal and his real estate, subject to the payment of the legacies given by his will:—Held, that the legacies given to the children were in the nature of demonstrative legacies, and that the settled property was primarily applicable for the payment of them.

By virtue of indentures, dated respectively the 22nd of April, 1812, and the 26th of May, 1817, certain personal estate was settled upon trusts for the benefit of George Parker, and Isabella his wife, during their respective lives; and after the decease of the survivor of them, for such of their children as they should jointly by deed appoint, or in default of such appointment as the survivor should by deed or will appoint; and in default of any such appointment, for their children (if more than one) in equal shares, with the usual provision as to bringing appointed shares into hotch-pot.

Isabella Parker survived her husband, and at the time of her death was absolutely entitled to considerable real and personal estate. By her will, dated the 9th of June, 1862, after giving certain specific and pecuniary legacies, and an annuity of 32*l.*, she bequeathed the sum of 5,600*l.* 3 per cent. Consolidated Bank Annuities to trustees upon certain trusts; and she gave the following legacies, that is to say—to her son, John Oxley Parker, 2,000*l.*; to her daughter, Isabella Catherine Eyre, 2,000*l.*; to her daughter, Elizabeth Ann Duff, 2,000*l.*; to her daughter, Mary Elizabeth Fraser, 2,000*l.*; to her daughter, Sarah Ann Pilgrim, 2,000*l.*; to her daughter, Frances Catherine Parker, 1,000*l.*; and to her grandson, James Houson Parker, 2,000*l.* And after directing the legacies of the daughters who should have husbands living at her death to be settled, and also after exercising a general power of appointment with respect to the proceeds of the sale of certain real estate contained in the indenture of the 26th of May, 1817, the testatrix bequeathed as follows:—

“ In exercise of the powers for this purpose given to me by the settlement made on my marriage with my said late husband, dated on or about the 22nd day of April, 1812, and of every other power authorizing or enabling me in this behalf, I appoint and give all the personal estate, monies, and premises thereby settled or agreed to be settled, and the stocks, funds, and securities upon which the same are or may be invested (subject and charged with the payment of the aforesaid pecuniary legacies to my said son and daughters), unto my said grandson, James Houson Parker, absolutely; but in case he shall die under the age of twenty-one years, I appoint and give all the said last-mentioned personal estate, monies, and premises, and the stocks, funds, and securities, in or upon which the same are or may be invested, subject as aforesaid, unto my said son-in-law, Henry Richard Eyre, absolutely. And subject to the payment of all the aforesaid legacies, and the said annuity, and my debts, funeral and testamentary expenses, I give all the residue of the personal estate which I may be entitled to at my decease, or over which I may have any disposing power, to my said grandson, James Houson Parker, absolutely; but in case he shall die under the age of twenty-one years (subject as last aforesaid), I give all the residue of my personal estate to my said son-in-law, Henry Richard Eyre, absolutely; and subject also to the said

legacies, annuity, debts and expenses, and in exercise of all powers of appointment vested in or otherwise enabling me, I appoint and give Bellman's Farm, in Essex, and all the real estate to which I shall be entitled at my decease, or over which I have any disposing power, unto my said grandson, James Houson Parker, his heirs and assigns, absolutely," with a gift over of the last-mentioned property to Henry Richard Eyre, in event of James Houson Parker dying under twenty-one.

The testatrix had ten children, all of whom attained the age of twenty-one.

Disney v. Crosse was a suit for the administration of the trusts of the indentures of the 22nd of April, 1812, and the 26th of May, 1817. *Eyre v. Parker* was a suit for the administration of the real and personal estate of Mrs. Parker. Both now came on together for further consideration. The principal question discussed was, what was the primary fund for the payment of the legacies given by the will of Mrs. Parker, to her son, John Oxley Parker, and her daughters therein named.

Mr. Kekewich, for the plaintiffs in *Disney v. Crosse*.

Mr. Cotton, for Henry Richard Eyre, the plaintiff in *Eyre v. Parker*, submitted that the primary fund for payment of the legacies was the residuary personal estate of the testatrix; next to that, Bellman's Farm, and her real estate: and that the settled property ought only to be had recourse to in case of a deficiency; for the legacies were not to be considered as appointments of that property. If this view of the case were adopted, those who claimed the settled property, in default of appointment, would be compelled to elect whether they would take under the will, or under the settlement.

Mr. Cole, Q.C., and *Mr. Faber, Mr. Jessel, Q.C.*, and *Mr. J. T. Humphry, Mr. Selwyn, Q.C.*, and *Mr. B. B. Rogers, Mr. Baggallay, Q.C.*, and *Mr. Shebbeare, Mr. Montague Cookson, and Mr. Wickens*, for the children of Mrs. Parker, and persons claiming under them, contended that the legacies were not appointments of the settled property; but merely, as the testatrix herself termed them, "pecuniary legacies," and as such to be paid out of the fund ordinarily applicable for the payment of legacies. It was the rule of the Court, established in *Bootle v. Blundell* (1 Mer. 193), that the general personal estate was the primary fund for such payment, unless there were sufficient indication in the will that the testator intended not merely to charge other portions of his estate with the payment, but to exonerate the general personal estate. That rule was rigidly adhered to in all cases except in those of which *Roberts v. Walker* (1 Russ. & My. 752), was the type—where a testator directed real estate to be sold and then blended the proceeds of the sale with the general personal estate. If the real estate was not directed to be sold, the ordinary rule was followed: *Boughton v. Boughton* (1 H.L. C. 406), *Tench v. Cheese* (6 D. M. & G. 453), *Simmons v. Rose* (6 D. M. & G. 411).

The question of election was also discussed at some length; but the view of the case taken by the Court renders it unnecessary to report the arguments.

Mr. Southgate, Q.C., *Mr. John Pearson*, and *Mr. Marwood Tucker*, for John Houson Parker.—Although the testatrix uses the word legacies in reference to these gifts, they are not in strictness legacies at all—they are appointments of the settled fund. If there were no residuary estate, it could not be doubted that the settled fund would be applicable in payment of them. Again, if there had been no gift of the residue of the settled fund to J. H. Parker, the person entitled in default of payment could not have taken the whole fund without paying these legacies. *Boughton v. Boughton* (1 H.L. C. 406) does not apply, as it relates simply to the question whether real or personal estate is primarily applicable to pay a legacy. We contend that these are in the nature of demonstrative legacies, payable primarily out of the settled property, as being the fund indicated by the testatrix for the payment of them.

Mr. Cotton, in reply.

LORD ROMILLY.—I think that *Boughton v. Boughton* and *Roberts v. Walker*, and that class of cases, have no application. I do not propose to interfere with the ordinary course of administration of assets; but I hold that these legacies are to be considered as demonstrative legacies, for the payment of which a particular fund is appointed. The testatrix, who has the power of appointing a particular fund to her children, sons and daughters, gives them legacies. Assume that she goes on to say, I direct those legacies to be paid out of the fund I have the power of appointing. Then the legacies would be clearly demonstrative, that is to say, they would be paid out of that fund in the first instance, and if that fund was not sufficient, they would be paid out of the residue. Upon consideration of the matter I have come to the conclusion that unless this is an appointment of the funds to the extent of these legacies to these persons, there is no appointment at all. If there is an appointment, then the observations which I have already made apply, that there is a particular fund set apart for the payment of these legacies, which can only be applied in payment of them. But if it is not an appointment of the fund, what is the meaning of these words—"In exercise of the power for this purpose given to me by the settlement made on my marriage, I appoint and give all the estate subject and charged with the aforesaid pecuniary legacies to my sons and daughters, to James Houson Parker." Supposing James Houson Parker had been an object of the power, he would have taken the fund, and that would have been a good appointment. But if the will stopped there could it be reasonably contended that there was not an appointment of that fund by virtue of the power contained in the settlement? She appoints the whole of the fund to James Houson Parker, subject to the payment of the aforesaid legacies to her sons and daughters: the sons and daughters are objects of the power, and can anybody correctly say this is not an appointment to them? The fact of her appointing the whole of the residue of the fund to a person who is not an object of the power, can have no effect upon the construction of the words, which must be exactly the same whether the testatrix has or has not made an error in supposing her grandson an object of the power. If the father had been living, and it had been an appointment to the father in lieu of the son, the construction would have been exactly the same. If then it is an appointment of the fund, how much is it an appointment of? It cannot be an appointment of so much of the legacies as the residue is not able to pay. It is an appointment of the whole amount of the legacies, which no doubt are pecuniary legacies; but they are pecuniary legacies which the testatrix directs to be paid in the first instance out of a particular fund, which may be applied to the payment of those particular legacies, and cannot be applied to the payment of any other legacies. She says subject to the payment of the aforesaid pecuniary legacies to my sons and daughters. She had given many more legacies previously to persons who were not objects of the power; and she does not say subject to those legacies, but only subject to the legacies given to her sons and daughters, who are the objects of the power. I am of opinion, therefore, that what I propose to do, will not make any new rule with respect to the distribution of assets. I merely say that a particular fund shall be first applied in payment of certain legacies. I am of opinion that, though it is true that the residue is charged with those legacies if the settlement fund is not able to pay them, yet that the settlement fund in the first instance is liable to pay all those legacies that can be properly paid out of it by virtue of the appointment of that fund.

WOOD, V.C., July 28, 1866.

LLOYD v. LLOYD.

L. R. 2 Eq. 722.

See, *Trappes v. Meredith*, [1870] E. R. A.; 39 L. J. Ch. 366; L. R. 9 Eq. 229; 21 L. T. 782; 18 W. R. 1017 (V.C.). Followed, *In re Parnham's Trusts*, [1877] E. R. A.; 46 L. J. Ch. 80; L. R. 13 Eq. 413 (M.R.). Applied, *Ancona v. Waddell*, [1879] E. R. A.; 48 L. J. Ch. 115; 10 Ch. D. 157; 40 L. T. 31; 27 W. R. 186 (V.C.). Distinguished, *Robertson v. Richardson*, [1886] E. R. A.; 55 L. J. Ch. 275; 30 Ch. D. 623; 33 W. R. 897 (Ch. D.). Referred to, *In re Broughton*, 1887, 57 L. T. 8 (Ch. D.). Distinguished, *In re Metcalfe*, [1891] E. R. A.; 60 L. J. Ch. 647; [1891] 3 Ch. 1; 65 L. T. 426 (C. A.). See, *In re Loftus-Otway*, [1895] E. R. A.; 64 L. J. Ch. 529; 72 L. T. 656; 43 W. R. 501 (Ch. D.).

Forfeiture—Bankruptcy—Annulment.

CONDITION. D.—*Gift by will of a share in residuary real and personal estate to L. for life; but if he should "by any act or default, or by operation of law, alien, charge, or dispose of the life interest, or in any manner anticipate the same to or in favour of any other person or persons," the gift to be void, and the share to go to the children of L. At the death of the testatrix L. was a bankrupt, having been adjudicated a few days before on his own petition. Assignees were appointed; but no steps were taken to realize the assets, and within a twelve-month the bankruptcy was, by an act of the creditors under their statutory powers, annulled:—Held, that a forfeiture of the life estate, within the meaning of the clause in the will, had not taken place.*

This was an adjourned summons.

Mary Ann Lloyd, widow, by her will, dated in 1865, bequeathed all the residue of her real estate, and all her residuary personalty, to trustees, upon trust as to four-fifths to pay and divide the same equally between four of her sons therein named, their executors or administrators. She directed her trustees to hold the remaining fifth upon trust to invest and pay the interest, dividends, and annual proceeds, to her son Oliver Wimburn Lloyd for his life. She then directed as follows:—"Provided nevertheless that if my said son shall by any act or default, or by operation of law, alien, charge, or dispose of the same life interest, or in any manner anticipate the same to or in favour of any other person or persons, then the trust lastly hereinbefore contained in favour of my said son shall thenceforth be absolutely void, as if my said son were actually dead."

In the event of the gift becoming void, the share was given to the children of the said O. W. Lloyd equally.

The testatrix died on the 25th of July, 1865. At that date O. W. Lloyd was a bankrupt, having been adjudicated on the 11th of July preceding on his own petition. An official and a creditors' assignee had been appointed, but no steps were taken to realize any part of the estate, and on the 24th of April, 1866, with the consent of the creditors under the 187th section of the Bankruptcy Act, 1861, the bankruptcy was annulled.

The bill was filed by the trustees, for administration, and the Chief Clerk having, by a special certificate, found that, "except as aforesaid," the said O. W. Lloyd had not by any act aliened, charged, or disposed of his life interest, O. W. Lloyd sought to have the certificate varied by striking out the above words.

Mr. G. M. Giffard, Q.C., and Mr. Nalder, for O. W. Lloyd.—In the events that have happened O. W. Lloyd has not "aliened, charged, or disposed of," his life interest within the intent and meaning of the will: *Smallcombe v. Olivier* (13 M. & W. 77); *White v. Chitty* (L. R. 1 Eq. 372).

Mr. F. H. Lascelles, for the trustees.

Mr. Daniel, Q.C., and Mr. Rasch, for the children.—One of the events contemplated by the testatrix has taken place, and the gift of the life interest is void.

The case is distinguishable from *White v. Chitty* (L. R. 1 Eq. 372). O. W. Lloyd was adjudicated on his own petition: he had consequently aliened by his own act. This is not an application by assignees in bankruptcy, and hence the argument does not apply, that a forfeiture of the gift will send the property in a channel other than that which the testatrix intended. In this instance a forfeiture would not defeat the testatrix's intention. In *White v. Chitty*, no assets could be realized, because, before the arrival of the quarter-day, and before any rents were receivable, the bankruptcy was annulled. That was not the case here.

[They referred to *Dorsett v. Dorsett* (30 Beav. 256).]

SIR W. PAGE WOOD, V.C.—The true principle of construction of limitations of this kind in wills is, to see whether or not the actual event has occurred which the testator contemplated as that, upon the happening of which his property was to go over. Here the words are—"If my said son shall, by any act or default, or by operation of law, alien, charge, or dispose of the same life interest, or in any manner anticipate the same to or in favour of any other person or persons." Here the legatee, by his own act, has done the thing which caused an alienation. He himself petitioned for the adjudication under which he was made bankrupt. Then, under the 187th section of the Bankruptcy Act, 1861, the creditors agreed to an arrangement, and the whole proceeding was annulled. The question is, whether such an alienation of his interest can be considered to have taken effect, as to divest the legacy according to the true intention of the testatrix.

The reason why, in some cases to which I have been referred, the Court has rather strained the language, so as to occasion forfeiture, has been to prevent the property passing into hands other than those which the testator intended should receive it. In like manner, if the circumstances of the case admit, the Court will endeavour to interpret the language in favour of the legatee, for whom the testator has intended to make as extended a provision as he can.

The only doubt I have felt in this case has been, whether a dealing by third parties, after adjudication, can alter the terms imposed by the will, or vary the rights of the person who is the object of the gift over. On the whole I am inclined to look upon the annulment in the light in which it was viewed by the Court of Exchequer, in the case of *Smallcombe v. Olivier* (13 M. & W. 77), and consider, not that it relates back to the adjudication and annuls everything that has been done in the interval, but still that the whole proceeding may be looked upon as an adjudication followed by an annulment, which, though it operates only from the date of such annulment, yet was in time to intercept the property before it passed into other hands than those of the legatee.

The question being whether or not the legatee has, by any act or default, or by operation of law, aliened, charged, or disposed of his life interest, I find that, although there was an act of the bankrupt which *prima facie* had that effect, yet that no one has interfered to realize the property, and that the bankruptcy has been intercepted by annulment of the adjudication.

I must, therefore, hold that the income of the legatee has not been forfeited.

Wood, V.C., July 19, 1866.

WILLIAMS v. BAILY.

L. R. 2 Eq. 731.

Explained, *Powell v. Powell*, [1874] E. R. A.; 43 L. J. P. 9; L. R. 3 P. & D. 186; 29 L. T. 466; 22 W. R. 62 (Mat.). Referred to, *Gandy v. Gandy*, 1882, 7 P.D. 77 (P.D. & A.): reversed, [1882] E. R. A.; 51 L. J. P. 41; 7 P.D. 168; 46 L. T. 607; 30 W. R. 673 (C. A.); *Cahill v. Cahill*, 1883, 8 App. Cas. 420; 49 L. T. 605; 31 W. R. 861 (H.L. (Ir.)); *Greenhill v. North British & Mercantile Insurance Co.*, [1893] E. R. A.; 62 L. J. Ch. 918; [1893] 3 Ch. 474; 69 L. T. 526; 42 W. R. 91 (Ch. D.); *In re Hodson's Settlement*, [1894] E. R. A.; 63 L. J. Ch. 609; [1894] 2 Ch. 421; 71 L. T. 77; 42 W. R. 531 (Ch. D.).

Husband and Wife—Separation Deed—Proceedings in Divorce Court—Alimony—Injunction.

HUSBAND AND WIFE. B.—*In a separation deed the husband covenanted with trustees to allow his wife 50l. a-year for her support; he being indemnified against all debts and liabilities on her account, and it being agreed on her behalf that she would not in any way endeavour to compel the husband again to live with her, or to allow her "any further, or greater, or other support, maintenance, or alimony," than the annuity of 50l.:—Held, that in the absence of any act shewing an unqualified acceptance by the wife of the provisions of the separation deed, or of any attempt to enforce it against her husband, the Court would not, upon interlocutory motion, restrain her from proceeding in the Divorce Court to obtain an allowance for alimony, as incident to her petition for a judicial separation on the ground of cruelty, but the Court put her under an undertaking to deal with the alimony as this Court should direct.*

Motion on behalf of the plaintiff for an injunction to restrain the prosecution of a suit for judicial separation commenced against the plaintiff in the Divorce Court, and to restrain any other proceedings in that Court for compelling the plaintiff to allow the defendant, his wife, any further allowance for her maintenance or alimony than the annual sum of 50l., pursuant to the provisions of a separation deed between himself and his wife.

The plaintiff and his wife were married in May, 1857, but differences having arisen, a separation deed was, in 1865, executed between them at the instance of the wife (as the bill alleged). By this deed, which was made between the plaintiff of the first part, his wife of the second part, and two trustees (also defendants in this suit) of the third part, the plaintiff covenanted that it should be lawful for his wife, notwithstanding their marriage, to live separate and apart from him, and that he would not endeavour to compel her to return to cohabitation by any suit or other proceedings, and would not interfere with her in any way. Mrs. Williams was to take for her own separate and absolute use, and notwithstanding her coverture, all such jewels, clothes, linen, wearing apparel, ornaments, articles, furniture, and things whatsoever as then belonged, or were reputed to belong to her, or which she should at any time or times thereafter acquire.

Mr. Williams also covenanted with the trustees to pay Mrs. Williams through their hands, an annuity of 50l. towards her maintenance and support, on condition that he should be indemnified against all debts and liabilities on her behalf. It was also agreed, on behalf of Mrs. Williams, that she would not take any proceedings to compel her husband to cohabit or live with her, and that she would not "require, or by any means whatsoever endeavour to compel, the said J. E. Williams (the plaintiff), to allow her any further, or greater, or other support, maintenance, or alimony, than the said clear annuity or yearly sum of 50l."

The bill alleged that the plaintiff had in all respects performed his part of the arrangement, and paid her the first quarterly payment of the annuity, which accrued due in the March of 1865 following the separation; but that, notwithstanding this, Mrs. Williams had, on the 9th of May, 1866, presented a petition in the Divorce Court for judicial separation on the ground of cruelty. The plaintiff, in his answer to the petition for a judicial separation, denied the charges of cruelty, and insisted that the separation deed was a bar to the proceedings. This portion of the answer, however, was struck out by order of the Judge Ordinary.

On the 29th of May, Mrs. Williams presented a petition in the Divorce Court for alimony *pendente lite*, so as to obtain an allowance greater than the 50*l.* a year stipulated by the separation deed, and the Judge Ordinary, on the 19th of June, decided that, notwithstanding the separation deed, Mr. Williams must give particulars of his income, so that the Court might be in a position to award alimony *pendente lite*.

Under these circumstances the present bill was filed against Mrs. Williams, and the trustees of the separation deed, for the purpose of restraining the proceedings in the Divorce Court.

The case made by the affidavits, in opposition to the present motion, was, that Mrs. Williams was compelled, from his ill usage and personal violence, to leave her husband's house and go home to her father, and that, when a separation deed was agreed upon, she had consented to take 50*l.* a year for her maintenance, under the impression, and acting upon advice, that she could not legally obtain anything more, and that if she did not accept that sum she would have nothing, and must starve. It was also alleged that Mr. Williams, who was an artist, had an income of 1,000*l.* a year, and lived in a house in Regent's Park, "splendidly furnished," and kept a butler and several other servants. In an affidavit made in reply, Mr. Williams denied the allegations as to personal violence, and gave the amount of his average income at less than one-half the sum mentioned by Mrs. Williams. It was stated in the course of the argument, that the usual amount allowed by the Divorce Court for alimony *pendente lite*, was one-fifth of the husband's income.

Mr. Rolt, Q.C., and Mr. T. A. Roberts, in support of the motion, contended, that separation deeds, whatever doubts might have been thrown upon them by the earlier authorities, were now recognised as perfectly valid and mutually binding upon both husband and wife, who was put into the position of a *feme sole*, and, therefore, fully competent to bind herself by an agreement of this kind. It was alleged by the bill, and not disputed, that the husband had performed his part of the arrangement, and, in the absence of any attempt to set aside the deed, the wife, who had accepted the furniture and other chattels, and payment of the annuity, was equally bound by it, and could not be allowed, after receiving the benefits given to her by the deed, to turn round and repudiate the obligations by suing for this additional allowance in the shape of alimony, in the face of her own agreement to the contrary: *Savage v. Foster* (9 Mod. 35); *Hill v. Turner* ((1 Atk. 515); *Hunt v. Hunt* (31 L. J. Ch. 161); *Wilton v. Hill* (25 L. J. Ch. 156); *Wilson v. Wilson* (14 Sim. 405; 1 H.L. C. 538; 5 H.L. C. 40); *Nedby v. Nedby* (21 L. J. Ch. 446).

The VICE-CHANCELLOR.—There is no covenant in the separation deed that she will not sue for a judicial separation, so that the only question before me is, as to this application for alimony *pendente lite*.

Mr. Willcock, Q.C. (with whom was Mr. Graham Hastings), on behalf of the trustees of the deed of settlement and Mrs. Williams, contended that she had been induced, without proper advice and assistance, and under pressure, to accept this pittance of 50*l.* a year (which, considering her husband's position and means, was an utterly inadequate allowance), under the impression that if she did not take it she would get nothing at all. There had been no such acceptance by Mrs. Williams personally, whatever might have been the case

on the part of her trustees, as to preclude her from applying, as incident to her petition for a judicial separation, for an increased allowance by way of alimony *pendente lite*. But in any case, the proceedings for alimony in the Divorce Court ought not to be interfered with, as the husband's means would be there inquired into, so as to obtain a basis for affording her a just and reasonable allowance.

He referred to *Boone v. Boone* (1756), mentioned by Lord Romilly in *Hunt v. Hunt* (31 L. J. Ch. 169).

Mr. Roberts, in reply.

SIR W. PAGE WOOD, V.C.—There can be no doubt that deeds of this description are perfectly valid, nor can there be any doubt that they can be enforced against the wife, who is not entitled to “approve and reprobate,” or, in other words, to accept the benefits and repudiate the obligations. I have myself gone further perhaps than had been done in any previous case in *Barrow v. Barrow* (4 K. & J. 409), where I bound the real estate of a married woman, on the ground that she was competent to elect, so as to affect her interest in real property, without a deed acknowledged for that purpose, and that having elected she must be held to her election.

I may also refer to *Bateman v. Ross* (1 Dow, 235), as an authority that a married woman, being in litigation and at arm's length with her husband, can be bound by her own agreement to submit the matters in dispute between them to arbitration.

Here I should have no hesitation in holding the defendant, Mrs. Williams, bound to the deed, and to all its provisions if she had sought to enforce it against her husband, or unequivocally asserted her rights under it. But has there been anything of that kind made out? In the case of a simple separation deed, it must be made between the husband and trustees on behalf of the wife, and any breach of the agreement by the wife will be answered by her trustees. But, until she has undoubtedly and unqualifiedly compromised herself by some act of acceptance, her case stands on a different footing from that of the trustees. I can only look at the deed as it stands. Both husband and wife wish to part, and it is not alleged that the separation has arisen through any fault of hers. The deed does not contain any covenant not to take proceedings for a judicial separation on the ground of cruelty, and, therefore, I could not make any order as to any suit in the Divorce Court for that purpose.

The whole question, therefore, is reduced to that which arises upon the petition for alimony. How far, then, has she acted upon the deed, so as to preclude herself from taking those proceedings? It is said that the husband has complied with all the provisions of the deed, and that she has accepted the benefits reserved to her, by taking the furniture, linen, and wearing apparel. But I do not think that this amounts to such an acceptance of the deed as will prevent her from disputing its provisions. Then with respect to the annuity of 50*l.* a year upon a separation by mutual consent, a married woman would be entitled to some allowance for maintenance, and, looking at his position, the husband could hardly allow her less than 50*l.* a year. I am not prepared, therefore, upon this interlocutory application, to say that there has been such an acceptance of the deed by this lady as to preclude her from disputing its provisions, or to induce me to grant an injunction against her proceedings in the Divorce Court for the purpose of obtaining alimony *pendente lite*. She must undertake to deal with any order the Divorce Court may make as to alimony as this Court shall direct, and upon this undertaking let the motion stand until the hearing of the cause, or further order.

COLEBY v. COLEBY.

STUART, V.C., June 25, 1866.

L. R. 2 Eq. 803; 14 L. T. 697; 12 Jur. N.S. 496.

Locke King's Act (17 & 18 Vict. c. 113)—Collateral Security.

EXECUTOR AND ADMINISTRATOR. J.—*A sum of 400l. borrowed by an intestate on his promissory note, but secured also by a memorandum and deposit of even date of title deeds of real estate in terms as collateral security:—Held, within Locke King's Act (17 & 18 Vict. c. 113). The heir-at-law, who paid the debts and funeral expenses out of his own moneys as a matter of bounty, but afterwards claimed to be allowed such payment out of the personal estate:—Held, not entitled to be repaid.*

This was a summons adjourned from Chambers. On the 3rd of August, 1861, T. T. Coleby borrowed from Mr. H. D. Smith 400l., and on the same day executed an agreement, which, omitting immaterial parts, was as follows:—

“Whereas the said H. D. Smith hath agreed to lend to the said T. T. Coleby 400l. upon his promissory note for that amount, bearing even date herewith, payable on demand to the said H. D. Smith, with interest at 6l. per cent., and upon having deposited with him, as collateral security for payment of the said 400l. and interest as aforesaid, the title deeds hereinafter mentioned: Now these presents witness, that in pursuance of the said agreement, and in consideration of the sum of 400l. lent and advanced by H. D. Smith to the said T. T. Coleby, he, the said T. T. Coleby, hath this day delivered his promissory note for the said sum of 400l., payable on demand, with interest thereon as aforesaid, unto the said H. D. Smith, and hath also deposited in the hands of the said H. D. Smith the title deeds mentioned in the schedule hereunder written. And the said T. T. Coleby doth hereby promise and agree with the said H. D. Smith, that all and every the said deeds and writing in the schedule hereinunder written, and so deposited, shall be and remain a security unto the said H. D. Smith for payment of the said sum of 400l. with interest at 6l. per cent., and that the said T. T. Coleby will, after default has been made in payment of the said sum of 400l. with interest as aforesaid, if and when required by the said H. D. Smith, but at the expense of the said T. T. Coleby, effectually convey and assure the said houses (enumerating them) unto the said H. D. Smith, for all the estate of the said T. T. Coleby, but subject to redemption.” The agreement then provided that the said indenture of mortgage should contain the usual covenants, and a power of sale, and that no proceedings should be taken by the said H. D. Smith to recover the amount of the loan without giving six months' notice, also that T. T. Coleby would not pay off the principal without six months' notice.

T. T. Coleby died intestate on the 22nd of March, 1864, leaving the said sum of 400l. still due on the above-mentioned securities. His widow administered to his estate; his brother, the Rev. George Coleby, his heir-at-law, took out a summons, dated the 22nd of November, 1864, to administer his personal estate, and obtained an order directing the usual inquiries. On the 9th of May, 1865, the Chief Clerk made his certificate, by which he found that there were no debts. That the intestate at the time of his death was indebted to H. D. Smith in the sum of 400l., and 47l. 17s. for interest, secured by the promissory note and the deposit of title deeds, which had been paid by the Rev. G. Coleby, and was now claimed by him to be allowed out of the personal estate. That the funeral expenses, amounting to 49l. 7s. 6d., and also some other debts of small amount, had been also paid by the Rev. G. Coleby, and that he claimed to be repaid out of the personal estate.

The plaintiff in his affidavit deposed as follows: “It was my intention

to have paid his (the intestate's) debts and funeral expenses out of my own pocket, but circumstances have since transpired which have induced me wholly to alter that intention, and I now claim the distributive share of the personal estate to which I am entitled."

The Chief Clerk submitted the questions to the Court.

Mr. Malins, Q.C., and Mr. Chapman Barber, for the administratrix.—This is the very case contemplated by the Act, 17 & 18 Vict. c. 113. The intestate died leaving about 1,200*l.* of personal estate and real estate worth 500*l.* a year, and his heir-at-law takes the whole of his real estate, that is nearly the whole of his property, while his widow, the person for whom he was more especially bound to provide, takes little or nothing. That a mortgage by deposit is within the Act has been decided by Vice-Chancellor Wood: *Pembroke v. Friend* (1 J. & H. 132).

Then as to the debts and funeral expenses, the plaintiff admits he paid them out of his own moneys as a gift, but alleges he has since changed his mind. He has, however, no right to claim repayment out of the estate.

Mr. J. Hinde Palmer, Q.C., and Mr. Boyle, for the plaintiff:—It is not denied that a mortgage by deposit may be within the operation of the Act, but here there is contrary intention, because it is only after failure of the personal estate that the land is to be resorted to. The agreement describes the land in terms as a collateral security, and nothing could more certainly indicate an intention that the mortgage debt is to be paid out of the personal estate. On the second point it has been long settled that a stranger may pay the funeral expenses without making himself an executor *de son tort*, or losing his right to be repaid.

SIR JOHN STUART, V.C.—This case comes precisely within the meaning of the Statute, and the mortgaged estate must bear the burden.

The plaintiff having voluntarily, and as a matter of bounty, paid the other debts and funeral expenses, cannot now, merely because he changes his mind, be allowed the amount out of the estate. He was under no obligation or liability to pay, and had no monies of the intestate in his hands applicable for that purpose. The payment must therefore be treated as a gift, which indeed, he admits it was, and cannot be recovered. There must be a declaration that the plaintiff is not entitled to be paid the equitable mortgage debt of 400*l.* out of the personal estate, or to be repaid the other debts and funeral expenses. Let the costs of all parties be taxed and paid out of the fund, except so much of the costs of the suit as have been occasioned by the plaintiff's claim to the 400*l.* Those costs to be paid by the plaintiff.

IN THE COMMON PLEAS.

May 1, 1866.

BANKART AND ANOTHER v. BOWERS.

L. R. 1 C.P. 484.

Vendor and Purchaser—Contract of Sale—Concurrent Stipulations.

VENDOR AND PURCHASER. B.—By a memorandum of agreement, A. agreed to sell to B. certain lands, therein described, and all the mines, beds, and veins of coal, &c., under the same, at a certain price; and B. agreed to purchase from A. all coal that he might from time to time require, at a fair market price:—Held, that these were concurrent acts; and that A. could not sue B. for not taking the coal, without averring performance or a readiness to perform his part of the agreement.

The first count of the declaration stated, that by an agreement dated the

31st of July, 1863, and made between the defendant of the one part and the plaintiffs were and still continued and always had been from the making of the plaintiffs, and that the plaintiffs should purchase from the defendant, the equity of redemption of and in certain lands, &c., known as the Turnhurst Hall estate, in Wolstanton, in the county of Stafford, save and except certain closes therein described, and of and in all the mines, beds, and veins of coal, ironstone, and other mineral within and under the same, together with all the engines, colliery buildings, and plant then being upon the same estate; and that payment should be made for the same by the plaintiffs on the terms and in the manner therein mentioned: and the defendant by the said agreement, and in consideration of the premises, agreed with the plaintiffs that the defendant would purchase from the plaintiffs all coal that the defendant might require from time to time, at the fair market rate: Averment, that although all things on the plaintiffs' part had been duly performed and fulfilled according to the terms of the agreement necessary to entitle the plaintiffs to sue for the breach thereafter mentioned, and although the plaintiffs were and still continued and always had been from the making of the said agreement, ready and willing to sell and supply to the defendant such coal as the defendant required, at the fair market rate, according to the terms of the agreement and the true intent and meaning thereof: Breach, that the defendant did not after the making of the agreement purchase or take from the plaintiffs all coal that he required, according to the agreement, or more than a very small and inconsiderable quantity of the coal which he required, and a much less quantity thereof than was by him so agreed to be purchased and taken, and on the contrary he took large quantities of coal from persons other than the plaintiffs, whereby the plaintiffs lost profits, &c.

Plea, that the agreement in the first count mentioned was and is an agreement in writing, in the words and figures following, that is to say, "Memorandum of agreement made this 31st of July, 1863, between G. F. Bowers, of &c., china manufacturer, of the one part, and F. Bankart, of &c., and H. Bankart, of &c., copper-smelters, of the other part, as follows:— 1. The said G. F. Bowers agrees to sell to the said F. Bankart and H. Bankart, and the said F. Bankart and H. Bankart agree to purchase from him, the equity or redemption in all the mines, beds, and veins of coal, ironstone, and other minerals within and under the estate called the Turnhurst Hall estate, situate, &c., containing in the whole 110a. 3r. 27p., or thereabouts, together with all the engines, colliery buildings, and plant now being upon the said estate, which together with the surface of the estate are subject to a mortgage of 1,750*l.* to Messrs. C. & J., and also all the rights and interests of the said G. F. Bowers, under a contract entered into by him on the 9th of March, 1863, with T. F. H., for the granting by him to the said G. F. Bowers for the term of forty-two years from the 31st of January, 1863, of power and authority to use a certain railway or tramway to be constructed over the lands of the said T. F. H. at &c. 2. The consideration for such purchase shall be the payment by the said F. Bankart and H. Bankart to the said G. F. Bowers of 2,000*l.* in manner following, 500*l.* in cash on the execution of the conveyance, and the remainder in bills of exchange for 1,500*l.* and interest extending over nine months from the execution of the said conveyance. 3. The said G. F. Bowers agrees to sell to the said F. Bankart and H. Bankart, and the said F. Bankart and H. Bankart agree to purchase of him, the equity of redemption in the whole of the said Turnhurst Hall estate, the mines and minerals in and under which are hereby contracted for, with the mansion-house called Turnhurst Hall, and the other buildings thereon (except the field called Big Brent, containing 8a. 3r. 11p., or thereabouts, and also except such portion of the field called Delph Field as is marked off with a red outline on a certain plan &c., for house-building purposes only. 4. The consideration for said purchase of the surface of the said estate, mansion-house, and buildings (except as aforesaid), shall be the payment by the said F. Bankart and H. Bankart to the said G. F. Bowers of the sum of 4,000*l.* in manner following,—the sum of

2,000*l.* in cash on the execution of the conveyance, and the remainder in bills of exchange for 2,000*l.* and interest extending over two years from the execution of the conveyance. 5. The said F. Bankart and H. Bankart shall take upon themselves all the engagements and liabilities of the said G. F. Bowers under the said agreement with the said T. F. H., and shall protect and indemnify the said G. F. Bowers from and against all such engagements and liabilities. 6. The said F. Bankart and H. Bankart shall be entitled to the rent of the surface of the Turnhurst Hall estate as from the 24th June, 1863. 7. The said G. F. Bowers shall purchase from the said F. Bankart and H. Bankart all coal that he may from time to time require, at the fair market rate. 8. The said G. F. Bowers shall deduce a good title to all the property comprised in this agreement: "Averment, that it was not agreed by and between the defendant and the plaintiffs as in the first count mentioned, save and except as in and by the said written agreement in this plea particularly set forth as aforesaid; and that the plaintiffs did not nor would purchase from the defendant, although the defendant was ready and willing to sell to the plaintiffs, the said equity of redemption, or the engines, colliery buildings, or plant in the first count mentioned, on the terms in the said agreement mentioned.

Demurrer, on the ground that the completion of the purchase was not a condition precedent to the performance of the contract declared on. Joinder.

Watkin Williams, in support of the demurrer, contended that it was not a condition precedent to the defendant's liability to the plaintiffs for the non-performance of the contract contained in the seventh clause of the agreement, viz. that he would purchase from them all the coal he might from time to time require, that the plaintiffs should perform the contract on their part contained in the first clause, viz. purchase and pay for the estate contracted to be sold to them; but that the two were totally distinct and independent covenants, giving to either party a remedy against the other by an action for a breach, according to the rules laid down in the notes to *Pordage v. Coles* (1 Wms'. Saund. 319 l.).

T. Jones, in support of the plea.—This is an agreement for the purchase of an estate by the plaintiffs from the defendant, and for the purchase of coal by the defendant from the plaintiffs. The plaintiffs are not willing to take the estate, but seek to compel the defendant to take all his coal from them. It must be conceded that the acceptance of the estate is not a condition precedent; but it is a condition concurrent, and the plaintiffs must be ready and willing to execute the contract on their part before they can call upon the defendant to perform his part of it. The reasonable construction of the contract is, that the whole is to date from the conveyance of the estate. The case falls within the 5th rule given in the notes to *Pordage v. Cole* (1 Wms'. Saund. 320 e.): "Where two acts are to be done at the same time, as, where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay a sum of money on the same day, neither can maintain an action without shewing performance of or an offer to perform his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale." As to the averment of readiness and willingness, it is said in the notes to *Peeters v. Opie* (2 Wms'. Saund. 352 a.): "The nature and necessity of such averments was much considered in a late case,—*Rawson v. Johnson* (1 East, 203),—which was assumpsit for the non-delivery of 100 qrs. of malt, which the defendant had undertaken to deliver on request at a certain price; and the plaintiff averred that, although afterwards, to wit, on &c., he requested the defendant to deliver him the 100 qrs. of malt, and was then and there ready and willing to pay the said defendant for the same according to the terms of the said sale, and although he was then and there ready and willing, and offered to accept and receive the said 100 qrs. of malt from the defendant, yet he refused to deliver them. After verdict for the plaintiff, it was moved in arrest of judgment that the

plaintiff did not aver the actual tender of the price agreed upon, the averment of a readiness and willingness only in the plaintiff to pay not being sufficient. But the Court overruled the objection, and held the averment of the plaintiff's readiness and willingness to pay for the malt sufficient; that under the averment the plaintiff was bound to prove that he was prepared to pay or tendered the money, if the defendant had been ready to receive it and to deliver the malt." So here, to effectuate the intention of the parties, the plaintiffs should have been ready and willing to take a conveyance of the estate and to pay the money on the day stipulated. Again, in *Morton v. Lamb* (7 T. R. 125), also cited in the notes to *Peeters v. Opie* (2 Wms'. Saund. 352 c.), the Court held, that, "where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he has performed, or was ready to perform, his part of the contract."

Williams, in reply.—No doubt, if the two covenants or contracts be dependent the one on the other, neither can sue the other for a breach without shewing performance or readiness and willingness to perform the contract on his part. Here the covenants are totally independent. The defendant bound himself to take the coal immediately. He could not delay till a perfect title to the estate had been made, which might take a considerable time. The Court cannot speculate upon the intention of the parties. They can only deal with the agreement as they find it: *Hale v. Rawson* (4 C.B. N.S. 85).

ERLE, C.J.—I am of opinion that our judgment upon this demurrer should be for the defendant. Where there is a contract by one party to sell an article and by the other party to pay for it, no time being named, it would be a strong thing to say that the buyer shall pay the money before he gets the consideration. The effect of the agreement set out in the plea is that the plaintiffs are to buy the mines and minerals from the defendant, and the defendant is to take all the coals he may require from the plaintiffs. These clearly are concurrent acts.

BYLES, J.—The effect of Mr. Watkin Williams' argument is, that the defendant must keep the mines, and yet is bound to buy his coals of the plaintiffs.

KEATING, J.—We must look to the whole agreement in order to ascertain what was the intention of the parties. We should obviously be frustrating that, if we were to yield to the argument of Mr. Williams.

MONTAGUE SMITH, J., concurred.

Judgment for the defendant.

IN THE COMMON PLEAS.

May 26, 1866.

SCARTH v. RUTLAND.

L. R. 1 C.P. 642.

Attorney—Delivery of Bill—Agreement for a specific Sum.

SOLICITOR. K.—*In the absence of a plea of no signed bill delivered, it is competent to an attorney to rely upon a contract for a specific sum for business to be done, without producing a bill and shewing charges fair and reasonable amounting to or exceeding the stipulated sum.*

Declaration for work and labour done by the plaintiff as attorney for the defendant. Plea, never indebted. Issue thereon.

At the trial, before the Under-Sheriff of Middlesex, it appeared that the plaintiff had been employed under a verbal contract to obtain the defendant's

discharge under the Bankruptcy Act, for a stipulated charge of 10*l.* 10*s.*, of which 7*l.* had been paid on account; and that the plaintiff afterwards sent in a bill claiming for his services on that occasion a sum of 14*l.* 16*s.* 4*d.* There was no plea of no signed bill delivered; nor was any evidence given by the plaintiff of the reasonableness of the charges.

It was contended on the part of the defendant that it was not competent to the plaintiff to set up a contract for a specific sum for costs, unless he also shewed that his reasonable bill of costs for the work done would amount to or exceed that sum.

The Under-Sheriff overruled the objection; and, in his summing up, he told the jury that there was no law to preclude an attorney from commuting his charges and making a bargain for a fixed sum for business which he is about to undertake, provided such a sum be not exorbitant: and under his direction the jury returned a verdict for the plaintiff, damages, 3*l.* 10*s.*

Eyre Lloyd moved for a new trial on the ground of the improper reception of evidence; and contended that the plaintiff ought not to have been allowed to give evidence of a contract to do the work for a specific sum, without going on to shew that a bill had been delivered and that the charges were fair and reasonable, and amounted to that sum; and he referred to *Philby v. Hazel* (8 C.B. N.S. 647; 29 L. J. C.P. 370), where it was held that an agreement by an attorney to receive a gross sum and costs out of pocket, in lieu of costs to be incurred, is not a void agreement, but that the bill is nevertheless taxable, and therefore that the delivery of a bill containing a charge for business done, the particular items being left in blank, and only those carried out in figures which consisted of actual disbursements, was not such a "delivery of a signed bill" as is contemplated by the 6 & 7 Vict. c. 73, s. 37.

ERLE, C.J.—All that that case amounts to is, that, notwithstanding an agreement limiting the attorney's claim, he must deliver a bill, and the client may tax it, and on the result of such taxation the attorney may be entitled to less, but cannot recover more, than the agreed sum. Here, however, the defendant was not in a position to object to the non-delivery of a signed bill.

MONTAGUE SMITH, J.—There is nothing to prevent an attorney from cutting down his own claim.

WILLES and BYLES, JJ., concurred.

Rule refused.

IN THE COMMON PLEAS.

May 30, 1866.

COULTHURST AND ANOTHER v. SWEET.

L. R. 1 C.P. 649.

See, *Buckle v. Knoop*, [1867] E. R. A.; 36 L. J. Ex. 49; L. R. 2 Ex. 125; 16 L. T. 231 (Ex.): on appeal, [1867] E. R. A.; 36 L. J. Ex. 223; L. R. 2 Ex. 333; 16 L. T. 571; 15 W. R. 999 (Ex. Ch.). Referred to, *Fraser v. Cuthbertson*, [1881] E. R. A.; 50 L. J. Q.B. 277; 6 Q.B. D. 93; 29 W. R. 396 (Q.B. D.). See *The Skandinav*, [1881] E. R. A.; 50 L. J. P. 46 (Adm.): reversed, [1882] E. R. A.; 51 L. J. P. 93 (C. A.). Adopted, *Gulf Line v. Laycock*, 1901, 7 Com. Cas. 1 (K.B. D.).

Shipping—Authority of Agent—Liability of Joint Owner—Construction of Bill of Lading—Custom as to weighing.

SHIPPING. A. IV.—Bark was shipped (green) at Penang, under a bill of lading describing it to be of a certain weight, and making it deliverable to the consignees in London on payment of freight at a certain rate per ton of 20 cwt. "nett weight delivered." On arrival in London, the agent appointed

by the managing owner demanded freight on the weight mentioned in the bill of lading, and refused to deliver the bark unless the consignees would pay according to that weight, or (under an alleged custom) incur the expense of weighing over the ship's side or at a legal quay. The consignees paid the money under protest, and brought an action against the defendant,—one of the joint owners,—to recover back the excess. The jury having negatived the alleged custom:—Held, that the defendant was liable, notwithstanding that he had not interfered or in any way assented to the appointment of the agent by the managing owner, and that no part of the money had come to his hands.

This was an action for money received, money paid, and money found due upon accounts stated. Plea, never indebted.

The cause was tried before Pollock, C.B., at the last Spring Assizes at Kingston. The facts were as follows:—The plaintiffs are the proprietors of the Phoenix Colour Works at Bristol. The defendant and three other persons resident in Glasgow were joint owners of the ship *Edinburgh Castle*, of the port of Glasgow; one of them, who carried on the business of a ship and insurance-broker there under the name of Skinner & Co., acting as ship's husband.

In June and July, 1865, 34,906 bundles of bark, described in the bill of lading as weighing nett 3,314 piculs, and 6,028 bundles described as weighing 602 piculs, were shipped by Messrs. Fraser & Co. at Penang, to be delivered at the port of London "unto shippers' order, or to their assigns, he or they paying freight for the said goods at the rate of 3*l.* sterling per ton of 20 cwt. nett weight delivered."¹

The vessel arrived in the port of London on the 26th of December, 1865. The plaintiffs, to whom the bark was consigned, instructed the Bristol manager of the Great Western Railway Company to cause it to be cleared, and to pay the freight and forward the bark to Bristol by rail. The company's agent in London accordingly demanded the bark, and sent lighters alongside the ship to receive it for conveyance to their wharf at Brentford, which is beyond the limits of the port of London, offering to pay the freight according to the bills of lading, at the rates of 3*l.* and 1*l.* 15*s.* respectively per ton of 20 cwt. nett weight delivered. The owners of the *Edinburgh Castle*, however, through Mackenzie, a broker in London employed by the managing owner, demanded freight upon the quantities mentioned in the bills of lading, which, the bark being in a green state when shipped, would necessarily considerably exceed the nett weight delivered in London. After much negotiation, Mackenzie on behalf of the owners consented to deliver the bark on payment of freight upon the weight delivered, but claimed under an alleged custom to have the weight ascertained by weighing the bark over the ship's side at the consignees' expense. The plaintiffs declined to accede to this, and, in order to obtain the bark, paid the sum demanded by Mackenzie (654*l.* 9*s.* 7*d.*) under protest. The bark was taken to the railway company's premises at Brentford and weighed, the nett weight being found to be 193 tons 10 cwt. 3 qrs. The plaintiffs thereupon brought this action to recover back the sum they had been compelled to pay in excess of the amount really due, viz. 109*l.* 12*s.* 1*d.*

There was no evidence to shew that the defendant had in any way interfered in the management of the vessel or in the appointment of Mackenzie as agent, or that any part of the money came to his hands.

It was admitted that the whole quantity of bark shipped was taken from the vessel and delivered to the railway company.

Under these circumstances it was contended on the part of the defendant that the action would not lie, the money having been voluntarily paid by the plaintiffs, and that the defendant, though a part owner of the ship, was not liable for the acts of Mackenzie. They also attempted to set up a custom for the consignee of goods shipped in bulk to pay freight according to the

(1) Under the second bill of lading, for the 6,028 bundles, the freight was 1*l.* 15*s.* per cwt.

weight in the bill of lading, unless they are weighed on board, or at the ship's side, by the dock company, or at a legal wharf or quay, the consignee paying the expense: but none of the witnesses ever knew of this custom having come into litigation.

The jury negatived the custom, and returned a verdict for the plaintiffs for 109*l.* 12*s.* 1*d.*

The learned Judge reported to the Court, as follows:—"The plaintiffs claimed to recover back a sum of money paid under protest to obtain possession of the bark in question. The claim to demand and receive the money was founded on the weight in the bills of lading; but, by the contract for freight, the freight was to be paid according to the weight delivered. The defendant set up a custom to take (under the circumstances) the weight in the bill of lading. I thought such a custom not proved, and so the jury found: but I reserved the question whether the defendant was liable."

Francis, in Easter Term last, obtained a rule *nisi* to enter a nonsuit, on the grounds that the money having been received by the managing owners of the ship without the knowledge or instructions of the defendant, and without his participation in the proceeds, he was not liable; and that the circumstances under which the money was paid did not entitle the plaintiffs to recover it back,—the plaintiffs having the option given to them to have the weight ascertained at the ship's side, or of taking the bark at the bill of lading freight.

Denman, *Q.C.*, and *Horace Lloyd*, shewed cause.—The defendant is responsible for the acts of Mackenzie, the agent, who acted under instructions from Skinner & Co., the managing owners. The main ground of objection to the plaintiff's right to recover back the money was, that they had paid it with full knowledge of the circumstances. They were, however, obliged to pay it in order to get the bark which the defendant detained under colour of a custom which the jury negatived. Where the managing owner of a ship employs an agent in the business of the ship, the co-owners are bound by his acts: *Barker v. Highley* (15 C.B. N.S. 27; 32 L. J. C.P. 270). There, the ship's husband and managing owner caused a bail-bond to be given in the Admiralty Court, in the names of his co-owner and himself, in a suit for a collision; and, the suit terminating in favour of the plaintiffs, and the bail having been called upon to pay damages, interest, and costs, it was held that the co-owner was responsible to the bail for the money so paid. The duties and powers of a managing owner are defined in *Abbot on Shipping* (10th edit., by Shee, p. 72). Here, a question arising upon the construction of the bill of lading, the plaintiffs were compelled to pay a larger sum for freight than was due, in order to obtain possession of their goods. How can that be said to be a voluntary payment?

[WILLES, J., referred to *Eubank v. Nutting* (7 C.B. 797) and *Tamvaco v. Simpson* (19 C.B. N.S. 453; 34 L. J. C.P. 268. In Ex. Ch. L. R. 1 C.P. 363).]

Francis and *Lord* in support of the rule. No doubt, where a carrier refuses to deliver goods except upon being paid an excessive charge, the excess may be recovered back. But here the plaintiffs had an option given to them, to take the bark at the bill of lading freight or to have it weighed at the ship's side. The latter alternative they declined, on account of the expense. In *The Duke de Cadaval v. Collins* (L. R. 4 A. & E. 858, 867), Coleridge, J., says: "It is clear that, if money be paid with full knowledge of facts, it cannot be recovered back. It is clear, too, that, if there be a *bonâ fide* legal process, under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation." And see the authorities referred to in *Chitty on Contracts* (7th ed., by Russell, 569). Here the claim was quite *bonâ fide*. The mere fact of a party being registered as owner will not make him liable: it is a question of contract in each case: *Briggs v. Wilkinson* (7 B. & C. 30), *Reeve v. Davis* (L. R. 1 A. & E. 312; 3 N. & M. 873), *Helme v. Smith* (7 Bing. 709; 5 M. & P. 744), *Myers v. Willis* (17 C.B.

77), *Brodie v. Howard* (17 C.B. 109), *French v. Styring* (2 C.B. N.S. 357), *Chitty on Contracts* (7th ed., by Russell, 222). The defendant here had no knowledge of the transaction, and got no part of the money; nor was there any evidence of a recognition by him of the appointment of Mackenzie as agent for the vessel, and therefore, upon the authority of *Sims v. Brittain* (4 B. & Ad. 375; 1 N. & M. 594) and *Sims v. Bond* (2 N. & M. 608), the defendant cannot be held to be responsible for his acts.

ERLE, C.J.—I am of opinion that this rule should be discharged. The discussion which has taken place has turned more upon the facts than upon the law applicable to them. There is no doubt as to the effect of the registry. The defendant is a part-owner. Skinner & Co., as managing owners, had authority to do all things usual in the management of the ship and the delivery of the cargo, and a right to appoint an agent for that purpose. Mackenzie was duly appointed as such agent; and all the part-owners are responsible for acts done by him within the scope of his duty. The bark in question having arrived in the port of London from Penang under bills of lading making it deliverable to the shippers' order or to their assigns, he or they paying freight at a certain rate of freight per ton of 20 cwt. "nett weight delivered," the ship-owners by their agent Mackenzie claimed to be paid freight according to the weight mentioned in the margin of the bills of lading, and they endeavoured to set up a custom to that effect. They clearly had no right to that by custom. Nor had they any right to call upon the merchants to pay them for the weighing of the bark. The plaintiffs, therefore, are entitled to recover back the excess which they were compelled to pay in order to obtain their goods.

WILLES, J.—I am of the same opinion. The provision in the bills of lading, for payment of freight "according to the nett weight delivered," was introduced for the purpose of excluding the difficulty arising from the decision of the Exchequer, dissented from by one member of the Court, in *Gibson v. Sturge* (10 Exch. 622; 24 L. J. Ex. 121). There, a vessel was chartered to carry a cargo of corn from Odessa to Gloucester for freight payable at a certain rate per quarter. 2,664 quarters were shipped at Odessa, and the master signed bills of lading in the usual form, and which contained a memorandum "quantity and quality unknown." The vessel arrived at Gloucester with the cargo of corn, when it was weighed at the Queen's beam and found to contain 2,785½ quarters. In the course of the voyage a portion of the corn, from some unknown cause, had become heated and damaged, whereby the bulk was increased. It was held that the freight was payable on the quantity of corn shipped, and not on its measurement at the port of discharge. Martin, B., who differed from the rest of the Court, said: "In my opinion, in the absence of contract upon the subject, what is most just and reasonable, what is most analogous to cases of a similar kind, and what is the most convenient practical rule upon the subject, and the most beneficial to all parties interested, the measurement at the port of delivery affords a test for the ascertainment of freight preferable to that of measurement at the port of loading. If this be found inconvenient in any particular classes of cargo, a few words inserted in the bill of lading would effectually remedy it." A similar question is raised in *Jacobsen's Sea Laws* (Baltimore edition, 1818, ch. 3, pp. 256 *et seq.*). To avoid all doubt as to that, the provision in question was inserted in these bills of lading: but there is no mention as to who is to weigh, or that the weighing is to be by any authorized standard, as at the Queen's beam, or the like. The vessel having arrived, the master or the agent for the managing owners insisted that the merchants, if they took the goods without weighing at the ship's side, must pay freight according to the weight mentioned in the margin of the bills of lading. This was not a mere request for delay in order to give the master an opportunity to weigh the bark, but in order to compel the merchants to pay the expense of the weighing. In the absence of any custom to govern the matter, the person who wants

to ascertain the quantity must incur the trouble and expense of weighing. It is by no means an uncommon thing to have goods weighed on board; but I never heard of the merchant being called upon to pay for it. The plaintiffs claimed to have the bark delivered to them on payment of the freight stipulated for by the bills of lading, viz. 3*l.* per ton nett weight delivered. Mackenzie, acting for the owners of the ship, declined to deliver it except on payment of the freight upon the quantity mentioned in the bill of lading; and, in order to obtain the bark, the plaintiffs were obliged to yield to his demand. They are clearly entitled to recover back the excess. It is a mistake to apply *Sims v. Brittain* (4 B. & Ad. 375; 1 N. & M. 594) and *Sims v. Bond* (2 N. & M. 608) to cases of this kind, because money had and received is only a short form which the plaintiffs are entitled to adopt instead of suing for the conversion. *Ewbank v. Nutting* (7 C.B. 797) is abundant authority to shew that Mackenzie was acting within the scope of his authority, and that the owners are responsible for his act. In the late case of *Tamvaco v. Simpson* (19 C.B. N.S. 453; 34 L. J. C.P. 268. In Ex. Ch. L. R. 1 C.P. 363; 35 L. J. C.P. 196), neither here nor in the Exchequer Chamber was it suggested that the owners were not liable for the conversion of the plaintiffs' goods by the master.

BYLES, J.—I am of the same opinion. The money was received here by the managing owner. I adhere to what was said by this Court in *Barker v. Highley* (15 C. B. N.S. 27; 32 L. J. C.P. 270), viz. that "the ship's husband or managing owner is an agent appointed by the other owners to do what is necessary to enable the ship to prosecute her voyage and earn freight." In the present case, that which the plaintiffs seek to recover back is a portion of the freight which was paid by them in order to obtain possession of their goods. The money was improperly received, and the owners are bound to return it.

MONTAGUE SMITH, J.—I am of the same opinion. Two points have been relied upon. First, it is said that this was a voluntary payment, and therefore cannot be recovered back, the plaintiffs having had the option of taking the goods at the bill of lading weight or of having them weighed over the ship's side. They were not bound to incur that expense. It therefore seems to me that the payment was not a voluntary one. The owners were attempting to place the plaintiffs in a wrong position. The second point resolves itself into a mere dispute about evidence. It was hardly denied that Mackenzie was authorized to receive the freight.

Rule discharged.

IN THE COMMON PLEAS.

June 7, 1866.

IN THE MATTER OF AN ARBITRATION BETWEEN T. P. WILLCOX
AND J. STORKEY.

L. R. 1 C.P. 671.

Arbitration—Agreement to refer—Making Submission a Rule of Court under s. 17 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

ARBITRATION. A.—By an agreement under seal for the transfer of a business, it was stipulated that, "in case any dispute should arise between the parties thereto concerning any matter relating to the business, or those presents or the construction thereof, such disputes should be referred to such member of the firm of B. & Co. as should be appointed by that firm to undertake the reference, in accordance with and subject to the provisions of the Common Law Procedure Act, 1854." *Disputes having arisen, B. & Co.*

appointed one T., a member of their firm, to be arbitrator, and he duly made his award:—Held, that there was a sufficient submission in writing to be made a rule of court under s. 17 of the Common Law Procedure Act, 1854.

By an agreement, under seal, between Thomas Percival Willcox, of the city of Bristol, architect, surveyor, and builder, of the one part, and Joseph Storkey, of the same place, mason and builder, of the other part, after reciting that Willcox had for several years carried on the business of an architect, surveyor, and builder in the said city, and that Storkey had been his foreman, it was agreed that Willcox should relinquish in favour of Storkey the business of a builder, retaining and carrying on only the business of an architect and surveyor, upon certain terms: and it was, amongst other things, provided that, "in case any dispute should arise between the parties thereto, or their respective executors, &c., or either of the said parties and the executors, &c., of the other of them, concerning any matter in any way relating to the said business so carried on by Storkey, or the accounts thereof, or those presents or the construction thereof, such dispute shall be referred to such one of the members of the firm of Barnard, Thomas & Co., of the city of Bristol, accountants, as shall be appointed by that firm to undertake the said reference, in accordance with and subject to the provisions of the Common Law Procedure Act, 1854." Disputes having arisen between the parties, Barnard, Thomas & Co., appointed one Tribe, a member of their firm, to be the arbitrator, and that gentleman made an award in favour of Mr. Willcox.

The above agreement for reference having been made a rule of Court,¹

J. O. Griffiths, on behalf of Storkey, moved to set aside that rule, on the ground that there was no submission in writing within the 17th section of the Common Law Procedure Act, 1854. In *Ex parte Glayshe* (3 H. & C. 442; 34 L. J. Ex. 41) it was held, that, where parties to a deed covenant to refer disputes which may arise to arbitrators to be chosen by them, and, on disputes arising, appoint arbitrators, the submission is by parol, and therefore cannot be made a rule of court under that section. In that case, Pollock, C.B., points out the distinction between an agreement to refer to an arbitrator to be appointed, and an agreement to refer to a person named in the instrument itself. "There is," says his Lordship, "an obvious distinction between an agreement to refer to an arbitrator to be appointed any matter of difference which may thereafter arise, and an agreement to refer to an arbitrator named a matter which has already become the subject of dispute. If there be a general agreement to refer future disputes to one or more parties to be appointed, and in pursuance of that disputes are referred, the submission is by parol, although the agreement is by deed; and a parol submission cannot be made a rule of court."

[ERLE, C.J.—*Re Newton and Hetherington* (19 C.B. N.S. 342) seems to be an authority the other way. There, a lease contained a proviso, that in case any disputes and differences should arise between the parties, they should be referred to two arbitrators, one to be chosen by each party, and that, if either of them should neglect to name an arbitrator on his part within seven days after notice of the appointment of an arbitrator by the other, the arbitrator so appointed shall act for both; and it was further agreed that "the submission of the said parties to the award of the said arbitrators or arbitrator might at the instance of either party be made a rule of court." Disputes having arisen, the lessor appointed an arbitrator, in writing, and gave notice in writing to the lessee that he had done so; but the latter did not appoint

(1) Under the 17th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125 which provides that "every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contains words purporting that the parties intended that it should not be made a rule of court."

an arbitrator on his part; whereupon, after due notice, the arbitrator appointed by the lessor proceeded ex parte, and made his award: and we held, that, upon filing the appointment, with an affidavit of the lessor verifying his signature thereto, the submission might be made a rule of court. I see no substantial distinction between that case and this.

WILLES, J.—The 12th and 13th sections of the act, which deal with cases in which no arbitrator is appointed, use terms corresponding with those of s. 17.]

There is here no agreement in writing to refer. It is difficult to discover any difference between *Ex parte Glaysher* (3 H. & C. 442; 34 L. J. Ex. 41) and this case.

ERLE, C.J.—The language of the statute, the decision of this Court, and the expediency of the thing, are all opposed to this application. *Re Newton and Hetherington* (19 C. B. N.S. 342) is substantially the same as this case. The agreement is, that, in case any dispute should arise between the parties concerning any matter in any way relating to the subject-matter or the construction of the agreement, such dispute should be referred to such member of the firm of Barnard & Co. as should be appointed by that firm to undertake the reference. The firm in writing appointed Mr. Tribe, and he has made his award. I think there is enough in writing to be put upon the files of the court. It is not necessary that we should conflict with the decision of the Court of Exchequer in *Ex parte Glaysher* (3 H. & C. 442; 34 L. J. Ex. 41). I will only add that the 12th and 17th sections of the Common Law Procedure Act, 1854, shew a clear intention that parties who have agreed that their differences shall be settled by arbitration shall be compelled to abide by their engagements.

WILLES, BYLES, and MONTAGUE SMITH, JJ., concurred.

Rule refused.

IN THE COMMON PLEAS.

June 11, 1866.

RANDEGGER v. HOLMES AND OTHERS.

L. R. 1 C.P. 679.

See, *Seligmann v. Le Boutillier*, [1866] E. R. A. 3781; L. R. 1 C.P. 681; *Minifie v. Railway Passengers Assurance Co.*, 1881, 44 L. T. 552 (Q.B. D.).

See Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19.

Contract—Arbitration Clause—Staying Proceedings under s. 11 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

ARBITRATION, A.—To an application for a stay of proceedings under the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, on the ground that the instrument upon which the action is brought contains a stipulation that, "if any difference should arise between the parties, either in principle or detail," the same shall be referred to arbitration,—it is no answer that the difference is one of law, as to the construction of the instrument.

By a charterparty dated the 19th of October, 1865, the defendants let to the plaintiff a steam-vessel called the *Advance* for six calendar months at charterer's option, commencing on or about the 1st of November. The charterparty contained, amongst others, the following provisions:—"The freight for the hire of the said steamer shall be paid as follows: At and after the rate of 796l. sterling per calendar month, and payable bi-monthly in advance, in cash in London, less 2½ per cent. in lieu of address commission, until the vessel is

again returned by the charterer, he having given fourteen clear days' notice to owners of his or their intention so to do. In the event of loss of time by deficiency of men, want of stores, break down of engines or machinery, or by the vessel's becoming incapable of steaming for more than twenty-four hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage. Should any difference arise between the parties to this contract, either in principle or detail, the same shall be referred for arbitration at London to two persons, one to be chosen by each contracting party, with power for them to call in a third, and the decision of a majority shall be final and binding. The acts of God, Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, navigation, and machinery, of whatever nature and kind, mutually excepted. In the event of the steamer being lost, the money advanced upon the current month shall be returned, in proportion to the number of days which she may not have completed of that month. It is clearly understood by the contracting parties to this charter that, the freight being made payable in advance, the charterers will not come under further advances to the ship abroad; and that, in the event of the steamer putting into any port or place from damage or repairs to hull, spars, or machinery, or other cause pertaining to owners, the charterers shall not be responsible for any port-charges or pilotage; and the time so lost to charterer shall be deducted from freight."

The charterer paid the first fourteen days' hire in advance, in accordance with the charterparty; but, having received intelligence that the ship had met with a disaster at sea when on her voyage from Newcastle to Newport, and that she had put into Portland for repairs, he declined to make the second bi-monthly payment; whereupon the owners insisted that the charterparty was at an end, and employed the vessel for other purposes.

An action having been brought by the charterer against the ship-owners for a breach of the charterparty, and a cross-action by the ship-owners against the charterer for non-payment of freight.

Hannen, for the ship-owners, obtained a rule calling upon the charterer to shew cause why all further proceedings in his action should not be stayed, on the ground that he had by the charterparty agreed that all differences between them should be referred to arbitration.

Sir G. Honyman shewed cause. The question between the parties being simply one of law upon the construction of the charterparty, the case is not within the 11th section.

[*WILLES, J.*—Is there any case, except where there has been a suggestion of fraud, in which the Court has refused to interfere?]

Wallis v. Hirsch (1 C. B. N.S. 316) was a case where fraud was suggested. But in *Lury v. Pearson* (1 C. B. N.S. 689), where by a charterparty it was agreed that the charterers should insure the vessel, and that the policies should be delivered to and be the property of the owners, and the charterparty contained a stipulation that "any question or difficulty which might thereafter arise out of the charterparty should be decided by arbitration," in a manner pointed out,—an action having been brought by the owners against the charterers for refusing to deliver them the policies, against which action it was admitted that there was no defence, the case was held not to be one for the application of this section.

Hannen, in support of the rule, was not called upon.

WILLES, J.—I see no reason why the stipulation which the parties have entered into should not be carried into effect. Both actions ought to be referred, the parties consenting that the costs of this application and of the application at Chambers should be in the discretion of the arbitrators.

ERLE, C.J., and *BYLES* and *MONTAGUE SMITH, JJ.*, concurred.

*Rule accordingly.*¹

(1) See the next case.

IN THE COMMON PLEAS.

June 11, 1866.

SELIGMANN v. LE BOUTILLIER.

L. R. 1 C.P. 681.

See *Minifie v. Railway Passengers' Assurance Co.*, 1881, 44 L. T. 552 (Q.B. D.).

See Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 91.

Contract—Arbitration Clause—Staying proceedings under s. 11 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

ARBITRATION. A.—By charterparty between plaintiff (ship-owner) and defendant (charterer), it was agreed, that "should any dispute arise between the owners and the charterers, the matters in dispute shall be referred to," &c. The owner having brought an action for freight, and the charterer having preferred a cross-claim for damages for the captain's refusal to ship a reasonable amount of cargo, and for general disobedience of orders, and being willing to refer all matters to arbitration:—Held, that it was a case for the interference of the Court under the 11th section of the Common Law Procedure Act, 1854.

By a charterparty the defendant agreed to hire the plaintiff's ship *Adele* for a term, at a lump freight per month; the charterparty containing a stipulation that, "should any dispute arise between the owners and the charterers, the matter in dispute shall be referred to three persons at Liverpool, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or any two of them, shall be final; and, for the purpose of enforcing any award, this agreement may be made a rule of court."

Disputes having arisen between the parties in consequence of the captain's refusal to take on board what the charterer considered to be a reasonable amount of cargo, and in other respects disregarding the orders and instructions of the charterer, for which the latter claimed damages, and the owner having brought an action to recover arrears of the stipulated hire of the ship,

Joyce, on a former day, after an ineffectual application at chambers, obtained a rule calling upon the plaintiff to shew cause why all further proceedings should not be stayed, and the matters referred to arbitrators, pursuant to the 11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

Crompton shewed cause. As the defendant has a cross-claim against the plaintiff, the case is taken out of the jurisdiction of the Court; or, at all events, it is a case in which the Court will not exercise their discretion, if they have any. *Russell v. Pellegrini* (6 E. & B. 1020; 26 L. J. Q.B. 75) will be relied on in support of the rule; but, in *Daunt v. Lazard* (26 L. J. Ex. 399), Bramwell, B., expressed his dissent from that decision, and doubted whether the Court of Exchequer would, notwithstanding that case, allow a reference of a matter not available as a defence or in reduction of damages in the same action, but only a ground for a cross-claim in another action. In *Pennell v. Walker* (18 C. B. 651; 27 L. J. C.P. 9), F. and S. having brought an action against W. to recover the price of timber delivered under a contract, and W. having brought a cross-action in which he sought to recover damages against F. and S. for alleged breaches by them of the same contract, the two actions, and all matters in difference between the parties, were referred to arbitration. Before anything was done under the reference, F. and S. became bankrupts; and their assignees brought a fresh action against W. for the price of the timber. Upon a motion, under the 11th section of the Common Law Procedure Act, 1854, to stay the proceedings in the last-mentioned action, this Court held that, assuming the section to apply to such a case (which they inclined to think it did not), it was not one in which they would, in the exercise of their discretion interfere, inasmuch as by so doing they would be giving W. an advantage which the law did not entitle him to.

Joyce, in support of the rule. In *Russell v. Pellegrini* (6 E. & B. 1020; 26 L. J. Q.B. 75), by an agreement in writing, a ship was chartered at a fixed sum per month; the charterparty providing that, "should any difference of opinion arise between the parties to this contract either in principle or detail, the same shall be referred," &c. The charterer claimed from the ship-owner damages for an alleged breach of an implied warranty of seaworthiness, and desired to have this claim referred, which the ship-owner declined. The charterer thereupon commenced an action. The monthly hire having become due the ship-owner demanded it from the charterer, and, on his refusal, commenced an action against him. The ground of refusal was that the charterer desired to have all the matters referred together, whereby he would have the benefit of a set-off. On a rule obtained by the charterer to stay proceedings in the ship-owner's action, the Court of Queen's Bench held (Wightman, J., *dubitante*.) that, though there was no dispute as to the subject-matter of the action itself, viz. the hire, which was admitted to be due, the circumstances gave the Court jurisdiction under the 17 & 18 Vict. c. 125, s. 11: and they, being satisfied, notwithstanding the pendency of the cross-action, that the charterer had always been desirous to refer all matters, and that the application was *bonâ fide*, and that justice would be done by staying the action, made the rule absolute to stay proceedings. It is impossible to distinguish that case from the present. *Wickham v. Harding* (28 L. J. Ex. 215) is also an authority in favour of this application.

ERLE, C.J.—I think this rule should be made absolute. I retain the opinion I expressed in *Russell v. Pellegrini* (6 E. & B. 1020; 26 L. J. Q.B. 75).

WILLES, BYLES and MONTAGUE SMITH, JJ., concurred.

*Rule absolute.*¹

IN THE COMMON PLEAS.

June 20, 1866.

WORRAL WATERWORKS COMPANY v. LLOYD.

L. R. 1 C.P. 719.

Execution—Elegit—Local Board of Health—Land held for Public Purposes.

EXECUTION. D.—*Land which had been conveyed to a local board of health, for the purposes of the Public Health Acts, was used as a reservoir for the supply of water to the district of the local board. A judgment having been obtained against the local board in the name of their clerk:—Held, that the land was liable to be taken under a writ of elegit.*

This was an action of ejectment tried before Mellor, J., at the last Liverpool spring assizes. The plaintiffs claimed as tenants by elegit. It appeared that the plaintiffs had recovered a judgment against the defendant, as clerk to the Tranmere local board of health, for 9,322l. 19s. 2d. debt and costs in an action on an award. They issued a writ of elegit, to which there was a return that the defendant was possessed as such clerk of certain goods, and also of the water mains and pipes, and other appliances connected therewith, placed in and upon certain streets within the township of Tranmere; and also that he was seised of certain land, within the township of Tranmere, with the appurtenances, part being a reservoir which was used for the supply of water to the township. The conveyance of the land to the local board was put in, by which the property was conveyed to the local board "to have and to hold to the use of the local board, their successors and assigns, for ever, for the purposes of the Public Health Act, 1848, and the Local Government Act, 1858, incorporated therewith, according to the true intent and meaning of the said acts respectively."

(1) See *Randegger v. Holmes*, ante, p. 3779.

A verdict was entered for the plaintiffs, with leave to move to enter the verdict for the defendant, or a nonsuit, on the ground that land conveyed to a local board of health for the purposes of the Public Health Act and Local Government Act, cannot be taken by an elegit on a judgment against the local board.

Mellish, Q.C., having obtained a rule pursuant to the leave reserved,

Edward James, Q.C., *Manisty, Q.C.*, and *Baylis*, appeared to shew cause against the rule, and relied on *Mersey Docks Trustees v. Gibbs* (L. R. 1 H.L. 93). They were stopped by the Court.

Crompton Hutton, and *Watkin Williams* (*Mellish, Q.C.*, with them), in support of the rule. The case of *Mersey Docks Trustees v. Gibbs* (L. R. 1 H.L. 93) only decides that the plaintiffs were entitled to judgment. It does not follow that they were entitled to take in execution land which was held for public purposes. The only case in which execution against such property has been upheld is *Saunders v. Slack*;¹ and the case of *Attorney General v. Wilkinson* (29 L. J. Ch. 41) is a decision distinctly in point that such an execution cannot be levied.

WILLES, J.—I am of the opinion that this rule should be discharged. We have been anticipated by the case in the Exchequer, *Saunders v. Slack* (see note (1), and by the decision of the House of Lords, in the case of *Mersey Docks Trustees v. Gibbs* (L. R. 1 H.L. 93). It has been said that the House of Lords only referred to the right of the plaintiffs to judgment, and not to execution; but the principle upon which their decision rests is equally applicable to the right to execution as to judgment, and it was so understood in *Coe v. Wise* (L. R. 1 Q.B. 711). *Blackburn, J.*, in delivering the opinion of the Judges to the House of Lords (L. R. 1 H.L. at p. 111), did not overlook the difficulty of public property being taken in execution for what is called a private debt, and he met it by denying that the trustees were trustees for the public any more than the debt was a public debt. In this very case the local board have been put in the place of a private waterworks company, and what reason is there that they should not be liable for their debts as much as the private company would have been?

There is nothing express in the acts of parliament to restrain the effect of the judgment; and if it be said that it is contrary to public policy for execution to issue, the decision in *Mersey Docks Trustees v. Gibbs* (L. R. 1 H.L. 93) is directly in point to shew that it is not. The case of *Attorney General v. Wilkinson* (29 L. J. Ch. 41), before the Lords Justices, was a very peculiar case; there, there was an express prohibition against retrospective rates, and, moreover, the Court only continued the injunction against the levy till the hearing of the case, which in fact never took place.

MONTAGUE SMITH, J.—I am of the same opinion. The decisions in *Mersey Docks Trustees v. Gibbs* (L. R. 1 H.L. 93) and *Coe v. Wise* (L. R. 1 Q.B. 711) are conclusive, and the law laid down by them is consonant to reason and common sense.

Rule discharged.

(1) 11 L. T. 484. This was a rule to set aside a *fi. fa.* issued by the surviving plaintiff upon a judgment obtained in *Bush and another v. Martin* (2 H. & C. 511, 38 L. J. Ex. 17), *Slack* having succeeded *Martin* as clerk to the Bradford Paving Commissioners. Fire-engines and other goods the property of the commissioners had been seized under the writ. The Court of Exchequer discharged the rule without expressing any opinion as to whether the execution was valid or not, in order to give the commissioners an opportunity of bringing an action, and so taking the question to a Court of error.

MATRIMONIAL.

Dec. 2, 1865.

EVANS v. EVANS AND BIRD.

L. R. 1 P. & D. 36.

Order as to application of Damages—Practice.

DIVORCE AND MATRIMONIAL CAUSES. I.—*Where it was proved, on the hearing of a petition, that there had been no issue of the marriage, and that at the time of the hearing the respondent was living with the co-respondent, the Court made the order for the payment to the petitioner of the damages assessed against the co-respondent part of the decree nisi, instead of postponing it until the decree absolute.*

This was a petition by a husband for a dissolution of marriage, and claiming damages from the co-respondent.

The respondent and the co-respondent did not appear, and the case was tried by the Judge Ordinary and a common jury. The adultery charged was proved, and the damages were assessed at 150*l.*, and a decree *nisi* was pronounced with costs against the co-respondent. It was proved that there had been no issue of the marriage, and also that, ever since the petitioner separated from the respondent, she had lived with the co-respondent.

Dr. Spinks, for the petitioner, moved that the co-respondent might be ordered to pay the damages to the petitioner. The respondent, under the circumstances, cannot ask that any part of the damages shall be applied for her benefit; and it is unnecessary to postpone the order as to the application of damages until the decree absolute.

THE JUDGE ORDINARY.—I order that the damages be paid to the petitioner, and the order will form part of the decree *nisi*.

 PROBATE.

May 15, 1866.

PAGLAR AND WIFE v. TONGUE.

L. R. 1 P. & D. 158.

Will of married woman—Power—Will executed before creation of power—Bonâ fide question as to existence of power—Limited grant with will annexed.

WILL. A.—*When the Court is satisfied that a bonâ fide question as to the existence of a power enabling a married woman to make a will is intended to or may be raised, it will grant a limited probate of such will, to enable the question as to the existence of the power to be determined by the Court of Chancery. Where A., being covert in 1844, and having at that time no power to make a will, executed a will, disposing of all property to which she was or ever might become entitled, and certain powers to make a will were given to her by the wills of two persons, who died subsequently to the execution of the will of 1844, and by a deed of separation executed in 1850, and an application for administration with the will of 1844 annexed was opposed on the ground that the will, being invalid at the date of its execution, could not be made valid by the subsequent acts of third parties:—Held, that this was a question to be determined by the Court of Chancery, and that a limited grant might go as prayed.*

The plaintiff, Mrs. Paglar, was a residuary legatee, named in the will of

Mary Ann Tongue, a married woman, dated the 27th day of April, 1844, and propounded the same as made under certain powers and authorities thereunto enabling her, and, in pursuance of an order of the Judge, had delivered particulars of the instruments, on some or one of which the plaintiffs relied as enabling her to make the will, namely, the will of Rebecca Barnsley (who died in 1845), dated 6th of July, 1829, and two codicils thereto, dated the 31st of August, 1842; a deed of separation between the deceased and her husband dated the 2nd of October, 1850; and the will and codicil of Letitia Tongue, dated respectively the 8th of March and the 27th of May, 1862.

The pleas by the defendant Cornelius Tongue (the deceased's husband) were: 1st. That the will propounded was not a valid will by reason of the deceased being at the time of its execution a *feme covert*, and there being no power or authority whatsoever existing at the time of her death authorizing or enabling her (notwithstanding her coverture) to make the said alleged will. 2nd. Undue execution.

Issue joined by plaintiffs.

The case was heard before the Court without a jury; no question was raised as to the execution of the will, and the instruments referred to in the particulars were put in evidence by consent. The deceased died on the 31st of August, 1865, having lived separate from her husband for upwards of 30 years. By the will of Mrs. Barnsley, the deceased took a life interest in certain real and personal property for her separate use, with power to appoint the same amongst her children, and in default of issue (which event had not happened) she had a general power of appointment over the same. By the deed of separation, after reciting that the deceased had lived separate from the defendant for many years, and that he had not contributed to her maintenance for 20 years, the defendant agreed "that the household furniture, plate, linen, &c., bequeathed for her separate use by the will of Mrs. Barnsley, should remain in her custody and possession so long as the executors of Mrs. Barnsley should permit, pursuant to the trusts and directions of the said will; and also that all other estate and effects whatsoever, real or personal, to which the deceased should, or might, by purchase, gift, or devise, or bequest, or by representation, or by savings out of her separate income or estate, or by any other means, during her present coverture, hereafter become entitled, should be for her sole and separate use, and that she should be at liberty from time to time, notwithstanding her coverture, by her will or codicil to dispose of the same." The bequest to the plaintiff in the will propounded, was as follows: "I give to my two daughters all the property of which I am now possessed, or which I ever may become entitled to at any time whatever.

Dr. Spinks, for the plaintiff.—First, the circumstances of the deceased having from a period prior to the date of her will, and up to her death, lived separate from her husband with his assent, and of her having during such period maintained herself and her children without any aid from him, brings the case within *Haddon v. Fladgate* (1 Sw. & Tr. 48), so as to entitle her to dispose by will of any property acquired by her during the separation. Secondly, the deed of separation expressly empowers her to make a will.

[*Per Curiam*.—Only of property acquired after its date.]

Thirdly, the fact that the instruments creating the power came into operation after the execution of the will, does not make the will inoperative in respect of property given to, or powers conferred on, the deceased by such instruments. The will of the deceased must be taken to speak from the date of her death, in July, 1865, according to the 24th section of 1 Vict. c. 26. See *Stillman v. Weedon* (16 Sim. 26), *Thomas v. Jones* (31 L. J. Ch. 732).

Dr. Tristram, for the defendant.—There is a material difference between this case and *Haddon v. Fladgate* (1 Sw. & Tr. 48). In *Haddon v. Fladgate* the agreement of the husband to permit his wife to enjoy her earnings and property for her separate use was made *before* the date of the will; in the present case it was made six years *after* the date of the will propounded, and is expressly

limited to after-acquired property. Secondly, at the time of the execution of this will, the deceased being a married woman, had clearly no power to make it, and if her death had occurred before that of Mrs. Barnsley, probate of it would have been refused as a matter of course. A will void at the time of execution, cannot be made valid by the subsequent act of a third party. Thirdly, this will would have been invalid if made before the last Wills Act—*Stone v. Forsyth* (2 Dougl. 707)—and therefore comes within s. 8 of 1 Vict. c. 26, which provides “that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act.”

[*Per Curiam*.—Is not the question whether the power has been duly executed, one that ought to be left for the decision of the Court of Chancery? Is it not for that Court to say, according to the decision of *Barnes v. Vincent* (5 Moo. P.C. 201), whether a will executed in 1844 is or is not to be construed as the execution of a power, which did not exist until some time afterwards?]

It is a rule of the Court never to grant probate unless the deceased has left some property within its jurisdiction upon which that probate will operate. At the date of this will the deceased had no power to make a will, and had no property settled to her separate use, and if it is clear that the will is void, the grant should be refused on the ground that there is no property in respect of which it can operate. There are expressions used in *Barnes v. Vincent* (5 Moo. P.C. 201) at variance with the previous decision of *Tatnall v. Hankey* (2 Moo. P.C. 342), and so Sir H. Jenner thought, *Este v. Este* (2 Roberts. 351), indicating that wherever a party propounds the will of a *feme covert*, provided he alleges it to be made in exercise of a power, and without reference to the truth or falsehood of the allegation, the Court is bound to grant probate of it. If this is so, it is at the option of any person to obtain probate of a married woman's will.

[*Per Curiam*.—The Court is entitled to expect the party bringing forward the will of a married woman to make out a *prima facie* case that it is made in exercise of a power. The Court before granting probate ought to be satisfied that the party is making a *bona fide* claim—that the will may or will turn out to be the execution of a power.]

Stillman v. Weedon (16 Sim. 26) is not in point, as the will there was not the will of a *feme covert*, but of a person *sui juris*, and was originally valid. (And see *Price v. Parker* (16 Sim. 198)).

SIR J. P. WILDE.—The principle upon which the Court must act in this case is laid down in the judgment in *Barnes v. Vincent* (5 Moo. P.C. 201); and the principle I take to be this, that inasmuch as the Court of Chancery, whose exclusive function it is to determine whether a power has been duly executed, cannot look at the paper now propounded, unless the seal of this Court is attached to it, this Court ought not to enter upon an investigation as to whether the power has or has not been duly executed (although the deceased's power to make a will at all often depends upon the determination of this question), but it ought to grant probate of the paper, provided it is satisfied that it was duly executed as a will, and provided, in reference to the deceased's capacity as a *feme covert* to make a will, it is satisfied that a *bona fide* question is intended to or may be raised as to the existence of a power of which the will may turn out to be a good execution. On this principle there is abundant reason to grant probate of the will now before the Court. The deed of separation carries the case farther, because it contains a distinct agreement by the husband that the wife may make a will disposing of after-acquired property, and it appears that she did afterwards come into property, under the will of Mrs. Tongue, who died in August, 1864, and which was proved on the 21st of June, 1865. There is no doubt, therefore, without investigating what other property she could deal with, that she was entitled, after August, 1864, to dispose of the property she took under that will, and no question would have arisen as to her right to make a will in execution of the power, if she had made

it after Mrs. Tongue's death. If I were to refuse probate, I should take on myself to determine a matter which ought to be determined by the Court of Chancery, namely, whether or not, there being a power created in a testamentary instrument executed in 1842 by a testatrix who died in 1845, and another power created in a will executed in 1862 by a testatrix who died in 1864, a will made in 1844 was or was not an execution of those powers. I do not propose to determine whether the will of 1844 was or was not a due execution of these powers. I am satisfied of the due execution of the will, and therefore grant administration with the will annexed to the plaintiff Mrs. Paglar.

MATRIMONIAL.

March 13, 1866.

BACON v. BACON.

L. R. 1 P. & D. 167.

Access to children—Judicial separation—Wife's motion—Costs.

Where the Court had decreed a judicial separation in favour of the husband on the ground of cruelty, and the wife afterwards applied on motion for access to some of the children of the marriage, and an order for access was made:—Held, that the wife was not entitled to have the costs of the motion taxed against her husband, as he had not refused her access to the children since the date of the decree.

This was originally a suit for restitution of conjugal rights, instituted by the wife and resisted by the husband on the ground of her cruelty. The Court found for the cruelty charged, and decreed a judicial separation in favour of the husband.

Dr. Wambey, for the wife, moved that she might have access to two of the elder children of the marriage, and the custody of the two younger ones.

Woollett, for the husband, had no objection to allowing the wife to have reasonable access to the children, but could not consent, she being the peccant party, to her having the custody of any of them.

The Judge Ordinary made an order for access only.

Dr. Wambey asked for the costs of the motion. The wife had applied to the husband for access, and it had been refused by him.

Woollett, contra. The application for access referred to was made pending the suit. No such application has been made since the decree for judicial separation; if it had been, it would not have been refused. The motion was, therefore, unnecessary. In order to saddle the husband with the wife's costs of the motion, an application for access should have been made and rejected since the date of the decree.

The JUDGE ORDINARY.—There should have been a distinct refusal of reasonable access by the husband after the decree for judicial separation was made in his favour to entitle the wife to have the costs of this motion taxed against him. I make no order as to costs.

MATRIMONIAL.

July 26, 1866.

BOARDMAN v. BOARDMAN, THE QUEEN'S PROCTOR
INTERVENING.

L. R. 1 P. & D. 233; 14 W. R. 1024.

Applied, *Sottomayer v. De Barros*, [1880] E. R. A.; 49 L. J. P. 1; 5 P. D. 94; 49 L. J. P. 81; 27 W. R. 917 (P.D. & A.). See, *R. v. Clarence*, [1889] E. R. A.; 58 L. J. M.C. 10; 22 Q.B. D. 23; 59 L. T. 780; 37 W. R. 166 (C.C.R.).

Evidence—Suit founded on Adultery—Cross-examination of Parties as to Adultery—Right of Queen's Proctor to cross-examine—14 & 15 Vict. c. 99, s. 4—16 & 17 Vict. c. 83, s. 5—22 & 23 Vict. c. 61, s. 6—Cruelty—Reckless communication of Disease.

DIVORCE AND MATRIMONIAL CAUSES. T.—*A petitioner and a respondent in a suit for dissolution of marriage, who are examined under the 6th section of the 22 & 23 Vict. c. 61, upon an issue of cruelty or desertion, may be cross-examined upon issues of their own adultery, and of each other's adultery. The Queen's Proctor intervening, and alleging collusion and the adultery of the petitioner, is entitled to cross-examine all the witnesses called by the petitioner and the respondent. When the respondent has been examined under the 6th section of the 22 & 23 Vict. c. 61, the Queen's Proctor may, therefore, cross-examine him for the purpose of proving the petitioner's adultery.*

DIVORCE AND MATRIMONIAL CAUSES. C.—*If a husband, knowing that he is in such a state of health that by having connection with his wife he will run the risk of communicating the venereal disease to her, recklessly has connection with her, and thereby communicates the disease to her, he is guilty of cruelty.*

This was a petition by a wife for dissolution of marriage on the ground of the adultery, coupled with the cruelty, of the husband. The only cruelty charged was wilful communication to the wife of the venereal disease. The respondent filed an answer traversing the allegations in the petition, and pleading condonation. The Queen's Proctor intervening under the 7th section of the 23 and 24 Vict. c. 144, alleged that the petitioner and the respondent were acting in collusion, and that the petitioner had been guilty of adultery. These issues came on for trial before the Judge Ordinary by a special jury.

The petitioner was examined under the 6th section of the 22 & 23 Vict. c. 61, on the issue of cruelty.

The Solicitor General (Hannen with him), for the Queen's Proctor, proposed to cross-examine her upon the issue of her adultery.

Coleridge, Q.C. (*Dr. Spinks* with him), for the petitioner, did not object if he was at liberty to re-examine her upon that issue.

[*THE JUDGE ORDINARY.*—That follows as a matter of course. I think that when a witness is put into the box upon the issue of cruelty, there is nothing in the act which excludes a cross-examination, which may touch the question of adultery; for such a course of examination may shew the sort of life she has been leading, and may hold her up to the jury as a person unworthy of credit. Besides, in this case her evidence upon the issue of her adultery is material to the issue of cruelty, the only cruelty charged being the communication of the venereal disease.]

The petitioner was accordingly cross-examined and re-examined upon the issue of her adultery.

At the close of the petitioner's case, the respondent, who conducted his

case in person, went into the witness-box, and gave evidence upon the issue of cruelty.

The Solicitor General proposed to cross-examine him upon the issue of the petitioner's adultery.

Coleridge, Q.C., objected. The Queen's Proctor has not traversed the cruelty, and is not entitled to cross-examine on that issue. The respondent is not a competent witness in support of the charge of adultery brought against his wife by the Queen's Proctor.

[*THE JUDGE ORDINARY*.—I think that the Queen's Proctor is entitled to cross-examine all the witnesses called by the petitioner and the respondent upon the issues which he has raised of collusion and of the adultery of the petitioner. It is extremely difficult, if not impossible, to work out the enactments of the legislature with regard to evidence consistently with each other as they stand. The parties to these suits being competent witnesses as to the cruelty, and the statute (22 & 23 Vict. c. 61, s. 6) which renders them competent witnesses containing no negative words excluding their evidence on other matters, the only rule I can lay down is, that when they are examined upon that issue they can be cross-examined within the usual limits. Any question material to the issues which the jury have to try, or bearing on the credit of the witness, is within the usual limits of cross-examination, and it is impossible therefore to exclude the evidence of the parties upon the issue of adultery, if it comes out in cross-examination. The statutes (14 & 15 Vict. c. 99, s. 4; 16 & 17 Vict. c. 83, s. 2) excluding the evidence of the parties in proceedings instituted in consequence of adultery, prevented them from being put into the witness-box, but an exception has been engrafted on those statutes, by which in certain cases they are allowed to go into the witness-box. I think that when they are in the witness-box they must be examined and cross-examined according to the ordinary rules of evidence.]

The respondent was accordingly cross-examined by the *Solicitor General*, and also by *Coleridge*, upon the issues of the petitioner's adultery.

[*THE JUDGE ORDINARY*, in summing up, after directing the jury upon the issue of adultery, directed them upon the issue of cruelty as follows: The next question, whether the respondent has committed cruelty, is not nearly so easy to determine as that of adultery. It depends more on reasonable inference and just conclusion than on facts alone. There is not a trace of any cruelty except the communication of the venereal disease. The law regards an act of that character as cruelty, and I think your sympathies will go along with it. It says that if a man has a venereal complaint, and knowingly communicates it to his wife, he is guilty of cruelty. Now, if a man knowing that he was suffering from a complaint of that sort, had intercourse with his wife, and did communicate it to her, even although he were to swear, and you were to believe him, that he did not mean to communicate it, I doubt whether you ought not to say that he had been guilty of cruelty. If he knew that his body was tainted, and that he might communicate the disease, if he knew that he was running the risk of giving his wife the complaint from which he was suffering, and he did give it to her, I am disposed to think that would be an act of cruelty. But you must go as far as that—you must be satisfied that he had reason to believe that he was doing a hazardous act, an act which might probably have the effect of communicating the disease to her.]

Before the jury delivered their verdict they asked the Judge Ordinary whether the husband would be guilty of cruelty if he had exercised indiscretion and recklessness in marital intercourse, and so communicated the disease to his wife without actual knowledge that he was infected.

[*THE JUDGE ORDINARY*.—If the husband knew that he was in such a state of health that the having connection with his wife would be a reckless act, I think the communication of the disease would amount to cruelty. I think that mere indiscretion, if it went no further than that, would not be sufficient; but if you think that, looking at the state of his health, and of his

knowledge of his health, he recklessly had communication with her, and thereby communicated the disease, that, in my opinion, is cruelty.]

The jury found that the respondent was guilty of adultery and of cruelty, and that the petitioner was not guilty of adultery.

July 26.—THE JUDGE ORDINARY.—I forbore to pronounce a decree in this case after the jury had delivered their verdict yesterday, because as the respondent was *inops consilii*, I wished to consider whether I was correct in the ruling which I gave to the jury on the issue of cruelty. I find that in *Jones v. Jones* (Searle & Smith Rep. 138) the full Court adopted the judgment of Dr. Lushington in *Ciocci v. Ciocci* (L. R. 1 E. & A. 121), and the Judge Ordinary said: "The alleged act of cruelty is the communication of a disease of a peculiar character, and it is said there are grounds which should induce the Court to believe that the respondent communicated that disease to the petitioner wilfully, or, at all events, that he knew he was in a condition which made it probable that he would communicate it, as in the case of *Ciocci v. Ciocci* (L. R. 1 E. & A. 121), and that he was perfectly reckless whether he communicated it or not." In *Ciocci v. Ciocci* (L. R. 1 E. & A. 121), Dr. Lushington said: "If this were a point necessary to be determined, I should hold, and without doubt, that if a man married under such circumstances" (i.e. having been suffering from venereal disease for some time immediately prior to the marriage), "and communicated to his wife the venereal disease, it was, to use the mildest term applicable to such conduct, such utter recklessness of the health and comfort of his wife, that if he did communicate such disease he was guilty of cruelty in the eye of the law; and I should hold this upon the principle that whoever does an act likely to produce injury and the injury follows, can never excuse himself by saying that he hoped a probable consequence might, by some peculiar good fortune, not follow." In this case the jury adopted the term "reckless," and they found the cruelty proved. I pronounce a decree *nisi*, with costs.

IN THE HOUSE OF LORDS.

March 8, 12, 1866.

THE COMMISSIONERS OF THE LEITH HARBOUR AND DOCKS,
appellants; THE INSPECTOR OF THE POOR AND OTHERS, *respondents*.*

L. R. 1 H.L. (Sc.) 17.

Referred to, *Greig v. Edinburgh University*, 1868, L. R. 1 H.L. (Sc.) 348 (H.L. (Sc.)); *Commissioners of Income Tax v. Pemsel*, [1892] E. R. A.; 61 L. J. Q.B. 265; [1891] A.C. 531; 65 L. T. 621 (H.L.).

Poor-rate—Immunity of the Crown—Liability of Harbours and Docks—General Liability—8 & 9 Vict. c. 83; 23 & 24 Vict. c. 48.

RATES AND RATING. B.—*The statutes which authorize assessment for relief of the poor are silent as to the Crown. Hence the Crown is subject to no poor-rate. To this immunity a wide signification is ascribed; for not only are the palaces of which Her Majesty is in actual occupation deemed free from assessment, but even the House of Lords is held to be exempt, on the ground that it is regal. So likewise Government offices, as the Post-office, the Horse Guards, and the Admiralty, escape this impost, simply because they are in the service of the Crown. In the days of Lord Mansfield, Lord Kenyon, Lord Ellenborough, and Lord Tenterden, an opinion prevailed that property held for public purposes (though unconnected with the Crown, the State, or the Government) was exempt from poor-rates. This opinion was shaken by Lord Denman,*

* Reported in the 3rd series of the Court of Session Cases, vol. ii. p. 1234.

and substantially overturned by Lord Campbell; but it was not finally extinguished till the judgments of the House of Lords pronounced last session in the English case of the *Mersey Docks*,¹ and in the Scotch case of the *Clyde Navigation Trustees v. Adamson*.²

Per the LORD CHANCELLOR (Lord Cranworth): We are all agreed that the principle of the *Mersey Docks Case* and that of the *Clyde Navigation Trustees v. Adamson* are the same, and not to be distinguished.

Adjudged by the House that the *Leith Commissioners* were liable to be assessed for the relief of the poor in respect of their docks and harbours as owners and occupiers of lands and heritages within the meaning of the statutes, not for their own use, but exclusively for the benefit of the public, there being no exemption of property held for public purposes unless held by the Crown or for the Crown.

Res Judicata: That the Court has decided against a poor-rate for one year, is no reason why it should not decide in favour of a poor-rate for another and a different year, in respect of the same property, and in a suit between the same individuals. The doctrine of *res judicata* does not apply to such a case.

The action was brought in January, 1861, by the inspector of the poor and three owners, or occupiers, of property in the parish of North Leith against the above commissioners, to have it declared that they were liable to be assessed for the relief of the poor, under the 8 & 9 Vict. c. 83, in respect of "all lands, quays, harbours, wharves, docks, sheds, cranes, &c., the property of, or occupied by them;" and that in estimating the yearly value of the said subjects, all harbour-dues, &c., and all miscellaneous dues collected by them, should be included and taken into account.

The commissioners' defence was, in the first place, *res judicata*, they averring that the very question raised in this case had been already decided in a previous suit between the same parties (2 Macq. 28).

Secondly, the commissioners asserted that the property sought to be charged was "held by them solely and exclusively for the benefit of the public, and that the revenues were appropriated to the maintenance of the harbour, and the liquidation of debts incurred in the construction of the works."

The Lord Ordinary, on the 20th of March, 1862, found and declared in terms of the several declaratory conclusions of the summons. In other words, he decided in favour of the claim, and against the commissioners.

A reclaiming note was presented by the commissioners to the First Division of the Court of Sessions, who, on review, confirmed the Lord Ordinary's decision; and hence the present appeal.

The Attorney-General, the Lord Advocate, and Mr. Anderson, Q.C., appeared as counsel for the appellants; and contended, in the first place, that the decision of the House of Lords in the case of the *Leith Harbour Commissioners v. The Inspector of the Poor* (2 Macq. 28), pronounced in 1855, was *res judicata*, and decisive of the present appeal, which was substantially between the same parties, and with reference to the same subject matter.

(1) See the *Mersey Docks Case* ([1866] E. R. A. 2313), from which it appears that Trustees as the legal occupiers of hospitals or lunatic asylums, are rateable to the poor; the real occupants being paupers sick or insane. The occupation, however, must be capable of yielding a net annual income, though it be not beneficial to the owner.

(2) 4 Macq. 931. In this case the decision of the House was that "Crown property, as well as property devoted to or made subservient to the Queen's Government, is exempt from poor-rate; but property held upon trust to create or improve docks and harbours in seaport towns, though having a public character, and though devoted to public purposes, is nevertheless subject to be rated for the relief of the poor."

Secondly, they insisted no exemption from poor-rate because here the property vested in the commissioners was held by them, not for private, but exclusively for public purposes.

In the course of the argument the Lord Chancellor stated the opinion of all their Lordships to be that the principle of the decision in the case of the *Mersey Docks*, and in the case of the *Clyde Navigation Trustees v. Adamson*, both pronounced by the House last session, was the same and not to be distinguished. The only exemption, his Lordship added, from poor-rate was that of the Crown, to which a very extended signification had been attached, so as to include prisons and rooms at the assizes.

The several points pressed by the appellant's learned counsel were deemed so clear against them that at the close of their remarks, the respondents' counsel, *Mr. Rolt* and *Sir Hugh Cairns*, were not called upon to address the House; and the following opinions were forthwith delivered by the law peers.

THE LORD CHANCELLOR.—My Lords, the question in this appeal, though one of great importance, does not appear to me, after the examination which the matter has received at your Lordships' hands, to be one of any difficulty.

It is not a matter of surprise that the subject should have been brought more than once under discussion. Erroneous views of it have been taken by very eminent Judges from time to time.—Lord Mansfield, Lord Kenyon, Lord Ellenborough, and Lord Tenterden thought that there was a distinction in respect of the rateability of property when it was not occupied by beneficial owners. That question was raised in the great case of the *Mersey Docks*, which finally came to be adjudicated upon here in the last session of Parliament; and which, after a very elaborate consideration by the Judges, as well as by your Lordships, was finally decided in favour of the rateability of all trustees or commissioners having harbours, docks, wharves, and other property of the same sort in their possession, in respect of which they levied harbour dues, tolls, or other sums of money. It was held that all these were liable in England according to the language of the statute of Elizabeth (43 Eliz. c. 2.) (and there is no difference in the language of the statutes which regulate the poor-law in Scotland), with this single qualification, that as the Crown is not mentioned in the Poor-law Acts, the Crown is not bound; and, therefore, Her Majesty's palaces (including the building in which your Lordships are now administering justice), and other establishments which can be said to be in the occupation of the Crown, are not rateable.

But it was distinctly held that harbours, docks, rivers, and wharves, are not in the occupation of the Crown, and consequently are rateable. Therefore, upon this general principle, I think there is no doubt that the property in the present case is rateable.

I certainly thought, and I believe both my noble and learned friends thought, that the very point had been decided last session in *Adamson's Case*³; but from the argument of the Lord Advocate, I was induced to look at the Journals to see what was the actual interlocutor which came by appeal before your Lordships; and it certainly does appear that some matters which were held in the *Mersey Docks Case* to be chargeable, did not form the subject of that interlocutor; and, therefore, there has not been any strict adjudication with respect to all that which is now sought to be held rateable in the present case. As it was not all included in *Adamson's Case*, it has not been finally adjudicated upon. But that which was deficient in point of adjudication in *Adamson's Case*, will now be made good by your Lordships' decision in this case. And it must be now held in Scotland, as in England, that the commissioners or trustees of docks, harbours, wharves, and everything of the sort, are liable to be rated in respect of their receipts, whatever be the purposes (other than Crown purposes) to which those receipts are to be applied.

(3) *Clyde Navigation Trustees v. Adamson* (4 Macq. 931).

There remains the single point of *res judicata*, which, I think, will appear to your Lordships to be more plausible than substantial. Some ten or eleven years ago the question was raised as to the liability of the commissioners of this very harbour to contribute to the rate for the year from Whit-Sunday, 1846, to Whit-Sunday, 1847. They denied liability; and pleaded, amongst other things, that "The subjects were held by them solely and exclusively for the benefit of the public; and further, that the rates and revenues leviable being by law limited and appropriated to the maintenance and repair of the harbour, and the liquidation of the debt incurred in the construction of the works, they were not liable for the assessment."

That case, however, turned, as appears by Mr. Macqueen's report of it, on a totally different point.⁴ And the affirmance of a part of the decision below, so far as it was affirmed, had reference not to the general question of rateability, but solely to the payment to be made for a particular year. Care, however, was taken by the House to guard itself from expressing any opinion as to the general question of the rateability of harbours and docks. The plea of *res judicata* is just as invalid as the other objections; and I shall, therefore, move your Lordships to affirm the decision appealed from.

LORD CHELMSFORD.—My Lords, I will not enter into the consideration of the former judgment in favour of the appellants (2 Macq. 28), and the effect of the declaration which accompanied it in this House, further than to say that whether the declaration is to be regarded as a reservation of the question of the liability of the commissioners to be assessed for the sum of 7,680*l.* in some other manner than form,—or a reservation of the question of their general liability for poor-rates,—it would equally leave the point open for future consideration, whether they were liable to any assessment for the relief of the poor in respect of the harbours, docks, and subjects vested in them as owners, tenants, or occupiers.

It appears to me that the argument for the appellants has not sufficiently attended to the nature of a plea of *res judicata*. The maxim of the civil law, "*res judicata pro veritate accipitur*," applied only when the identical question, which had been once judicially decided, was again raised between the same parties—the rule laid down in the Digest, lib. xlv. t. 2, s. 3, being "*exceptionem rei judicatæ ob stare, quoties eadem questio inter easdem personas*

(4) The Court of Session on the 19th of December, 1852, decided that the sum of 7,680*l.*, appointed to be paid annually out of the revenues of the harbour and docks of Leith, was liable to be assessed for the poor, under the 8 & 9 Vict. c. 83, for the year from Whit-Sunday, 1846, to Whit-Sunday, 1847. The assessment amounted to 518*l.* 8*s.*, for which they decreed against the commissioners of North Leith, and declared that they and their successors in office were liable to pay poor-rates on the said sum of 7,680*l.* from Whit-Sunday, 1847, and in all time thereafter; but reserving to the said commissioners their relief against the inspector of the poor of South Leith, to the extent of such portion of the said sum (if any) as might be found to be assessable to the parish of South Leith. Upon the appeal all that was said by the law peers was as follows:—The LORD CHANCELLOR CRANWORTH.—There is no authority whatsoever in the Poor Law Act to rate a sum of money. In order to have made this interlocutor sustainable in point of form, it should have imposed a rate, not upon the fund, but upon the commissioners, as being the owners and occupiers of the docks. Another objection, which is quite unanswerable, is this, that here these gentlemen are rated in the parish of North Leith for the whole of these docks, although only a part of them is situated in that parish, and they are told you may recover such proportion, if it is improperly assessed, from the parish of South Leith. But a court of justice must not thus deal with the suitors who come to it for relief. It appears to me, therefore, that both the form and the principle of this decision are entirely wrong, and therefore the course which I propose to take is simply to move your Lordships that this interlocutor be reversed, but that the judgment of the House shall be so drawn up as not to prejudice the parties with respect to any rate that may be imposed hereafter.—LORD BROUGHAM.—I entirely agree. The interlocutor of the Court of Session was reversed with the following guarded declaration:—"This judgment of reversal is not to prejudice or affect any question which shall hereafter arise as to the liability of the said commissioners to be assessed for the poor, by virtue of the Act 8 & 9 Vict. c. 83, for the harbour, docks, and subjects vested in them as owners, tenants, or occupiers, as in the pleadings is mentioned. And it is further ordered that, with this declaration, the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment." The Judgment of the House was pronounced on the 6th of February, 1855 (2 Macq. 28).

revocatur." This plea, therefore, is exactly analogous to a plea in the English Courts of "judgment recovered;"^s in which it is necessary, in order to make the judgment operate as an estoppel, that it should be between the same parties and upon the same subject matter coming directly in question, either in the same Court, or in another Court of co-ordinate jurisdiction.

Without considering whether the pursuers are different or substantially the same in the present and in the former action, or whether the circumstances under which the question is now raised have been changed from what they were before by the Act of the 23 & 24 Vict. c. 48, it is sufficient to say that the proceeding in the present case being for a different rate from that upon which the former judgment proceeded, the cause of action is different, and the plea of *res judicata* is consequently inapplicable.

In a case to which the plea of *res judicata* properly applies, and an appeal is made to the House, its jurisdiction is not taken away by effect being given to that plea. On the contrary, it is then deciding upon the whole subject of the appeal. The only question in such a case would be whether there was a previous judgment between the same parties on the same subject matter; and that once established, there would be no possibility of going behind the judgment and examining the grounds on which it proceeded; for, as long as it remained in force and unreversed, it would be conclusive between the parties.

But I think the plea of *res judicata* cannot in this case be maintained.

LORD KINGSDOWN.—My Lords, I quite agree with my two noble and learned friends.

Interlocutors affirmed, and appeal dismissed with costs.

IN THE HOUSE OF LORDS.

July 12, 13, 1866.

JAMES WHITE AND OTHERS, *appellants*, THE DUKE OF BUCCLEUCH AND OTHERS, *respondents*.

L. R. 1 H.L. (Sc.) 70.

See, *Pisani v. Att.-Gen. for Gibraltar*, 1874, L. R. 5 P.C. 516; 80 L. T. 729; 22 W. R. 900 (P.C.).

Practice—Jurisdiction—Issues—Uncertainty—Right of way—Res judicata—Costs.

ARBITRATION, REFERENCE AND AWARD.—1. *Where proceedings are taken out of the ordinary cursus curiæ with the assent of the parties, all subsequent interlocutors in the course adopted, though pronounced adversely, are in the nature of awards, and not subject to appeal.*

2. *Where, in an action of declarator of right of way, the defender had consented to judgment against him upon issues describing the footpath claimed as leading "by or near" a red line on a plan in process, the Court has subsequently directed an engineer to lay off the footpath so consented to "in such manner and such a line as to make the footpath least burdensome to the defender":—Held, 1, That the Court, by so doing, had departed from the cursus curiæ. And, 2, That all the interlocutors following on that departure were extra-judicial and not appealable. 3. That the judgment was vague and uncertain in consequence of the alternative form of the issue "by or near." And 4. Affirming the judgment of the Court below, that a minute abandoning three out of five footpaths claimed in the summons, and lodged before closing*

(5) As to the plea of "Judgment recovered," see Saunders on Pleading and Evidence, Lush's 2nd ed. vol. i. pp. 257, 258, 264; vol. ii. pp. 257, 1388.

the record, was irregular as a minute under the Judicature Act; and that it was too late to receive another minute in the same terms after closing the record, and after judgment upon the issues as to the other two footpaths had been given, although some conclusions of the summons were still undisposed of. 5. *Semble, judgment of absolvitor, quoad the three roads, the right to which was never put in issue, would not be res judicata in another action to establish such right.* 6. *An appeal against interlocutors made after a departure from the ordinary course of the Court, dismissed without costs, the House being of opinion that the parties had been led astray by the Court below.*

In 1846, the appellants raised an action before the Court of Session against the late Earl of Morton, concluding *inter alia*, that it should be declared that the five roads or footpaths described in the summons, and lying between Aberdour and Burntisland, in Fifeshire, were public rights of way, and that the defender should be ordained to remove obstructions, and interdicted from interfering with the free use by the public of the right of way. The Earl of Morton, by his defence, maintained that these footpaths were his private property, and not burdened with any public right of way. On the 7th of March, 1851, before the record was closed, the appellants lodged a minute, by which they abandoned the cause, in so far as related to three of the footpaths, reserving their right to bring a new action as to these, in terms of the Judicature Act (6 Geo. 4. c. 120), and the relative Act of Sederunt. Upon this minute being lodged, the Lord Ordinary (Robertson) appointed the defender to give in an account of his expenses relative to the part of the cause abandoned, and remitted the same to the auditor to tax and report. On the 31st of May, 1851, the record was closed. Thereafter, the Court remitted to Mr. Wylie, a civil engineer, to make a plan of the ground, shewing the line of footpath claimed, and the places where the two branches thereof entered and left the defender's ground. Mr. Wylie prepared a plan, on which the footpath claimed was delineated by a red line.

By interlocutor of the 18th of July, 1854, the Court approved of two issues, and appointed them to be the issues for trying the cause. The issue as to one of the roads claimed was as follows:—

1. Whether, for the said period of forty years, or for time immemorial, there existed a public right of way or branch foot-road for foot-passengers, leading by or near the broad red line, as shewn on the plan No. 424, of process, from the Kirk Wynd of the old or easter village of Aberdour, in a southerly direction along the eastern side of what is known as the Mill Meadow, to or near the Teinds' Barns, and thence in an easterly direction through or betwixt a row or double row of old trees till it joins the pathway first above described at or near the Heughs, at or near the aforesaid northern extremity of the Whitesands Bay, and thence by that pathway to Starleyburn, and thence through the remaining portion of the defender's lands to the kirkton of Burntisland, or to the harbour and royal burgh thereof.

The issue as to the other road claimed was in the same terms, *mutatis mutandis*.

Shortly before the day fixed for trial the defender lodged a minute, by which he consented to a judgment against him in the same way as if a verdict had been found for the appellants on the issues in the cause. Lord Morton thereafter presented a note craving, that, since the right of path had been conceded, it was necessary, for the protection of his property, that the footpaths should be judicially defined and laid off. The Court, thereupon, by interlocutor of the 23rd of December, 1854, remitted the process, with the issues and the minute consenting to judgment, to Mr. Wylie, with directions to him "to lay off and mark on the ground, and also on the plan prepared by him, the footpath so consented to, with the entrances to the same, in such manner and in such line as to make the footpath least burdensome to the defender, and so as to interfere as little as might be with the use and occupation of the ground by

the defender, and, at the same time, so as fully to answer the right of footpath between the places mentioned in the issues, and without interference with that line of way." Mr. Wylie made an interim report desiring instructions with reference to a proposed diversion of the footpath between the Kirk Wynd and the Teinds' Barns, mentioned in the issue, from the broad red line, as delineated on the plan therein referred to, on to a private cart-road belonging to the defender, which ran parallel to the red line between a row of trees and a stone wall. The appellants objected to this diversion, but the Court, by interlocutor of date the 10th of March, 1855, found that the appellants were not entitled to a footpath separate from that cart-road. On the 29th of November, 1856, their Lordships approved of the final report and relative plan prepared by Mr. Wylie, on which plan the footpath between the Kirk Wynd and the Teinds' Barns was marked upon the cart-road; and found the appellants entitled to the footpaths so marked on the plan.

The appellants subsequently moved the Court to ordain the respondents, against whom the action had been transferred on the death of Lord Morton, to remove certain obstructions from the footpath; but the Court, by interlocutor of the 6th of December, 1861, refused the motion.¹

In January, 1862, the appellants moved the Court to dispose of the remaining conclusions of the summons, and to find them entitled to expenses. The Court, instead of dealing with this motion, ordered the parties to be heard on the competency of the appellants' minute of abandonment, dated 7th of March, 1851; and their Lordships by interlocutor, dated the 21st of May, 1862, found that this minute was incompetent, and appointed it to be withdrawn, on the ground that it was lodged *before* the record had been closed, whereas to make it competent under the Judicature Act it should not have been lodged till *after* that step had been taken.² To meet this view the appellants lodged a new minute in precisely the same terms as the former. The Court, however, by interlocutor of the 6th of June, 1862, held that the appellants were not entitled in the then state of the process to abandon in terms of their second minute; and found and declared, in terms of the declaratory and prohibitory conclusions of the summons, as regarded the footpaths laid down on Mr. Wylie's plan, and settled by the interlocutor of the 22nd of November, 1856, to be the footpaths to which the public were entitled: *quoad ultra* their Lordships *assolizied* the respondent, but found the appellants entitled to certain expenses, which were modified to 750*l*. by interlocutor of the 31st of March, 1863.³

The present appeal was taken against the interlocutors of the 10th of March, 1855, the 29th of November, 1856, the 6th of December, 1861, the 21st of May, 1862, the 6th of June, 1862, and the 3rd of March, 1863.

Mr. Anderson, Q.C., and Mr. C. Grey Wotherspoon, for the appellants, argued that all the interlocutors appealed against were erroneous. The right of the appellants to the footpath in the red line marked on the plan was judicially established by the defender's minute of consent to a judgment, as if a jury had returned a verdict; and the Court, therefore, had no right or power afterwards to deprive them, or the public, of any portion of the footpath as they had done, by diverting that portion of the red line between the Kirk Wynd and the Teinds' Barns on to the cart-road. The cart-road was never claimed, and never conceded. The appellants would not have accepted it in lieu of a corresponding portion of their red line; for, among other reasons, the cart-road was not in all circumstances a safe route, while the road by the red line was. The road so diverted was described in the issue by reference to the plan in process; that line, and that alone, should have been given to the appellants.

LORD WESTBURY.—I observe that the second issue describes the footpath as situated "by or near" the red line. This is an issue which contains a vitious

(1) See *Hay, &c. v. Earl of Morton* (24 Court of Session Cases (2nd Series) 116).

(2) See *Hay, &c. v. Earl of Morton* (24 Court of Session Cases (2nd Series) 1054).

(3) See *Hay, &c. v. Earl of Morton* (24 Court of Session Cases (2nd Series) 1056).

amount of uncertainty, and upon which no satisfactory judgment could have been pronounced by any Court.]

The alternative "by or near" was no doubt sanctioned by the Court, but this was to meet the case of any variation in the proof. By the defender's concession, however, no proof was required; and the proper course, in those circumstances, was to have given the route as laid down by the red line. At all events, the footpath should not have been placed upon a dangerous, private, ill-kept, cart-road. In this matter it was submitted the Court had clearly acted *ultra vires*.

[The LORD CHANCELLOR.—Both *ultra vires* and *ex via*.]

Quite so; that was the way the appellants desired to put it before their Lordships. The interlocutor of the 6th of March, 1855, pronounced upon Mr. Wylie's interim report, and which directed this diversion of the footpath, should, therefore, be reversed.

[LORD WESTBURY directed attention to the fact that the interlocutor of the 6th of March, 1855, followed upon that of the 22nd of December, 1854, by which Mr. Wylie was directed to lay off and mark on the ground, and also on the plan, the footpath in such a line as to make the footpath least burdensome to the defender, and inquired whether that interlocutor of 1854 was not the basis of those which followed, as to the diversion of the footpath, and must not be taken to involve a consent by the parties to the departure from the strictly judicial duty or functions of the Court; and that, if that were so, whether there had not been a departure from the *cursum curiæ* by the parties, which rendered any appeal against the subsequent relative interlocutors incompetent.]

Their Lordships would observe that the interlocutor of 1854, in addition, stated that the line to be laid down was "the footpath so consented to," which surely meant the red line. The appellants most certainly never intended to consent to anything that might deprive them of a footpath by the red line. They urgently protested at the time against any generosity being shewn to the noble defender by laying down any other footpath than the one they had gained. But, again, the interlocutor of 1854 merely contained directions to Mr. Wylie. It could not injure the appellants till acted upon; and the appellants had appealed to the interlocutor, which judicially declared the alteration of the footpath. That was the interlocutor by which the appellants were aggrieved. It was a judicial act, and was competently brought up by the appeal. It might have been that the red line would have been considered by Mr. Wylie to be the least burdensome to the defender; in which case the appellants would have had no reason to complain of the interlocutor of 1854. It was clear neither party, for a moment, thought that the appellants had consented to take anything but the red line, or that there should be a departure from the *cursum curiæ* in the mode of disposing of the case. There was not the slightest indication of such a view in the respondent's printed case presented to their lordships. The Court had also erred in refusing to order the removal of obstructions.

Then as to the abandonment of the three roads. The minute of 4th of March, 1851, was, no doubt, lodged three months before the closing of the record; but, if bad on that account, as a minute under the Judicature Act, it was, at all events, good as an abandonment at common law; *Caledonian Iron Foundry Company v. Clyne* (10 S. & D. 133); *Shands' Practice* (Vol. i. p. 494). The Lord Ordinary had not, it was true, pronounced in terms the usual interlocutor receiving the minute of abandonment; but, in effect, he did the same thing by appointing the defender to lodge his account of expenses "relative to the part of the cause so abandoned." The defender had acquiesced for eleven years in that abandonment; the Court itself had impliedly confirmed it by approving the issues, which related solely to the remaining two roads, "as the issues for trying the cause;" although, at the last moment, their Lordships started and sustained the objection to the minute of 1851. The defender could not take advantage of this objection after such a long acquiescence: *Elliott v. Sir J. L. Johnston's Trustees* (1 S. & D. 51, affirmed, 2 Shaw's Appeal Cases,

461). But, even if the minute of 1861 was bad, the minute of 1862, lodged long after the record was closed, and before the cause was disposed of, was good.

At the conclusion of the argument for the appellants, their Lordships, after consultation, desired the counsel for the respondents to confine their argument to the question of abandonment.

Mr. Rolt, Q.C., and *Mr. Hall* (of the Scotch Bar), for the respondents, argued that both the minutes of abandonment were properly disregarded by the Court below. The minute of 1851 was bad under the Judicature Act, because it was lodged *before* the record was closed. It was also bad at common law, because it had not been followed by the usual interlocutor, declaring it to have been received. The minute of 1862 was made too late. The record contained all the conclusions and allegations applicable to the five roads; so when the Court came finally to dispose of the case, there was no other course open to them than to give a declaration as to the two footpaths conceded by the respondents, and to *assolzie* as to other roads claimed. This branch of the case was purely one of practice, and their Lordships would be slow in such a matter to interfere with the ruling below.

Mr. Anderson, Q.C., replied.

The LORD CHANCELLOR (Lord Chelmsford).—My Lords, this is an appeal against six interlocutors of the Second Division of the Court of Session, and, in the course of the argument, your Lordships indicated a very strong opinion that, as to four of them, the appeal was incompetent.

The Court below had no power whatever to direct a road to be laid out equally convenient with that to which the public were clearly entitled. They have not given the public any way which they have been accustomed to use; but they have consulted the convenience of the defender, and they have directed *Mr. Wylie* to ascertain a road which will be equally convenient to the public with that to which they were entitled, and not inconvenient to the defender.

There is no doubt whatever, therefore, that in this interlocutor, the Court having proceeded *ultra vires*, all the subsequent interlocutors which were founded on this, as their basis, were taken out of the judicial course, and, consequently, were not a subject of appeal.

The only remaining question, therefore, relates to the question as to the minute of abandonment, upon which, undoubtedly, there appeared to be some difficulty during the course of the argument, but it is one which, on consideration, it seems to me may be very easily determined. The minute that was originally given in on the 4th of March, 1851, was in these terms: "*Deas*, for the pursuers, stated that he abandoned the cause in so far as it related to the rights of way or footpaths described in Articles 2nd, 3rd and 5th of the revised condescendence, reserving the pursuer's right to bring a new action relative to the roads and portions of the cause thus abandoned, in terms of the statute 6 Geo. 4, c. 120, and relative Act of Sederunt, without prejudice to the pursuer's right to proceed with the said cause as regarded the whole other matters and roads involved therein as accords." Upon that there was an interlocutor by the Lord Ordinary of the 7th March, 1851, in these terms: "The Lord Ordinary, having considered the minute by which the pursuers abandon this cause in part, appoint the defender to give an account of expenses relative to the part of the cause now abandoned, and remits the account thereof, when lodged, to the auditor to tax the same and to report, and *quoad ultra* continues the cause till to-morrow."

Now, it must be observed, in passing, that that minute of abandonment was never perfected, because, according to the practice which is laid down in *Mr. Shand's book*⁽⁴⁾ (a book of authority), there should have been a payment of the expenses which the Lord Ordinary directs to be ascertained. And the next step to be taken by the pursuer should have been to obtain an interlocutor of the Lord Ordinary, that "in respect the expenses due to the

(4) Practice of the Court of Session, p. 343.

defender had been paid, allows the pursuer to abandon this cause, dismisses the action, and decerns, with the expense of extract." Nothing of that kind was done, and, therefore, at the time of the closing of the record, which was on the 31st of May, 1851, there was no complete abandonment of these causes of action.

A new minute was given in, the date of which is the 26th of May, 1862, exactly in the terms of the former minute of 1851. Now it may be observed, with regard to the new minute, that it was only under this statute of the 6 Geo. 4, that such a minute could have been given in at that time, when the record was closed, and the statute of the 6 Geo. 4 only gives power to pursuer to abandon the whole cause of action. But this was an abandonment only of a part of the cause of action, and, therefore, on that ground, as it appears to me, it was incompetent.

But the Court deals with both these minutes of abandonment. First of all, in a judgment of the 21st of May, 1862, with regard to the first, the minute of 1851, the Lord Justice Clerk says it "contains an incompetent proposal," which I understand to mean that it was incomplete—that it was a mere proposal—that it was never carried into effect by a proper allowance of the abandonment after the payment of the expenses. And the rest of the Judges are of opinion that an abandonment of an action under the statute (and this professes undoubtedly to be an abandonment of the action under the statute) is only competent after the record is closed.

Now, my Lords, without entering into a consideration of whether there can be a part abandonment of a cause, or whether there can be an abandonment of a cause before the record is closed, I think your Lordships may decide in favour of these interlocutors upon a distinct and specific ground which is applicable to this particular case. The minute of abandonment of March, 1851, was incomplete, as I have shewn, at the time when the record was closed; but the record was closed in these terms on the 31st of May, 1851: The interlocutor is, "Declares the record to be closed on the adjusted revised condescendence for the pursuer, No. 9, and the adjusted revised answers, No. 50, of process." Now, my Lords, there can be no doubt at all that the record was closed with respect to the five roads stated in the revised condescendence, and forming, therefore, part of the record; and that it was absolutely necessary for the Court to dispose of those claims upon the record which were made by the Pursuer, because they were not withdrawn from the record. Although, practically, the case was confined to the trial of the issues with regard to two of the roads, still those claims remained on the record, and it was absolutely necessary for the Court to dispose of them. Now, in order to dispose of them, the Court considered it necessary, first of all, to direct the minute of March, 1851, to be withdrawn, and afterwards, in their interlocutor of the 6th of June, 1862, to find that the pursuers were "not entitled to abandon in terms of the said minute." These minutes being out of the question; the claims as to those three roads had to be disposed of; and the only mode in which they could possibly be disposed of, as there was no evidence in support of them, and as they were not withdrawn, was to enter an absolvitor for the defender, and therefore the Court directed that absolvitor to be entered.

I was a good deal struck by the observations which were made by my noble and learned friend (Lord Westbury), in the course of the argument, as to the danger which might arise to the public supposing this interlocutor were to stand, with an absolvitor of the defenders, because it might then be said that that would entirely conclude the public against any future claim with respect to these rights of way. I have very great doubts whether that would be the effect of it. Supposing any future claim to be made in respect of these roads, I doubt very much whether the public would be concluded by this interlocutor. I think it would be quite competent to the party prosecuting such a claim to shew the circumstances under which that interlocutor was

pronounced; and, undoubtedly, if the circumstances could be shewn, it never could be said that it was binding against the public.

Under these circumstances, I submit to your Lordships that this interlocutor is perfectly correct. But a question may arise as to what ought to be done with the costs in this case. It appears to me (I say it with very great deference to the learned Judges) that they have led the parties completely astray. They ought not to have gone on judicially to pronounce those several interlocutors which have been declared to be incompetent. They unnecessarily, and, as I venture to say, improperly, kept the parties before them, when the parties themselves had proceeded in a way which took the case out of the jurisdiction of the Court. Under these circumstances, I submit to your Lordships that, in dismissing this appeal, we ought to dismiss it without costs.

LORD CRANWORTH.—My Lords, I entirely concur with my noble and learned friend in the conclusion at which he has arrived in this case. When the jury had returned a verdict (for we must consider it as if they had returned a verdict) that there was a right of way “by or near the red line,” it was patent that the Court had got a finding that *per se* could not be applied. How were the Court to deal with this? It is not necessary for me to say: indeed I should feel myself at a loss to say exactly what, according to practice, ought to have been the course pursued. It is plain that issues have been directed which did not exhaust the subject. How was that to be supplied?

The best way to put it for the appellants is this, to treat it as a finding, as no doubt it was a finding, that there was in some direction or other a public right of way from the one point to the other. That was found by the jury. The precise line was not found. I do not say that it was open to the Court, but, perhaps, it was open to them, to have them put in some course of inquiry, either by reference to Mr. Wylie, or by some other mode, to ascertain what was the course of the public right of way, whether along the red line, or if not along the red line, how far, and in what direction diverging from it. If that had been done, whether it was the proper course or not, it might have led at least to an ultimate finding upon that which was the point really to be decided—namely, what was the line of the public right of way; if that had been done, I think if an interlocutor had been made upon that subject, it might have been right, or it might have been wrong, but it would have been upon a totally different footing for us to consider from what it is at present. But what the Court did was to direct an inquiry, which upon no possible ground could they have a right to direct—namely, an inquiry, or rather a reference to Mr. Wylie, telling him, not to ascertain what the line was, but to make out a new and convenient line, as little as possible burdensome to the defender. That might be, by way of arrangement, an extremely convenient course to pursue: but it immediately took the whole proceeding out of the ordinary *cursus curiæ*, and therefore it was incompetent afterwards for the parties to appeal against anything that was done in pursuance of that reference. That is the ground upon which my noble and learned friend has rested his view of the case upon the merits, and I entirely concur with him in the conclusion which he has arrived at on this, the first point in the case.

My Lords, with regard to the second point, it has always been the rule of your Lordships' House to be as slow as possible to interfere with anything that is mere practice. What really was the case here was this:—The parties having entered this minute of the 4th of March, 1851, abandoning the cause *quoad* the three roads, the record is afterwards made up containing the whole of the condescendence and the whole of the answers, embracing all the five roads. I fully enter into the feeling of the Court, therefore, that when the cause came finally to be disposed of, and they were bound to make a deliverance as to the whole, it was necessary for them to treat the record as they found it; and the result being in their view that there was a proper finding, or a proper disposal of the case as to the two roads, but no proof at all having

been given as to the three other roads, the absolvitor was a necessary consequence.

I confess, I do not feel apprehensive as to any effect which this decision will have upon any of the public who may hereafter assert such a right; because I consider that it is perfectly clear that, even if such a decree as this can be given in evidence, it can be conclusive only if, upon the face of it, it shews that there has been an adjudication. But upon the face of this decree it would appear that there has been no adjudication.

I also think that the proposal which my noble and learned friend has made to your Lordships, with regard to the costs of this appeal, is a right one, because, after all, it is an error on the part of the Court which has led the parties into taking the course which they have taken. Therefore I concur with my noble and learned friend that the appeal should be dismissed without costs.

LORD WESTBURY.—My Lords, I entirely concur in the conclusions at which my noble and learned friends have arrived. From the moment that the consent of the parties to a verdict, and afterwards to a judgment, upon the inartificially framed issue, was substituted for a regular proceeding, this cause was taken out of the ordinary and regular course of judicial procedure. No doubt, the original issue was inartificially framed; but it contained within it materials for answering by the jury two questions—one, whether there was a road along the red line; the other, if not along the red line, whether there was a road along any other and what line.

The verdict that was taken by consent, or rather the judgment, was a simple affirmative to that issue; an affirmative, therefore, which could not be applied to either one of the questions. In reality, the issue ought to have been directed to be tried, and the insufficiency of the consent ought to have been observed. But, instead of that, the Court have endeavoured to correct the error, and to supply the defect by taking a course which certainly was not within their judicial authority; but which not having been complained of by either party, must be attributed entirely to the consent of the parties. What the Court did was embodied in the interlocutor of the 22nd of December, 1854: and that is certainly not a deliverance in pursuance of any judicial power; it is nothing in the world more than an embodiment of certain terms which may have been approved of by the Court, and which appear to have been acquiesced in by the parties.

Now that was the basis of all that was subsequently done; a basis constituted of the consensus of the parties, and not of the exercise of any judicial authority. It is impossible to interfere with that; it rests upon matters which are not brought before us, and which we cannot remove. Therefore, that standing, all that subsequently follows is an emanation of the original agreement to take this matter out of the ordinary path of judicial determination. On that ground therefore, my Lords, the appeal is wholly incompetent; or rather, it is one which we are incapable of entertaining. We cannot apply the ordinary rules of law to proceedings based on an order which is utterly at variance with the ordinary rules of law.

Now, with regard to the other point, undoubtedly I entirely concur in this, that full credit must be given to the Judges of the Court below with regard to a mere matter of practice, unless we are enabled to ascertain, in a manner which admits of no possible doubt, that there has been a miscarriage in the application of their rules of practice; but in this respect, though originally I felt some anxiety and doubt on the point, I am now satisfied that there has been no miscarriage in point either of substance or of form. It was undoubtedly competent, I apprehend, by the law and practice of Scotland, to the pursuer, anterior to the closing of the record by minute, and also by amendment, to have restricted the conclusions of the summons in his action, provided that minute was so dealt with by the pursuer as to become an irrevocable thing, and to accompany the summons in such a manner as that,

when the record was closed, it might plainly appear to be closed upon that restricted summons. But, without entering further upon that, what was done by the appellant was different from that course of procedure altogether. It is true he delivered in a minute in March, 1851, to which I abstain from giving any kind of designation, because there has been a controversy as to whether it contains the necessary elements of a minute of restriction or not; but even if it was a minute of restriction, the course taken by the appellant afterwards was one which certainly justifies the form of the interlocutor which was finally pronounced, because it is plain that the appellant thought proper to demand judgment upon the summons, which, so far as the closed record is concerned, appears to be unrestricted upon the whole of the pleadings, which pleadings were addressed to the five rights of road that were the subject of the original cause of action. The result was, that, as the record so made up and closed, unquestionably the defender was entitled to an absolvitor from that which was disproved, and from that also which has been abandoned.

My anxiety at first was, lest the form of absolvitor should involve in it an apparent conclusion that the question had been tried and determined on its merits; but I think we ought not to permit any doubt of that kind to interfere with the ordinary form of judicial expression of interlocutors in Scotland, because I must take it for granted that these interlocutors are so worded that the real truth of the nature of the absolvitor might easily be ascertained upon an examination of the interlocutor, or of the matters on the record, in a process to which that interlocutor would naturally open the door for investigation or proof.

On these grounds, therefore, my Lords, I entirely concur with my noble and learned friend, that there is no reason to alter the form of the interlocutor in that respect; and that this appeal must fail. But inasmuch as it fails in consequence of there having been a common understanding to pursue a path which was a by-path, and not the ordinary judicial high-road, I think, as that has been the result of agreement, it would be hard to dismiss this appeal with costs by reason of our being incompetent to deal with matters which both parties seem to have supposed that we should be competent to deal with. Therefore I approve entirely of the motion, proposed by my learned friend to be submitted to your Lordships, that the last interlocutors should be affirmed and the petition of appeal dismissed without costs.

The following question was then put:—That the interlocutors of the 21st of May, 1862, the 6th of June, 1862, and the 28th of February, 1863, be affirmed, and the appeal dismissed, without costs.

LORD WESTBURY.—Would your Lordships allow me to suggest that our intention is to affirm those interlocutors which discharge the minute, and grant the absolvitor? But inasmuch as it is not competent to the House to entertain the appeal upon the first interlocutors, it would be incompetent to the House to affirm those interlocutors. I would, therefore, with submission to your Lordships, suggest that your Lordships should dismiss, without costs, the appeal as to all the interlocutors, except the interlocutors discharging the minute, and granting the absolvitor, but affirm those last interlocutors, the appeal in respect of those interlocutors also being dismissed without costs.

LORD CRANWORTH.—I think that would be very much the effect of the question as it was put by my noble and learned friend on the woolsack. The principle is, that we do not affirm those interlocutors which we think were grounded upon the original interlocutor of December, 1854, which took the case out of the common *cursus curiæ*. We do not reverse them, and we do not affirm them. We are not competent to deal with them.

LORD WESTBURY.—Those interlocutors were emanations from the consent of the parties, and from the consent of the parties alone can they derive any authority; therefore they are not affirmed.

The LORD CHANCELLOR.—I believe the result of the way in which I put the

question to the House is precisely what your Lordships have suggested, namely, that we take no notice at all of those interlocutors upon which the appeal is incompetent, but, with regard to the other interlocutors, we affirm them, and dismiss the appeal without costs in respect of the whole.

Certain Interlocutors affirmed, and Appeal dismissed, but without costs.

IN THE QUEEN'S BENCH.

Jan. 20, 1866.

STEELE v. THE MAYOR, ALDERMEN AND BURGESSES OF THE
BOROUGH OF LIVERPOOL.

7 B. & S. 261.

Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. s. 18.—Notice to treat—Trustees under Local Improvement Act—Plea.

COMPULSORY PURCHASE.—1. *A notice to treat for the purchase of land under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. s. 18., is a contract of purchase, whether given by trustees under an Act of Parliament for a public purpose, or by a Company formed for a private speculation.*

2. *Declaration upon an award made by a sole arbitrator under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18., stated, that under The Liverpool Improvement Act, 1864, and the Acts incorporated therewith, the defendants were authorized to purchase certain messuages and lands, and that the plaintiff was entitled to and interested in them as lessee in possession, and the defendants gave him a notice within the meaning of The Land Clauses Consolidation Act, 1845, to treat for the purchase thereof. The Court refused leave to plead either of the following pleas: (1) That the defendants were trustees for the public, and that the notice to treat was rescinded by them before any thing was done under it, the plaintiff's interest not being beneficial for the public under the purposes of the Act. (2.) An equitable plea to the same effect.*

The first count of the declaration stated that, by the provisions of The Liverpool Improvement Act, 1864, and the Acts incorporated therewith, the defendants were authorized to purchase and take certain messuages and lands situated, &c.; and the plaintiff was entitled to or interested in them as lessee in possession thereof for the residue of years expiring on the 1st July, 1866, at a certain yearly rent; and thereupon the defendants gave to the plaintiff a notice within the meaning of The Lands Clauses Consolidation Act, 1845, that the messuages and lands, and the interest of the plaintiff therein, were required and intended to be purchased and taken by the defendants under the authority of the acts, and in that notice the defendants stated all such matters and particulars as were required by The Lands Clauses Consolidation Act, 1845; and that the defendants were willing to treat for the purchase thereof, and as to the compensation to be made to the plaintiff for the damage to be sustained by him by reason of the execution of any of the powers given by the acts; and afterwards, more than twenty-one days having elapsed after the service of that notice, and no agreement having been come to between the plaintiff and the defendants as to the amount of the compensation to be paid by them to him in respect of the premises, and the plaintiff having at that time a greater interest in the messuages and lands than as tenant for a year or from year to year, and the compensation claimed by the plaintiff in respect of the premises exceeding 50*l.*, and the defendants not having issued their warrant to the sheriff to summon a jury in respect of the messuages and lands, the plaintiff, by notice in writing under his hand, signified to the defendant his

desire to have the amount of such compensation settled by arbitration, and stated in such notice all such matters and particulars as were required by The Lands Clauses Consolidation Act, 1845, in that behalf. And thereupon, the plaintiff and the defendants not having concurred in the appointment of a single arbitrator, the plaintiff, by writing under his hand, duly nominated and appointed J. A. P. as an arbitrator on his part to whom the question of the amount of such compensation should be duly referred, and delivered such appointment to J. A. P., and gave notice thereof to the defendants, and duly caused to be served upon them a request in writing, under his the plaintiff's hand, requiring them to appoint an arbitrator on their part to whom the question should be referred, and containing all such matters and particulars as were required by The Lands Clauses Consolidation Act, 1845, and the defendants not having, within fourteen days after such request, nor at all, appointed any arbitrator on their behalf in the premises, the plaintiff having himself previously appointed J. A. P. as arbitrator, duly and in pursuance of the provisions of The Lands Clauses Consolidation Act, 1845, appointed J. A. P. to act on behalf of both parties in the premises, and J. A. P. thereupon became and was the sole arbitrator thereon. The count then averred that J. A. P., having first duly made and subscribed such declaration as was required by The Lands Clauses Consolidation Act, 1845, duly proceeded to hear and determine the question of compensation, and the time for making his award thereon was enlarged by common consent of the plaintiff and the defendants up to and beyond the time of the making of the award after mentioned, and J. A. P. afterwards duly made his award thereon in accordance with the provisions of The Lands Clauses Consolidation Act, 1845, and thereby awarded and determined that the amount of compensation to be paid by the defendants to the plaintiff for the purchase by them of his interest in the messuages and lands required to be taken, and for and in respect of the loss, damage and injury sustained and to be sustained by him by reason of the execution of the intended works, and of the exercise by the defendants of the powers of the acts, was the sum of 7,050*l.*: and that the plaintiff did all things on his part to be done, and all things happened which were necessary in order to entitle him to be paid by the defendants the sum of 7,050*l.*: alleging that the defendants had not paid the same.

The second count was similar to the first, except that it stated that the defendants concurred in the appointment of J. A. P. as a single arbitrator within the meaning of The Lands Clauses Consolidation Act, 1845, to whom the question of the amount of compensation should be referred; and J. A. P. then became and was the single arbitrator thereon.

On application to a Judge at Chambers, to plead several pleas, it was agreed that the matter should be discussed on application to the Court for a rule.

The principal pleas in dispute were the third and tenth, of which the following is an abstract.

Third. That the defendants were trustees for the public, and that the notice to treat was rescinded by them before anything was done under it, the taking of the plaintiff's interest not being beneficial for the public under the purposes of the act.

Tenth. On equitable grounds, that the defendants were trustees for the public, and that notice to treat was given under a mistaken belief that it would be beneficial to the public to purchase the plaintiff's interest; that on discovery of the mistake, and before notice to treat had been entered on, the defendants revoked the notice to treat; and that the plaintiff had not been in any way prejudiced by what was done.

Statute 27 & 28 Vict. c. lxii. "An act to authorize the construction of new and widening and altering of existing streets and other improvements in the borough of Liverpool."

Sect. 3. "The Lands Clauses Consolidation Act, 1845, and The Lands Clauses Consolidation Acts Amendment Act, 1860, shall be incorporated with

and form part of this act, except so far as the same may be expressly varied or altered by this act."

Sect. 6. "Subject to the provisions of this act and the acts incorporated herewith, the Corporation may enter upon, take, and use all or any of the lands shewn on the said plans and described in the said book of reference, and may make the new streets, and may widen the existing streets in the course and direction to the extent shewn upon the deposited plans, and according to the levels defined on the deposited sections."

C. Crompton now moved for a rule accordingly.—Where Commissioners acting for the public give a notice to treat under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 18., they may withdraw it; *Reg. v. The Commissioners of Woods and Forests* (15 Q.B. 761). [*Blackburn, J.*—The Commissioners in that case were merely the mouthpiece of the Crown: they were not making a contract for themselves any more than attorneys acting for their clients do. And there were some peculiar provisions in statute 9 & 10 Vict. c. 38. passed for empowering the Commissioners to form a royal park in Battersea Fields.] *Patteson, J.*, delivering the judgment of the Court in that case, said, p. 773, "If this was the case of a railway or other private Company, no doubt the return would be insufficient, because notice having been given that the lands were required, and a claim sent in accordingly, a contract is entered into, and the parties stand in relation of vendor and purchaser." Here the Corporation of Liverpool were authorized by statute 27 & 28 Vict. c. lxxii. s. 6. to enter upon, take and use the lands shewn on the plans and described in the book of reference, and to make the new streets and widen the existing streets in the course and direction and to the extent shewn upon the deposited plans; and are not like a railway or other private Company.

The Court granted the rule.

Horace Lloyd shewed cause in the first instance.—The Corporation of Liverpool have no special privilege to withdraw their notice to treat. In *Reg. v. The Commissioners of Woods and Forests* (15 Q.B. 761) the Commissioners were appointed under a public act, with power on behalf of the executive government to purchase land for the benefit of the public.

C. Crompton, in support of the rule.—The Corporation of Liverpool act under statute 27 & 28 Vict. c. lxxii., which is applicable to them alone.

COCKBURN, C.J.—The Corporation of Liverpool are not in the same position as the Commissioners of Woods and Forests, whose powers in the case which has been referred to were exercised under statute 9 & 10 Vict. c. 38, containing special provisions. The Corporation here gave their notice under section 18 of statute 8 & 9 Vict. c. 18, which makes no distinction between trustees under an act of parliament for carrying out a public purpose and Companies formed under statutory powers for a private speculation; and therefore they come under the ordinary rule that a notice to treat for a purchase has the effect of a contract for purchase.

BLACKBURN, MELLOR, and LUSH, JJ., concurred.

Rule discharged.

ADMIRALTY.

March 2, 1866.

"THE BENEDETTO" v. "THE CALYPSO."*

Holt. Adm. Ca. 117.

SHIPPING. *G.*—This was an action brought by the Italian barque *Benedetto*, 249 tons register, in charge of a pilot, from North Shields, coal

* Decided under Art. 12 of The Regulations of 1863.

laden, for Buenos Ayres, against the English barque *Calypso*, 306 tons, from London, with a general cargo, for Falmouth, in Jamaica, to recover for a total loss resulting from a collision between them off the South Foreland about 6 p.m. on the 30th of January, 1866. It was agreed that the wind was S.S.E. The *Benedetto* represented the weather as fine and clear; the *Calypso* as moderate, but a little hazy. The case for the *Benedetto* was, that the tide being two hours' ebb, she was under all plain sail, except the foretopgallant sail, proceeding close-hauled on the starboard tack, heading E., making four knots, carrying her proper lights, when the green lights of two vessels were seen on the port bow of the *Benedetto*, and at a distance of about one mile, coming down the Channel on the opposite port tack, and thereupon the *Benedetto* was kept on her then course, close-hauled to the wind on the starboard tack, in the expectation that the said two vessels would keep out of her way. One of the vessels, a brig, passed astern of and clear of the *Benedetto*, but the other of the vessels, the barque *Calypso*, advanced until her green light was visible on the starboard or weather bow of the *Benedetto*, when she was seen to be keeping away, and her red (port) light came into view, and a collision between the two vessels being inevitable, the *Calypso* was loudly hailed from the *Benedetto*, and the helm of the *Benedetto* was put hard-a-starboard for the purpose of lessening the effect of the collision; but, almost as soon as this had been done, the *Calypso* ran into and struck the *Benedetto* on her starboard side, between the fore and main rigging, with great violence, and did her considerable damage, in consequence of which the *Benedetto* shortly afterwards foundered, her crew having saved themselves by getting on board the *Calypso*. The *Calypso*, on whose part a cross action was brought, pleaded that, the tide being about three and a half hours' ebb, she was proceeding on the port tack close-hauled, heading about S.W., making four and a half knots, exhibiting her regulation lights, when the red light of the *Benedetto* was observed about half a mile off, and one point on the starboard bow; that the *Calypso's* helm was thereupon ported, and put hard a-port, but that the *Benedetto*, showing her green light, and notwithstanding hailing from the *Calypso*, ran across the *Calypso's* bows, and, with her starboard side, came into collision with the stem of the *Calypso*. It was then alleged that the *Benedetto* did not duly port her helm, and improperly starboarded it. The witnesses on both sides were examined *vivâ voce*.

The Court was assisted by Captain Farrer and Captain Close.

Mr. Brett, Q.C., and Mr. E. C. C. Clarkson, appeared for the *Benedetto*; Dr. Deane, Q.C., and Mr. V. Lushington, for the *Calypso*.

THE COURT, addressing the Elder Brethren, said: "Gentlemen, the two stories told by these two vessels are entirely conflicting, and you must make up your minds to which party you will give credit; and one of the greatest assistances you will have in order to so make up your minds, will be by considering the probabilities of each representation, at the same time constantly fixing your attention upon those parts of the case which are not disputed. It was, no doubt, under the regulations, the duty of the *Calypso* to give way, and of the *Benedetto* to keep her course. You will have to consider whether the *Calypso* neglected to port until it was too late, and whether the *Benedetto* was justified in starboarding. You are well aware that by another of the rules it was the duty of the *Benedetto* to keep on her course, and you will have to say whether the danger was so imminent that she was justified in starboarding, or whether you think she did so precipitately, and without adequate and sufficient cause."

The Court and Elder Brethren retired for consultation, and upon their return,

DR. LUSHINGTON said: We are all of opinion that the *Calypso* is solely to blame for this collision.

ADMIRALTY.

April 19, 1866.

"THE HAWK" v. "THE HANNAH MARY."*

Holt. Adm. Ca. 119.

SHIPPING. G.—This was an action brought by the brigantine *Hawk*, 172 tons, from Rochester, in ballast, for Shields, to load coals, against the brig *Hannah Mary*, from London, in ballast, for Hartlepool, to recover for the loss resulting from a collision between them near the West Rocks, in the Swin, about 11 p.m. on the 23rd of March, 1865. The *Hawk* stated the wind as N. to N. by W., and the weather as clear, with a fresh breeze. The *Hannah Mary* represented the former as N.N.W. to N.W., and the latter as dark, with occasional showers. The case for the *Hawk* was, that the tide being nearly half ebb, of the force of about two knots, and while she was proceeding under all plain sail, close-hauled on the starboard tack, heading about W.N.W., and making from two and a half to three knots, exhibiting the Admiralty regulation lights, the green light of the *Hannah Mary* was seen at the distance of from a quarter to half a mile, bearing about two points on the lee (port) bow of the *Hawk*, and thereupon that vessel was kept on her then course, close-hauled to the wind on the starboard tack, in the expectation that the *Hannah Mary*, which was on the port tack, would keep out of her way; but the *Hannah Mary*, instead of so doing, approached the *Hawk*, and rendered a collision with her inevitable, whereupon the helm of the *Hawk* was put hard a-port with the view of lessening the damage; but directly after this the *Hannah Mary* ran into and struck the *Hawk* on her port bow abreast of the windlass, and did her considerable damage, in consequence of which she was compelled to proceed to Whitstable, in the county of Kent, where she arrived on the 24th day of the said month of March. The *Hannah Mary* pleaded, that having been at anchor, she proceeded to beat down the Swin under all plain sail, and about 11 p.m. of the day in question was heading about E.N.E., going at from five to six knots, exhibiting the proper lights, when a brig, on the same course as herself, was seen right ahead of her, and only at a short distance, to go about, apparently to avoid another vessel on the starboard tack reaching towards her (the brig); that the starboard-tack vessel had been till then hidden by the brig from the view of the *Hannah Mary*; that thereupon the helm of the *Hannah Mary* was ported to avoid the brig and starboard-tacked vessel, and that whilst so under the influence of their port helm, the green light of the *Hawk* was, for the first time, perceived on their starboard bow, about a cable's length off; that there was no other course open to the *Hannah Mary* than to keep her helm hard a-port, which she did; notwithstanding which, the port bows of the two vessels came into collision. The witnesses in the case were examined *vivâ voce*.

The Court was assisted by Captain Farrer and Captain Weller.

Mr. Aspinall, Q.C., and Mr. E. C. Clarkson, appeared for the plaintiffs; Dr. Deane, Q.C., and Mr. Potter for the defendants.

THE COURT, addressing the Elder Brethren, said: Gentlemen, when this case was originally framed in the pleadings there was only one question suggested, and that was, that the *Hannah Mary* was not to blame because the collision was an inevitable accident. It is now said at the hearing that the *Hawk* was to blame for having improperly ported. I doubt whether it was open to the *Hannah Mary* to impeach the conduct of the *Hawk*, after having omitted to do so altogether in the pleadings; but, really, if it was open to her, I am of opinion there is no ground whatever for saying that the *Hawk* was to blame. It was a fair night, she was upon the starboard tack, close-hauled, and, according to her own statement and evidence, she ported

* Decided under Art. 12 of The Regulations of 1863.

at a time when the collision had become imminent, and to lessen the blow. The only point then is, whether or not the *Hannah Mary* has proved that the collision arose from inevitable accident. You will consider whether there was any obstruction in the way, arising from one or two vessels, which rendered it impracticable for the *Hannah Mary* to see the *Hawk* at an earlier period than a cable's length.

The Court and Elder Brethren retired for consultation, and upon their return,

DR. LUSHINGTON said: I am advised, and entirely concur in the advice I have received, that the *Hannah Mary* is solely to blame for this collision.

PRIVY COUNCIL.

Nov. 21, 1866.

"THE THAMES" v. "THE STORK."*

Holt Adm. Ca. 151.

SHIPPING. G.—This was an action brought by the screw steam ship *Thames*, 1,090 tons register, propelled by two engines of 170 nominal horse power, and belonging to the British Colonial Steamship Company, from Quebec, in British North America, with a general cargo and passengers, for London, against the steam ship *Stork*, of 561 tons register, the property of the General Steam Navigation Company, from London for Scotland, with passengers and cargo, to obtain compensation for damage sustained by reason of a collision between them in the Sea Reach, in the river Thames, about 3 P.M. on the 16th of December, 1865. The *Thames* stated the wind as from southward and westward, and the weather as fine and clear. The *Stork* stated the former as N.W., and the latter as fine. The case for the *Thames* was, that the tide being about half ebb, and of the force of about two knots, she was proceeding, in charge of a duly licensed Trinity pilot, up Sea Reach, under steam alone, at from seven to eight knots an hour, and steering about W.N.W., and when approaching the Chapman Light two steamers, one of which was the *Stork*, were seen coming down the river ahead, at the distance of a mile to a mile and a quarter. That the *Stork* was the most southerly of the said two steam ships, and was on the port bow of the *Thames*. The helm of the *Thames* was ported in order that she and the said two steam ships might pass port side to port side; but the *Stork* approached the *Thames*, and rendered a collision imminent, whereupon the helm of the *Thames* was put hard a-port, and her engines were stopped and reversed; and although the *Stork* was loudly hailed from the *Thames*, she ran into and struck the *Thames* on the port bow, abreast of her cathead, and did her considerable damage. It was then alleged that the helm of the *Stork* was not properly ported, but improperly starboarded. The *Stork*, in her defence, pleaded that she was proceeding down the river on the north side of mid-channel, at about 11 knots, when the *Thames* steamer was observed coming up the river, about a mile distant, and about three points on the *Stork's* starboard bow. That if the two vessels had continued their respective courses, there would have been no risk whatever of a collision; the river, moreover, was all clear to the southward, but there were vessels to the northward close to the *Stork*. That the *Thames*, however, as she advanced, improperly ported her helm, and was seen coming athwart the river towards the *Stork*. That the *Stork* then put her helm to starboard, and stopped and reversed her engines, and hailed the *Thames* as she approached; but the *Thames* came on, and with her bobstay and cutwater struck the *Stork* on the starboard bow, abaft the cathead. The witnesses on both sides were examined *vivâ voce*.

* Decided under Art. 13 of the Regulations of 1863.

The Court was assisted by Captain Bax and Captain Lambert.

Mr. Karlake, Q.C., and *Mr. E. C. Clarkson*, appeared for the plaintiffs; *Mr. Aspinall, Q.C.*, and *Mr. V. Lushington*, appeared for the defendants.

THE COURT, addressing the Elder Brethren, said: Gentlemen, I think the 13th Article of the Steering and Sailing Rules a very important one, to which you should give your best consideration, as it must operate generally upon the circumstances which have occurred, and you will give it that effect which should tend to the security of navigation, and to the prevention of collisions. The rule is in these words:—"If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms, of both shall be put to port." That rule must depend upon a certain state of facts to render it imperative upon a ship navigating the ocean. The other vessel must be end on, or,—if not,—nearly end on, so as to involve a risk of collision, to render the application of the rule imperative. We pretty well understand the meaning of the expression "nearly end on;" but what the circumstances are which involve a risk of collision it would be excessively difficult, if not impossible, to define. I would say that it is wise and fitting to give that risk an extensive operation, and not to curtail it, though I will not now enter more particularly into the subject. These vessels were meeting at the rate of 18 knots an hour, and in that case in less than three minutes they would cross over a mile. I must put it to you whether it was not fitting, if not absolutely compulsory, under the circumstances, upon the *Thames* to port. If they were so nearly end on, and the other vessel was a single point on the port bow, I think no doubt can be entertained on the question. If, on the other hand, according to the statement of the *Stork*, she was three points on the starboard bow, I do not pretend to form an opinion what would be her duty then, but I must leave it entirely to your judgment and nautical experience. In order to excuse her from porting, it must be quite clear there were three points difference, and not less; for, surely, it would never do to contend, where they were so nearly meeting end on—that if the evidence should be that it was one or two points only in the direction they were meeting—that that would be sufficient to dispense with the observance of this rule. I pray you, where there is such seriously conflicting evidence—and I do not mean to impugn the veracity of any individual—to consider the demeanour of the witnesses who have been before you, and to consider to which you think the greater degree of credit is justly due. You must also regard the probability of the story told by each party. You must consider, assuming for the moment there was no absolute necessity upon the *Thames* to port, whether she was clearly wrong in porting; and, looking at the distance which the vessels were apart, must not those on board the *Stork*, if a good look-out had been kept, have seen that the helm of the *Thames* was ported; and ought not those in the *Stork* to have known that the starboarding her helm, under those circumstances, was likely to be attended with great mischief? It has been said that, if the *Stork* had resorted to other measures, there would have been a collision straight on. I leave that to your consideration. If the *Thames* was right in porting, I cannot conceive that she was wrong in porting as much as she could; and if, at the time the occurrence took place, she should have stopped and reversed, there is the evidence of the second mate, who distinctly swears that that was done, and I do not think that his testimony can be impeached.

The Court and Elder Brethren then retired for consultation, and upon their return,

DR. LUSHINGTON said: We are all of opinion that the *Stork* is solely to blame for this collision.

On this case being taken to the Judicial Committee of the Privy Council on appeal, LORD WESTBURY, in giving the judgment of their Lordships, said: This case unquestionably falls within the observation of that salutary rule which was read as having been laid down in 1860 in the case of the *Julia*. It was there most properly maintained, on the part of the learned counsel for the

appellants, that if they could only hope to succeed by a comparison of the evidence, and by showing or contending that the weight of evidence was on their side, in opposition to the judgment in the Court below, that they should be spared of convincing us that it would be our duty to set aside that judgment. But the first point taken, which was a point of law, by the counsel for the appellants is this, that the learned Judge, in his observations that he addressed to the Trinity Masters, had laid down for their guidance this rule of law, that to exempt two vessels from being in a relative position that involved the probability or risk of collision, it would be necessary to show that one was at least three points on the starboard bow of the other. Upon an examination of the learned Judge's opinion as delivered, we do not concur in the observation, that he was intending to lay down, or that he did lay down, any rule of law. Whether the vessels were in such a relative position as to bring them within the 13th Rule (which we entirely agree with the learned Judge, ought to have a large interpretation put upon it in favour of its being a rule of caution and safety)—to find, I say, whether the vessels were in such a position was a question of fact to be determined upon the evidence; and, as a question of fact to be determined by the evidence, it is left by the learned Judge to the Trinity Masters for their opinion. All that he does is to add his personal opinion upon such a question as that, that unless a vessel were clearly shown to be three points on the starboard bow of the other, it would be impossible to say that there was no probability or danger of collision. It is unnecessary to give any opinion upon that point. Neither is it necessary to lay down any rule, if it were competent for us to do so. It is sufficient to say, that whether vessels were in such a relative position as to involve risk of collision must be always a question of fact to be determined upon the circumstances; and if, with the full knowledge of all the circumstances, the question of fact had been determined, it would not be consistent with what we deem to be a wholesome rule of procedure that we should attempt to disturb it. But, then, the appellants' counsel says, "I am enabled to show you a fact which is beyond controversy, and which serves to prove demonstratively that the vessels were not in that position, and I desire you to give effect to that fact, because then you will not be weighing the testimony of the witnesses, but you will be taking an indisputable fact and following it out to its necessary consequence. Now the fact was this:—It is first alleged that the evidence of a certain surveyor, a gentleman of the name of Bayley, proves that the blow given by the *Thames*—the blow that the *Stork* received on her collision with the *Thames*—was a blow the direction of which was (to take his very words), 'a blow from forward to aft'—that is to say, that the *Stork* came into collision with the *Thames* on her starboard bow, or that the blow was in such a direction that the momentum or impulse from the blow extended from the forward part of the *Stork* to the aftpart of the *Stork*. From that fact, assuming it to be established, the argument is this, that the *Thames*, to have given that blow, must have been lying in a certain direction: that she could only have assumed that direction, which was an alteration of her primitive course, by porting her helm to an excessive degree; that having got into that position, and having that relative position with reference to the *Stork*, it serves to prove that the *Stork* could not have been at all end on with the *Thames*, or in a line with the *Thames*, to involve the risk of a collision." Every part of this chain of reasoning is simply argumentative; and if we gave any encouragement to it, it would open the door to positive conclusions of fact, upon positive testimony, being overruled by the Court of Appeal on a species of argumentative reasoning, deriving a certain conclusion from a particular fact which may or may not exist in the case. The direction in which the *Thames* lay, relative to the *Stork*, at the time of the collision, and the direction of the blow, were the subjects of positive testimony, and, therefore, what was the direction of the blow, and what would be the effect of the *Thames* lying in a particular position relatively to the *Stork* at the time she gave the blow, was before the Trinity House Masters, on the positive testimony in the case,

without the necessity of resorting to this species of argumentative reasoning in order to arrive at the same facts. They, no doubt, took that, if they considered it to be a fact established by the evidence, into their consideration. But we may observe, that the reasoning, even if we could accept it, and even if we could follow it, would be reasoning which, in this particular case, is wholly inconclusive, because one material term is altogether omitted. When the *Thames* ported and threw her head to the right, the *Stork* at the same time starboarded—left the original line of her course, and threw her head to the left. The result was, that the position which the *Stork* assumed by the operation brought her, in her course down the river, into a line removed from, and parallel to, what was the line of her course at the time she did starboard her helm, and the line she would have continued to keep if she had not starboarded; and it is impossible for us to tell that that operation of the *Stork*, starboarding, did not bring her into that position as regards the *Thames*, the *Thames* lying in the direction which has been alleged. The value, therefore, of this species of reasoning, as a criterion to determine the original position of the *Stork* as regards the *Thames*, fails entirely. But it is impossible for us to work out a nautical problem of that kind, and it would be the most dangerous thing in the world for any Court of Appeal to assume the power of examining the question through a medium of this description of nautical reasoning and nautical conclusion, for the purpose of arriving at the opinion that the positive evidence in the case with respect to the original position of the *Stork* was incorrect. It is a question of fact, as we have already observed, what were the relative positions of the two vessels previously to the collision. The question of fact is determined by the evidence to be this: that they were in such a relative position that their course, if pursued, would have involved the risk of collision. The question, therefore, is simply this—whether, that being the state of things as proved by the evidence, was it or was it not the duty of the *Stork* to have complied with the 13th Rule, and ported her helm? The obligation of her doing so arises, in our opinion, first, from the fact of her being in that position. That fact we do not choose to try, and cannot try. It was tried in the Court below, and there determined. Secondly, the obligation to port arises also from the fact that she saw the *Thames's* head ported; and, therefore, by starboarding, she altogether defeated the cautious operation on the part of the *Thames*, and created the collision. She should have followed the example of the *Thames*, there being no impediment to prevent her doing so, in which case the two vessels would have gone clear of one another. We therefore, entirely concur in the conclusion which has been arrived at in the Court below. The gentlemen whose able assistance we have upon this occasion have given great attention to the argument, and have also read the evidence; and they, like ourselves, have arrived, independently, at the same conclusion—namely, that the evidence was right, and that the *Stork* was wholly to blame. We must, therefore, recommend her Majesty to confirm the judgment, and dismiss this appeal with costs.

See also the cases of *The Louisa v. The City of Paris*, under Article 3, Holt. Adm. Ca. 15, *The Fruiter v. The Fingal*, and *The Milo v. The William Hunter*, under Article 14 (see next case), and *The Newcastle v. The Graaf*, under Article 19, Holt. Adm. Ca. 247.

ADMIRALTY.

March 14, 1866.

"THE MILO" v. "THE WILLIAM HUNTER."*

Holt. Adm. Ca. 161.

SHIPPING. G.—This was an action brought by the owners of the brig

* Decided under Art. 14 of The Regulations of 1863.

Milo, 230 tons, from Rochester, in ballast, for Shields, against the iron screw steam ship *William Hunter*, 796 tons register, working engines of 90-horse power, from the Tyne Docks, coal laden, for London, and in charge of George Thurlbeck, a duly licensed sea pilot, to recover for the loss resulting from a collision between them, in the river Tyne, about 2 A.M. of the 23rd of June, 1865. For the brig the wind was stated as W.S.W., and almost a calm, and the weather as thick and hazy. For the steamer the former was represented as S.W., very light, and the latter as quite fine, break of day. The case on behalf of the brig set forth, that she was in tow of the steam-tug *Hellan*, the tide being nearly high water, and of the force of about half-a-knot an hour, having her foretopmast, maintopmast, maintopgallant, and mainroyal staysail, trysail, and jib set, proceeding close along the Herd Sand, in the river Tyne, in the usual and accustomed course pursued by vessels entering that river from the southward, when making for what is called the Narrows, and was making about $4\frac{1}{2}$ knots per hour, exhibiting her Admiralty regulation lights, brightly burning, and the steam-tug showing a red light in accordance with the regulations in the Tyne, and she had reached about from one to two ships' lengths up the stone wall which is erected along the Herd Sand, when the bright light of the *William Hunter* was seen from the *Hellan*, as also from the *Milo*, and such light was about from two and a half to three points on the starboard bow of the *Milo*, and about 200 yards off; that the *William Hunter*, instead of keeping on her course and passing clear of the *Milo* on her starboard side, as she could and ought to have done, improperly ported her helm, and rendered a collision with the *Milo* imminent; and that although the helm of the *Milo* was starboarded, with the view (if possible) of avoiding the said collision, the *William Hunter* ran into and struck the *Milo* abreast of the main rigging on the starboard side, and did her so much damage that she almost immediately sank close in on the south shore of the river Tyne. The *William Hunter*, on whose part a cross action was brought, pleaded that she was steaming at reduced speed, and as near to the south shore as she safely could, until she had got to about a cable's length below the pier jetty at South Shields; that she was carrying her proper light, burning well, and was still on the south side of the river, when those on board her observed the red lights of a vessel, which turned out to belong to the *Hellan* and *Milo*, about mid-channel, and about a point on the port bow of the *William Hunter*, and about two cables' length off, in a position and course to pass clear up the river on their port side, and the *William Hunter* thereupon continued her course unaltered, until suddenly the steam-tug was observed to be coming over to the south side of the river under a starboard helm, and the green light of the *Milo* herself was opened, whereupon the engines of the *William Hunter* were instantly stopped and reversed full speed, and her helm put hard a-port, and those on board her shouted loudly and repeatedly to those on board the brig to port their helm, notwithstanding which the said tug crossed the hawse of the *William Hunter*, and turned to the southward, and then cast off the tow-line of the brig, which, still under a starboard helm, ran right under the bows of the *William Hunter*. It was further pleaded, that the way of the *William Hunter* was not yet entirely stopped, and her stem cut into the starboard side of the *Milo* at right angles, just in the way of her starboard main rigging; that the plates on the port bow of the *William Hunter* were stove in, but that neither her stem nor starboard bow were in any way damaged; and the *Milo* almost immediately sunk close to the South Pier, with her head about S.S.W. The witnesses on both sides were examined *vidé voce*.

The Court was assisted by Captain Redman and Captain Bayly.

Dr. Deane, Q.C., and *Mr. E. C. Clarkson*, appeared for the *Milo*; *Mr. Milward, Q.C.*, and *Mr. Potter*, for the *William Hunter*.

The COURT, addressing the Elder Brethren, said: Gentlemen, it is my belief that the ultimate issue of this case will very much depend upon the ascertainment of one single fact; but, nevertheless, before I come to look at that

fact, it is my duty to point out some other matters for your consideration. It has been very properly stated to you, that there is a cross action as well as the original action; but the effect of that is simply this, that our object to ascertain the truth will not be in any respect displaced, but we must find whether both vessels are to blame, or not to blame—in fact, we must find more particularly than we should do in a single action, and that is the whole of it. I should wish, first, to inquire as to this river Tyne. The result appears to me to be this, that the custom is for laden vessels to keep on the south side; and it may be, for aught I say to the contrary, the custom for vessels not laden to go on the south side too. As for there being any law upon the subject, I know of none existing in this day. These are two vessels which may be called steam vessels, in one sense of the word. The one is a steamer coming down the river, the other is a vessel in tow of a steam-tug, and I do not know that there has been any decision in point with respect to a steam-tug when taken into consideration with a regular steamer not towing a vessel; but I will assume for granted that it is the duty of the steamer to act exactly the same as if it was a tug by itself. There are two rules which have been laid down under the authority of an Act of Parliament, and they are very short and very clear: "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." If you are of opinion these vessels were meeting end on, or nearly end on, so as to involve a risk of collision, of course this rule would apply, and it would have been the absolute duty of both vessels to have ported. And, moreover, if this was the state of the case, as it is clear the *Milo* did not port, she will be to blame; but in order to bring her within this rule, you must be satisfied they were meeting end on, or nearly end on, so as to involve a risk of collision. Now we come to the next rule: "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of the way of the other." If this was the state of facts, I apprehend the *Milo*, in starboarding, and so endeavouring to get out of the way of the *William Hunter*, acted in obedience to this rule, but not otherwise. Therefore it depends, as I stated before, very much upon the fact of how these vessels were meeting each other. Here the two statements differ, and the evidence differs in this respect. According to the statement of the *William Hunter*, the red light of this vessel was seen on her port bow; and the *Milo*, though upon the port bow of the *William Hunter*, and having the opportunity of seeing what the *William Hunter* was doing, altered her course, or pursued the course she was following, so as to cross the bows of the *William Hunter*, which notwithstanding all she attempted to do, ran into and sank her. The facts, as stated by the *Milo*, are totally different, for her statement is, that she was coming up and approaching the *William Hunter*, and that the *William Hunter* bore three and a half points on her starboard side. If that was the state of the case, and the *William Hunter* starboarded and kept as much to the south as she could, I am at a loss to conceive she could do anything more, either with regard to the rules laid down by authority of Parliament, or any rule whatever. The important fact seems to me to be, how the vessels were approaching each other; because I think, according to the determination you come to how the vessels were approaching, so, according to your better judgment, I think, the issue of the case must depend.

The Court and Elder Brethren retired for consultation, and, upon their return,

Dr. LUSHINGTON said: We are all of opinion that the steamer *William Hunter* was solely to blame for this collision.

Decree accordingly in both actions.

See also the cases of *The Louisa* v. *The City of Paris*, under Article 3, and *The Golden Pledge* v. *The Cognac*, and *The Amazon* v. *The Osprey*, under Article 13.

ADMIRALTY.

March 10, 1866.

"THE PORT" v. "THE CASTILIAN."*

Holt. Adm. Ca. 190.

This was an action brought by the schooner *Port*, 60 tons register, from Workington, Cumberland, with a cargo of paving stones, for Liverpool, against the screw steam ship *Castilian*, to recover for a total loss resulting from a collision between them, about 9 P.M., on the 30th of November, 1865, off New Brighton, in the river Mersey. For the *Port* the wind was represented as E., and the weather fine, clear, and moonlight. For the *Castilian*, the former was stated as N.E., and the latter as cloudy and overcast. The case for the *Port* was, that it was high water and the tide slack, and she was carrying her proper lights, duly fixed and brightly burning, and was close-hauled on the port tack, making scarcely any way through the water, heading up the river, when those on board her observed the green lights of the *Castilian*, distance about a mile from, and ahead of her; that she was kept upon her course, and the lights of the *Castilian* were watched; that, soon afterwards, the red light of the *Castilian* also came into view, and the *Castilian* herself was seen coming direct for her; that the *Castilian* was repeatedly hailed by those on board the *Port*; and at length, when the vessels were distant about 200 yards from each other, some one from on board the *Castilian* hailed those on board the schooner to put her helm a-port; that her (the schooner's) helm was accordingly put to port, but without any effect by reason of the state of the wind and the shortness of the time, and the *Castilian* almost immediately afterwards came into collision with the schooner. It was then alleged that the *Castilian* with her stem struck the *Port* on her starboard bow, just clear of the stem, and carried her head round to the northward, and then backed clear of and away from the schooner, and that the crew of the schooner left her in their boat, and the schooner shortly afterwards sank. The *Castilian* pleaded, that she left the Huskisson Dock, in the Mersey, outward bound, in charge of a licensed pilot, and proceeded down the river, there being a light breeze, but quite sufficient to give a schooner under sail good way, and she was heading about N., and steaming at three-quarters speed, carrying the regulation lights brightly burning, when the *Port* was seen right ahead, distant about 500 yards; that shortly afterwards her red light appeared, and she seemed to be steering for the Cheshire shore, and the helm of the *Castilian* was thereupon put hard a-port, and her engines stopped and reversed, but that the schooner starboarded her helm (showing her green light), whereupon the schooner was hailed to port; that the two vessels, however, came in collision, the starboard bow of the schooner coming in contact with the stem of the steamer. It was further pleaded, that the schooner did not carry the regulation lights duly exhibited and duly burning; that she did not keep her course, as she was bound to do, but improperly starboarded her helm; and that the collision was wholly occasioned by the improper navigation of the schooner, and by the negligence of those on board her, and was not occasioned by those on board the *Castilian*; but that, if the collision was in anywise occasioned by the *Castilian*, it was occasioned by the default of the pilot employed by compulsion of law. The witnesses on both sides were examined *vidé voce*.

The Court was assisted by Captain Owen and Captain Close.

Mr. Butt and Dr. Pritchard appeared for the *Port*; Mr. Brett, Q.C., and Mr. V. Lushington, for the *Castilian*.

The Court, addressing the Elder Brethren, said: Gentlemen, we all know by the law in a case of this kind, that it was the duty of the steamer to avoid the schooner, and it was the duty of the schooner to do nothing whatsoever.

* Decided under Art. 15 of The Regulations of 1863.

but to keep her course. The case really comes to this, therefore, that the steamer was unquestionably to blame for this collision, unless it can be shown that the schooner did something which occasioned it. It is said in the pleadings and evidence that the schooner is to blame for starboarding her helm, and for not carrying the lights required by law. The two questions for you to determine, then, are simply these—whether the schooner did or did not starboard so as to co-operate to occasion this collision; and whether the schooner's lights were so deficient as not to give those on board the steamer the advantage required by law, of descriing the vessel in due time, so as to enable her to take those means which were undoubtedly within her power to avoid this collision. I am of opinion, from the evidence of the plaintiffs, and from the evidence of a witness produced by the defendants, the pilot of a vessel called the *Oneida*, that the helm of the schooner was, to a certain extent, starboarded; but to what extent it was starboarded, and whether it was starboarded enough to cause the collision, is a matter of difficulty, which I must submit to your judgment. As to the lights of the schooner, I am inclined to think that it is not shown, on the part of the steamer, to my satisfaction at all, that such was the state of the lights as to have prevented their being seen by that vessel in time, or that such was the condition of the night as to have prevented their being descried in sufficient time; for it is not enough to say the lights were not of the best quality, or such as the law demands, if the night was such that, if those on board the steamer had used the best means in their power, they could with facility have avoided the schooner. Looking at the pleadings of the *Castilian*, they state that the collision was occasioned by the starboarding on the part of the schooner; and she represents, in her preliminary acts and pleadings, she saw the schooner at the distance of from 500 to 600 yards. I question very much, looking at the description of the night—call it, if you please, a fair night, but hazy on the water—whether she had not ample opportunity, if all this be true, of avoiding the collision in question with the schooner.

The Court and Elder Brethren retired for consultation, and, upon their return,

Dr. LUSHINGTON said: "We are of opinion that the steamer is to blame for this collision, and that the fault is not wholly attributable to the pilot."

IN THE PRIVY COUNCIL.

Nov. 1, 1866.

"THE SAMPHIRE" v. "THE FANNY BUCK."*

Holt. Adm. Ca. 193.

SHIPPING. G.—This was an action brought by the paddle steam ship *Samphire*, 183 tons register, employed in the carriage of mails and passengers between Dover and Calais, against the American barque the *Fanny Buck*, 585 tons register, from Rotterdam (in ballast) for Cardiff, to recover for the loss resulting from a collision between them three or four miles from the Admiralty Pier, Dover, about 11.15 p.m., on the 13th of December, 1865. The case for the *Samphire* was, that while carrying the mails and about 70 passengers, the wind being about N.N.W., moderate breeze, the night very dark with a low haze, and the tide slack water, she was pursuing her usual course across the Channel, steaming her usual speed, about 12 knots an hour, carrying the regulation lights brightly burning, and a good look-out being maintained on board her, when the barque was observed about two points on her port bow, distant about two ships' lengths, and shortly afterwards a white light was

* Decided under Art. 15 of The Regulations of 1863.

seen on board her. That the helm of the *Samphire* was put hard a-port, and her engines were stopped and reversed, but the *Fanny Buck* coming on, with her stem struck the port bow of the *Samphire* with great force, doing very great damage, whereby the *Samphire* was put in great danger of sinking, and in result several lives were lost. The *Fanny Buck* passed on without rendering the *Samphire* any assistance. It was then alleged that the *Fanny Buck* did not carry or exhibit any due or sufficient light; that the collision was wholly the fault of the *Fanny Buck*, and was, as far as the *Samphire* was concerned, an inevitable accident. The *Fanny Buck*, on whose part a cross action was brought, pleaded that she was in charge of a pilot, the night being dark but clear, and the wind variable from N. to N.N.W., the tide making to the eastward at the rate of from two to three knots, and she was proceeding under all plain sail—mainsail, mizenstaysail, and gafftopsail only excepted—close-hauled on the starboard tack, heading about W., making six to seven knots, exhibiting red and green lights, both burning brightly, and properly placed and screened, a good look-out being kept on board her, when the bright masthead light of the *Samphire* was seen on the starboard bow, at the distance of from two to three miles, and shortly after such light was so seen, the red light of the *Samphire* was also seen. That the *Fanny Buck* was kept on her course, close-hauled to the wind on her starboard tack, in the expectation that the *Samphire* would keep out of her way, as she ought to have done; but that the *Samphire*, however, instead of keeping out of the way of the *Fanny Buck*, and although the crew of the *Fanny Buck* loudly hailed her, came on without stopping or easing her engines, and with her port side, before the fore-rigging, ran with great violence against the stem and starboard bow of the *Fanny Buck*, and stove in such bow, and did her other considerable damage, in consequence whereof the *Fanny Buck* was compelled to take assistance and proceed to Dover, where she arrived the following day. It was further pleaded that the collision was caused by, and attributable to, the negligent and improper navigation of the *Samphire*, in not keeping a good look-out, and in not taking proper measures to keep out of the way of the *Fanny Buck*; and that no blame in regard to the occurrence of the collision was attributable to the *Fanny Buck*, or to those or any of those on board her. Witnesses on both sides were examined *vivâ voce*.

The Court was assisted by Captain Were and Captain Fenwick.

Dr. Deane, Q.C., and Mr. V. Lushington, appeared for the *Samphire*; Mr. Brett, Q.C., and Mr. E. C. Clarkson, for the *Fanny Buck*.

The COURT, addressing the Elder Brethren, said: Gentlemen, I am sure I need not insist upon the necessity of entirely abstaining from allowing to operate on your minds anything that has occurred relative to this case antecedently to the hearing. We are all of us bound to consider the evidence, and to form our determination according to that evidence, throwing out of consideration altogether any matters which might have occurred in another place, and upon another occasion. The vessel proceeded against in this case—and there are cross actions—is an American barque of 585 tons, and the vessel proceeding is the *Samphire*, a well-known mail steamer crossing the Channel. In virtue of treaties which have taken place, all the regulations respecting lights, and the courses to be pursued, have been adopted by the United States of America. It was, therefore, the duty of the *Fanny Buck* to keep her course under the existing circumstances—not to deviate from that course upon any account whatever; and it was the duty of the *Samphire* to get out of her way. That is the law for America as well as England. The *Samphire's* case is, that a strange vessel was observed two points on her port bow, distant about two ships' length, and that shortly afterwards a white light was seen on board her; that the *Samphire's* helm was put hard a-port; that they were unable to discover the barque at an earlier period; that the attempt of putting the helm hard a-port utterly and wholly failed, and the collision occurred. You will advise me whether, under these circumstances, admitting these to be the facts,

the steamer was justified in calling this an inevitable accident, or whether, had there been a proper look-out on board her, this accident would not have occurred. There are two ways of looking at this case. One is, to suppose that the night was extraordinarily dark and hazy, and that the steamer, going at the rate of 12 knots an hour, was going at an improper rate of speed, and she would be in fault in consequence of so doing. I do not think the evidence would at all support that view of the case, because, looking at the testimony given by the Belgian lieutenant, and looking at the whole of the evidence, I take it that this was a night in which it was dark, and there may have been, for aught I say to the contrary, a little haze on the water, but there was nothing to create any extraordinary difficulty. Then we come to this, that, if there were proper lights on board the *Fanny Buck*, unquestionably the steamer ought to have seen them; and if she did not, it must have been in consequence of her own want of a good look-out, which would have enabled her so to have done. I cannot doubt that both lights were burning and exhibited on board the barque at the time of the collision, looking at the evidence, and also because all the testimony from the steamer is to the effect that the green light was seen, and nobody disputes about the red light. Then comes the question—in what state was the green light burning, and was it, or not, a sufficient light? That is really the gist of this case. I was in hopes that we should get from the witnesses from the Board of Trade, something like an intelligible account of how they judged as to the sufficiency of the lamps; but I am bound to tell you that nothing was ever more unsatisfactory to my mind. They did not appear to me even to have a pattern by which they regulated their judgment. They appear to have had no principles upon which they founded their opinion, but, in a sort of overhand guess way, to have rejected those lamps which did not please them, and to have an idea as to what was a proper lamp. But goodness only knows what it was. You have had the evidence of the maker of this lamp; you have heard his statement of how he made an experiment, how he found that the lamps complied with the regulations, that he had made all of the same pattern and same dimensions, and had fixed his stamp thereon. I now leave it to you, gentlemen, to say whether this is not adequate proof these lamps were capable, if properly trimmed with oil, of fulfilling the demand made by the regulations. If you should be of opinion in the affirmative, the next point is, according to the evidence in the case, are you of opinion that the lamps were so trimmed, from time to time, as to be capable of showing the light in the manner stated? If you should think that the *Fanny Buck* carried proper lights, and that they were burning properly at the time of collision, then there is an end of the case.

The Court and Elder Brethren retired for consultation, and upon their return,

Dr. LUSHINGTON said: The steamer is solely to blame for this collision.

Decree accordingly in both actions.

On this case being taken on appeal to the Judicial Committee of the Privy Council, Lord Westbury delivered their lordships' judgment as follows:—We have considered this case, which is certainly one of great importance, because it is most necessary that steamers, which go at a great rate of speed, and have always within themselves the power of regulating their course so as to prevent collision, should be placed under the rule of observing great diligence and care in their nightly voyages. Their lordships entirely agree with the Court below that the issue in this case is simply whether the *Fanny Buck* had lights properly burning at the time when the collision occurred. It is not the issue which has been attempted to be substituted by the counsel for the appellant, viz., whether there was a want of reasonable diligence on the part of the *Samphire*. That may be the consequence of finding the fact that the *Fanny Buck* had proper lights burning at the time of the collision. By "proper

lights" we mean such lights as, with reasonable care on the part of the *Samphire*, must have been seen by the *Samphire* in time to prevent a collision.

The evidence upon that issue is entirely one way. There is positive testimony, by persons whose characters are above suspicion, that the lamps on board the *Fanny Buck* had been properly trimmed, and were properly burning at the time of the collision.

That is attempted to be met, on the part of the appellant, first by a species of argumentative allegation, viz., that the lamps were so constructed that they could not have answered the purpose for which they were required. But we find that this assertion is contradicted by the evidence. The maker of the lamps, a French manufacturer, states that the lamp was of a similar construction with a great number of others which he has supplied to ships for many years with great success; and his evidence proves that this lamp, if properly trimmed, would answer every purpose of a ship's lamp, in conformity with the regulations.

An attempt was then made on the part of the appellant to meet this testimony by the examination of two English surveyors; but their evidence fails entirely to show that the lamp was so constructed as to be incapable of answering its purpose. The objection which they take to it is simply with respect to the shade of the green glass, their opinion being that if the green were darker, the light would be seen at a greater distance; but no one of them ventures to say that the lamp was so constructed as that, with proper care paid to the trimming and the burning of it, it would not cast a light which would be quite capable of being seen so as to prevent a collision; and one of them distinctly says, in answer to the final question which was put to him by the learned Judge in the Court below, that the lamp was sufficient to throw a light to a considerable distance.

Now these two vessels at the time of the collision were in this relative position:—the *Fanny Buck* was close-hauled, beating against the wind, with the tide, such as it was, against her, and running at the rate of between five and six knots an hour. The steamer's course was nearly at a right angle to the line of the course of the *Fanny Buck*, and the *Samphire* was running at the very considerable rate of twelve knots or upwards of twelve knots an hour.

It was quite wrong for the steamer to go at that rate, unless she was perfectly certain that in the night time she would be able to see the lights of approaching vessels,—provided, of course, those lights were proper and sufficient.

We must remark here a very material omission on the part of the *Samphire*. The evidence on the part of the *Samphire* is, that there was a look-out man ahead; that the master was on the bridge; that with him there was another man, Malpas, and also a call-boy to communicate his orders to the engine-room. The look-out man (Northover) states that he was sometimes on the larboard bow, sometimes on the starboard bow. He says that he saw the sails of the *Fanny Buck* first, and afterwards her lights. There is a good deal of discrepancy between the evidence of the master on the one side, and the evidence of Northover on the other, as to the distance of the vessels; but the material omission on the part of the *Samphire* is this, that the other look-out man (Malpas) is not called at all. No evidence is attempted to be given by Malpas in favour of the *Samphire*.

The evidence of the engineer of the *Samphire* is distinct and conclusive against her, because he admits that immediately after the collision, he ran upon deck, and then saw the green light of the *Fanny Buck*, which, he says, was burning dim; but dim as it was, in his opinion it was a light which might have been seen three-quarters of a mile off. The other evidence on the part of the *Samphire* is full of inconsistencies. If you believe the evidence of the master, there was no green light; and he asserts that the light which he saw was a bright light moving over the side of the vessel. The evidence of Northover is distinct that he saw the green light; the evidence of the engineer

is that he saw a green light; the evidence of a passenger on board the *Samphire* is that he saw a green light at the time of the collision.

An attempt has also been made to show that there was no sufficient testimony with regard to the trimming of the lamps, and that the lamp was one which required regular trimming.

Now the mate of the *Fanny Buck* is most distinct upon that point; and there is nothing which can with any propriety be thrown into the opposite scale, because the testimony given by the individual Miller only discredits the persons who bring forward a witness so utterly unworthy of belief.

Upon the whole, therefore, we are decidedly of opinion, and our opinion is confirmed by that of the professional gentlemen who are here, that the conclusion of the Court below was right; that the issue, as put by the learned Judge of the Court below in his judgment, was the true one; and that the evidence upon that issue is conclusive and satisfactory.

Their lordships will therefore humbly report to her Majesty that the judgment and decree of the High Court of Admiralty ought to be affirmed and this appeal dismissed with costs.

See also the cases of *The Emperor v. The Zephyr*, under Article 4; *The Sea Nymph of Chester*, and *The Emperor v. The Lady of the Lake*, under Article 5; *The Joseph Straker v. The Karla*, under Article 16; *The Iron Duke*, *The Newburgh v. The Oscar*, *The Great Conquest v. The David Cannon*, *The Una v. The Thomas Lea*, and *The Uncas v. The Mæander*, under Article 18; and *The Margaret v. The Emma*, under Article 19.

ADMIRALTY.

Jan. 17, 1866.

" THE JUNO " v. " THE EVANGELINE. " *

Holt. Adm. Ca. 222.

SHIPPING. G.—This was an action brought by the owners of the schooner *Juno*, 92 tons, from Poole (Dorset), laden with fish for Lisbon, against the ship *Evangeline*, from London, with a general cargo for Calcutta, to obtain compensation for the loss resulting from a collision between them, some few miles from the Start Point, about 7 P.M. on the 27th of February, 1865. For the *Juno*, the wind was stated as about S.W., and the weather as cloudy, but fine; for the *Evangeline*, the former was represented as about W.S.W., and the latter as moderate breeze, but increasing: the night dark and overcast. The case for the *Juno* was, that while proceeding under all plain sail, close-hauled on the port tack, heading W.N.W. making 3 knots, carrying her proper lights, the *Evangeline* was seen astern on her port quarter, distant a mile; that she (the *Juno*) was kept on her course, close-hauled to the wind on the port tack, in the expectation that the *Evangeline* (which was sailing faster than, and overtaking the *Juno*), would take proper measures to keep out of the way of the *Juno*; but the *Evangeline*, although she was hailed from the *Juno*, came on without any apparent alteration of her course, and approached so near to the *Juno* that she rendered a collision imminent, whereupon, in order to avoid imminent danger, the helm of the *Juno* was ported, notwithstanding which the *Evangeline* ran into and struck the *Juno* on the port quarter, and did her so much damage that her master and crew got on board the *Evangeline* to save their lives. The two vessels remained in contact together for about one hour and a half, after which, the *Evangeline*, having got clear of the *Juno*, squared away, and proceeded back up channel to Cowes, where she landed the master and crew of the *Juno*. The *Juno* subsequently

* Decided under Art. 17 of The Regulations of 1863.

drove ashore near Dartmouth, and became a wreck. The answer on the part of the *Evangeline*, by whose owners a cross action was brought, pleaded that the tide was about high water, that she was close-hauled on the port tack, heading about N.W., and making 5 knots, showing the Admiralty regulation lights, when the *Juno* was observed about a quarter of a mile distant, about a point and a half to the lee bow. No light was visible on board her, nor could it be perceived at first what tack she was on; but on examination she appeared to be on the same tack as the *Evangeline*, but lying a little closer to the wind. The *Evangeline's* helm was immediately put hard a-port, and thereby the *Evangeline* would have gone clear under the stern of the *Juno*; but as the *Evangeline* approached, those on board the *Juno*, who had a commanding view of the *Evangeline*, shouted to the *Evangeline* to luff, and thereupon the helm of the *Evangeline* was put hard down. A collision shortly afterwards ensued, the jibboom of the *Evangeline* striking the *Juno's* mainmast, and the *Evangeline's* stem striking the *Juno's* stern, but not doing any serious damage to the hull. The crew of the *Juno* immediately climbed on board the *Evangeline*, and although the two vessels remained in collision for more than an hour, refused to return to their own vessel in order to endeavour to save her. The *Evangeline* put back to Cowes for repairs. The witnesses for the *Evangeline* were examined *viva voce*, the evidence for the *Juno* being printed.

The Court was assisted by Captain Drew and Admiral Collinson.

Dr. Deane, Q.C., and Mr. E. C. Clarkson appeared for the *Juno*; Mr. Brett, Q.C., and Mr. V. Lushington for the *Evangeline*.

THE COURT, addressing the Elder Brethren, said: Gentlemen, I apprehend that upon the opinion which you form as to the facts of this case will depend the ultimate decision. There is contradictory evidence, and the whole of the evidence has been thoroughly sifted. There were two vessels proceeding down channel, and the *Evangeline* was overhauling the *Juno*. There is no doubt as to the law, as laid down by statute, that the *Evangeline*, under those circumstances, was bound to give way to the vessel in advance, either by starboarding her helm or porting it, as might be most convenient. That the *Evangeline* ported in order to avoid the collision, is an undoubted fact; but it is alleged for the *Juno* that the *Evangeline* ported at a time when she was in such a situation that the consequence of it was to produce a collision instead of avoiding it. It was said, in the argument on behalf of the *Juno*, that the *Evangeline* was so far to windward of her—some 5 or 6 points, I think one of the witnesses said 6 points—at any rate, so far to windward, and so far in advance, that to port was to seek certain destruction. How many points she was to windward of her, considering the quarter from which the wind blew, is, I think, a question of considerable importance. There is not a word said in the petition as to the *Juno* having hailed the *Evangeline* to luff. Whether hailing her to luff, and the actual luffing was the cause of the collision, is a question for you to determine. In the answer of the *Evangeline*, it is said there was no light visible on board the *Juno*, which might very well be as she was following the *Juno* up; but there is no reason to suppose that the *Juno* was not carrying her proper lights. You will form your opinion what were the bearings of these vessels at the time the *Evangeline* ported, whether it was a proper measure, and upon that I say nothing, and whether it was done in time. The *Juno* admits she ported. Beyond all doubt that was an improper act on her part, unless you should be of opinion that the danger was so imminent that in order to save life, that was the only measure that could be pursued.

The Court and Elder Brethren then retired for consultation, and upon their return—

DR. LUSHINGTON said: I am advised, and I see no reason to dissent from the advice which has been offered to me, that the *Evangeline* is solely to blame for this collision.

ADMIRALTY.

April 26, 1866.

" THE UNCAS " v. " THE MÆANDER. " *

Holt. Adm. Ca. 243.

SHIPPING. G.—This was an action brought by the owners of the late ship *Uncas*, 1,320 tons register, from Callao for Queenstown for orders, and thence to Liverpool, laden with a cargo of guano, against the steam ship *Mæander*, 974 tons gross register, from Liverpool for the Mediterranean, to recover for a total loss resulting from a collision between them off the Tuskar Rock, in the Irish Channel, about 5 P.M. on the 1st of December, 1865. For the *Uncas*, the wind was represented as S. by E., and the weather as clear and moonlight; for the *Mæander*, the former was stated as S.S.E., and the latter as cloudy and hazy, strong breeze—the tide being about two hours' flood, running about two and three-quarters knots. The case for the *Uncas* was, that while under all plain sail, making seven knots, and steering E.N.E., carrying her proper regulation lights, duly exhibited and brightly burning, the masthead light of the *Mæander* was seen nearly ahead, at the distance of about a mile; that the *Uncas* was kept on her course, in the expectation that the *Mæander* would keep clear of her, until the *Mæander*, which was under steam and sail, was seen to be rapidly approaching the *Uncas* on her starboard bow, and close upon her, whereupon the helm of the *Uncas* was put up with a view of lessening the effects of the then inevitable collision, and the *Mæander* almost immediately afterwards ran against, and with her stem struck the *Uncas* with great violence about the after part of the starboard main rigging, and cut right into her, and caused her almost immediately to sink, her crew having just time to escape to the *Mæander*; that the *Mæander*, whilst approaching the *Uncas*, did not duly slacken her speed, or duly stop and reverse her engines; that those on board the *Mæander* did not take proper measures to keep clear of the *Uncas*. The defence of the *Mæander* set forth, that she was steering S.W. $\frac{1}{4}$ S., and going about seven knots, carrying the regulation lights, properly exhibited and burning, when the red light of the *Uncas* was observed, distant about two and a half miles, bearing about three points on the starboard bow, whereupon the helm of the *Mæander* was ported, and the red light was brought on the port bow of the *Mæander*; that the red light appearing to be closing, the helm of the *Mæander* was put hard a-port, and her engines stopped, but that the *Uncas*, showing her green light, ran across the *Mæander's* bow at great speed, and with her starboard side, between main and mizen rigging, came into contact with the stem of the *Mæander*. It was then alleged that the *Uncas* did not keep her course, as she was bound to do, but improperly starboarded her helm.

The witnesses on both sides were examined *vivâ voce*.

The Court was assisted by Captain Shuttleworth and Admiral Collinson.

Mr. Milward, Q.C., and Mr. E. C. Clarkson, appeared for the *Uncas*; Mr. Aspinall, Q.C., and Mr. V. Lushington, for the *Mæander*.

THE COURT, addressing the Elder Brethren, said: Gentlemen, in one respect this is a case of great importance—I mean with regard to the value which is at stake, and dependent upon our decision. Under the rules and regulations for a steamer and sailing vessel meeting, it was the duty of the steamer meeting the sailing vessel to get out of her way, and it was the duty of the sailing vessel to keep her course. If this collision took place from the fault of the *Uncas*, there is an end of the whole question, and we need not inquire whether the *Mæander* did her duty or not. The question is—did or did not the *Uncas* not merely starboard, but so alter her course as to bring

* Decided under Art. 18 of The Regulations of 1863.

about this collision? Her witnesses swear she did not alter her course. As to the steamer, I must leave it to you to consider whether she pursued the right measures under all the circumstances.

The Court and Elder Brethren retired for consultation, and upon their return—

DR. LUSHINGTON said: I am advised by the gentlemen who have favoured me with their attendance, that this collision was brought about entirely by the fault of the *Uncas*; that she must not only have starboarded, but that she must have altered her course, as there is no other rational solution to the manner in which the vessels could have come together. They so advise me, and I see no reason not to adopt their opinion.

ADMIRALTY.

June 9, 1866.

"THE ERINAGH" v. "THE RJUKAN."*

Holt. Adm. Ca. 244.

SHIPPING. G.—This was an action brought by the barque *Erinagh*, 308 tons, from St. Kitts, with cotton and sugar, for Greenock, against the ship *Rjukan*, 634 tons, from Bordeaux, in ballast, for Quebec, to obtain compensation for damage sustained by reason of a collision between them at sea, about 1 A.M. on the 23rd of April, 1865. The *Erinagh* stated the wind as from N.N.E. to N.E., and the weather as starlight, but no moon, rather hazy on the horizon, with occasional showers, very strong wind, approaching to a gale, with heavy sea running. The *Rjukan* represented the former as N. by E. to N.N.E., and the latter as dark and cloudy. The case for the *Erinagh* was, that while under close-reefed fore and main topsails and foretopmost staysail, close-hauled on the port tack, head reaching and with scarcely steerage way, the green light of the *Rjukan* was seen bearing three points on the starboard bow, distant a mile. That she (the barque) kept her course, and the *Rjukan* having the wind free, and under full sail, continued rapidly to approach, showing her green light until within a short distance, when suddenly the green light disappeared and the red light opened, and the *Rjukan* ported as if to cross the barque's bows. That the crew of the barque loudly hailed the *Rjukan* to starboard their helm and keep away, to which no attention was paid. That, seeing a collision was inevitable, the yards of the *Erinagh* were thrown aback, and her helm was starboarded, but she had not sufficient way through the water to render this last measure of any avail. That while the yards of the *Erinagh* were being thrown aback, the port bow of the *Rjukan* struck the starboard side of the bowsprit of the *Erinagh*, carrying it away, together with the starboard cathead and cutwater, and the *Rjukan* then forged round to the port side of the *Erinagh*, doing considerable damage, and the vessels remained in collision about a quarter of an hour. It was then asserted that the foremast of the *Erinagh* was so severely sprung by the collision, that it shortly afterwards broke away about 14 feet from the deck; that all the crew of the barque, except three, got on board the *Rjukan*, thinking their vessel was going down by the head, but it being ascertained that she was making no water they returned, and, having rigged a jury mast, proceeded on their voyage. The *Rjukan* pleaded that she was proceeding under double-reefed topsails, foresail, reefed mainsail, crossjack, jib, and mizen, heading W. by N., making five knots, carrying the proper lights, brightly burning and properly screened, when a light, the colour of which was not then distinguishable, was seen ahead half a mile off, and that thereupon the helm of the *Rjukan* was ported, and the red and green lights of

* Decided under Art. 18. of The Regulations of 1863.

the *Erinagh* were then seen. That the helm of the *Rjukan* was kept a-port and her after-yards were braced sharp up, and she was brought close to the wind on the starboard tack, and she was so kept; but that the *Erinagh*, which was on the port tack, ran into and with her stem and starboard bow struck the *Rjukan* on her port bow. The *Rjukan* attributed the collision to the *Erinagh* starboarding her helm instead of porting it. The depositions of the witnesses on both sides were printed.

The Court was assisted by Captain Were and Captain Nisbet.

Mr. Aspinall, Q.C., and Mr. Potter, appeared for the *Erinagh*; Mr. Brett, Q.C., and Mr. E. C. Clarkson, for the *Rjukan*.

THE COURT, addressing the Elder Brethren, said: Gentlemen, supposing these two vessels were meeting end on, it is clear that the *Erinagh* did not obey the 11th rule; that she did not port, and that she starboarded—when and at what time may be a matter of discussion hereafter; but, if that rule applies, the *Erinagh* was to blame. Whether the case falls under the 12th Rule, which applies to vessels crossing, is a matter entirely for your consideration. You, having before you the statement of the wind and courses, will know which ship ought to have kept out of the way, and what ought to have been the line of conduct pursued by each ship. What they did do I think is clear enough, and you have only to form your opinion whether that was right or wrong. It is quite clear to my mind that the *Rjukan* ported, and the *Erinagh* starboarded. When she starboarded is a matter for your consideration, and of importance.

The Court and Elder Brethren retired for consultation, and upon their return—

DR. LUSHINGTON said: We all think that the *Rjukan* is solely to blame.

See also the cases of *The Emperor v. The Zephyr*, under Article 4; *The Pyrus v. The Smales*, under Article 5; *The Dapper v. The Lady Normanby*, under Article 11; *The James Dunn v. The Tyrian*, *The Benedetto v. The Calypso*, *The Eliza v. the Orinoco*, *The Sea Serpent v. The Presto*, *The George Dean v. The Constitution*, *The Hawk v. The Hannah Mary*, under Article 12; *The Golden Pledge v. The Cognac*, and *The Amazon v. The Osprey*, under Article 13; *The Jane v. The Great Eastern*, *The Governor v. The John MacIntyre*, *The Monsoon v. The Neptune*, under Article 15; *The Newcastle v. The Graaf*, *The Margaret v. The Emma*, and *The Planet v. The Aura*, under Article 19.

May 31, 1866.

PICKFORD AND COMPANY, petitioners.—Patton.—A. Moncrieff, v. CALEDONIAN RAILWAY COMPANY, respondents.—Clerk.—Johnstone¹.

1 Ry. & Can. Traff. Cas. 252.

Carrier—Use of Station—Undue Preference to Company's Agents—Way-bill.

A railway company which employed agents for delivering in a large town goods brought by the railway to the parties to whom they were addressed, arranged within the station the goods to be delivered by these agents, and afforded to them other facilities in the use of the station:—Held, that the company, in refusing to give the same advantages to carriers to whom goods were consigned, were not guilty of a contravention of the provisions of the Railway and Canal Traffic Act.

A railway company receiving from another railway company goods addressed by the sender to A.B., Argyle Street, Glasgow, is not bound to regard markings by the latter company in the way-bill or invoice as to the carriers to be employed in the delivery².

(1) Reported in 4 Sess. Ca. 755, 3rd Ser.

(2) But see *Parkinson v. Great Western Railway Co.*, 1 Ry. & Can. Traff. Cas.

This was a petition presented by Messrs. Pickford and Company, carriers in London, Edinburgh, Glasgow, and all the principal towns in Great Britain, against the Caledonian Railway Company, under the Railway and Canal Traffic Act, 1854.

The petition set forth: The Caledonian Railway Company have, "in violation and contravention of the provisions of the Acts of Parliament after quoted, given undue and unreasonable preference and advantage to themselves, in their capacity of common carriers, and to other persons and companies, over the petitioners, and have imposed on the petitioners undue and unreasonable prejudice and disadvantage, thereby entailing on the petitioners a heavy pecuniary loss.

"In particular, the said Caledonian Railway Company have contravened the provisions of the said Acts of Parliament (*inter alia*), in the following respects:—

"(1.) They have in some instances refused to hand over to the petitioners at their station in Buchanan Street, Glasgow, for delivery by the petitioners, goods, which either arrived there labelled, consigned, or addressed to the petitioners' care, or with respect to which the consignees thereof directed them to hand over the same to the petitioners for delivery.

"(2.) The said railway company further afford to other carriers, who are the competitors and rivals of the petitioners in business, facilities for lifting goods from their stations which they refuse to the petitioners, and do all in their power to obstruct the petitioners in lifting and carting goods from their said stations.

"(3.) The said railway company give an undue preference and advantage over the petitioners to other carriers, their competitors in business, inasmuch as they receive payment from the said competitors at the end of the month, or other stated period, of the charges on goods consigned to them during the month; while they compel the petitioners to make payment to them of the particular charges applicable to each package of goods consigned to the petitioners before such package is removed from the station of the railway company, or placed on the cart of the petitioners; and while thus exacting from the petitioners separate and instant settlement of charges payable to the railway company, they refuse to make similar settlements of charges and overcharges payable to the petitioners.

"(4.) The railway company also afford to the rivals of the petitioners in business accommodation at their said station for carrying on their business, which they refuse to the petitioners."

The petition further set forth several instances of alleged violation and contravention of the said act.

The petition also narrated the 83rd section of the 8 & 9 Vict. c. 33, providing that tolls levied by railways "should be at all times charged equally to all persons," and the 2nd and 3rd sections of the Railway and Canal Traffic Act, 1854.

The prayer of the petition was to the effect that the Court should find that the proceedings complained of were in violation and contravention of the said acts, and should enjoin the railway company from giving any undue and unreasonable preference and advantage to themselves or other persons over the petitioners, or from subjecting the petitioners to any undue and unreasonable prejudice and disadvantage in the matters libelled.

Answers were given in by the respondents, in which they objected to the relevancy of the petition, as not containing statements sufficient to infer a contravention of the act, and in which they denied the facts stated by the petitioners.

The Court, on the 4th March, 1863, pronounced the following interlocutor:—"Having heard counsel on the petition and complaint, and answers

thereto, before answer thereto, and of consent of both parties, remit to Mr. Robert Lee, advocate, to inquire into all matters of fact bearing on the subjects of complaint by the petitioners, and examine witnesses and havers on oath, and to administer such oath, all in terms of the 3rd section of the Railway and Canal Traffic Act, 1854, and to report to the Court the result of such evidence and inquiry; and recommend to the reporter to preserve short notes of the evidence taken by him, to be transmitted to the Court, in case they should desire the same, and should call for their production; and grant diligence."

The result of the inquiry and evidence is sufficiently given in the opinion of the Lord Justice Clerk.

The petitioners argued that this case came within the principle laid down in the case of *Bazendale v. Great Western Railway Co.* ((*Reading Case*), 1 Ry. & Can. Traff. Cas. 202), and that they suffered pecuniary loss by the system insisted on by the railway company: *Wannan v. Scottish Central Railway Co.* (1 Ry. & Can. Traff. Cas. 237).

The respondents argued that there was no breach of the statute, *Cooper v. London & South Western Railway Company* (1 Ry. & Can. Traff. Cas. 185), and that the pursuer had failed to shew any grounds for having his complaint entertained.

At advising—

LORD JUSTICE CLERK (*Inglis*).—When this petition and complaint first came before the Court, it was quite obvious that there were some of the allegations which were relevant and which required proof. There might have been a good deal of doubt, perhaps, about the relevancy of some others of those allegations; but as some of them were undoubtedly relevant, the respondents consented that there should be a proof allowed before answer. And accordingly we took the course which is authorized by the act of parliament and remitted to a gentleman in whom we had confidence "to inquire into all matters of fact bearing on the subject of complaint by the petitioners, and examine witnesses and havers on oath, all in terms of the 3rd section of the Railway and Canal Traffic Act, 1854," and to report to the Court the result of such evidence and inquiry, and recommend to the reporter to preserve short notes of the evidence taken by him, to be transmitted to the Court, in case they should desire the same." Now, Mr. Lee, in making the report before us, has laid his notes of the evidence before us also, and I think, looking to the nature of his report, he was quite right in doing so; because in the course of his report he finds it necessary to make very special reference to some of the evidence, and it was for that reason obviously desirable that his notes of the evidence should be before the Court at the time that the parties were heard on the whole matter. We are now to consider at once the relevancy and the proof. But the case has certainly, by means of the proof, been reduced to very narrow limits indeed. Upon the fifth page of the petition and complaint the grounds of complaint are set out under different heads; and omitting in the meantime the consideration of the first head of the complaint, the remaining three may be disposed of, I think, very easily. The second head of the complaint is, that the railway company afford to other carriers, who are the competitors and rivals of the petitioners in business, facilities for lifting goods from their station, which they refuse to the petitioners, and do all in their power to obstruct the petitioners in lifting and carting the goods from their said station. Now that is a relevant ground of complaint, because, if it were true there would be a breach of the provision of the statute, which requires the company to afford all reasonable facilities for the delivery of traffic, and forbids them to give any undue or reasonable preference or advantage to one person, or to subject any person or description of traffic to any undue or unreasonable prejudice or disadvantage. But the

(3) See 1 Ry. & Can. Traff. cas. 2.

question is, whether this allegation has been proved. Now the matter of fact which is brought out in the evidence, and reported to us by Mr. Lee, is this: The Caledonian Railway Company, the respondents, conduct the business of delivering goods which are carried by their railways to Glasgow, by means of carts, to different places in the city, through agents employed by them, Messrs. Cameron and Company; but in point of fact this is just the railway company itself performing the business of carters,—the arrangement which they make with Cameron and Company being of such a nature that Cameron and Company are not in the position of common carriers exercising an independent trade, and receiving goods from the Caledonian Company as carriers under a new contract of carriage which they have entered into; but, on the contrary, are merely the servants or agents of the Caledonian Company, in performing part of the contract of carriage undertaken by that company. Now, what is complained of is, that the goods which are brought to the station in Glasgow by the railway, and which are to be delivered by Cameron and Company, or in other words by the Caledonian Railway Company, are within the premises of the railway company divided into districts for facility of loading upon their carts and conveying to the different districts in the city, while as regards the goods of Pickford and Company no such division of these goods is made into districts within the premises of the Caledonian Railway Company; and it is said that this is an undue preference or advantage to the railway company themselves as carters, and an undue and unreasonable prejudice and disadvantage to Pickford and Company exercising the same trade. Now it is impossible to leave out of view here the facts which are brought before us as regards the amount of the traffic and cartage carried on by the two parties who are thus contrasted. We find in the evidence, as reported to us by Mr. Lee, that, taking as an example the months of October and November, 1862, there were carted from the station daily by Cameron and Company, as servants or agents of the Caledonian Company 152 tons of goods in October, and 141 tons of goods in November, as a daily average; and during the same period, the daily average carted by Pickford and Company was nine tons in October, and 15 tons in November. Now, an arrangement to divide goods into districts may be an extremely desirable and proper thing where there is an immense quantity of goods, and a very unnecessary and useless thing where there is a small quantity. But still further, it must be kept in mind that the Caledonian Company make use of their own premises for the purpose of assorting these goods, in order to enable their own carters the more readily to get them away from the station. But they are not bound, so far as I can see, for that reason, to lend their premises to other carters for the purpose of assorting their goods. A thing may be very reasonable and proper to be done by the railway company themselves, within their own premises, with a view to speedy and accurate delivery within the city of Glasgow, which they are not in the least degree bound to communicate to other people. These people, if they desired to have such a division of their goods, may make it for themselves with premises of their own. I cannot hold that this is what the statute calls an undue and unreasonable preference of the one party, or an undue and unreasonable prejudice and disadvantage to the other; and therefore, I think, there is no case under this head of the petition.

The next head of the petition is an objection to the manner in which the Caledonian Company settle accounts with the petitioners, and it was alleged very strongly on this head of the petition that they gave a most unfair advantage to one set of traders by allowing them to run monthly accounts, while they insisted on having a settlement of cash down in the case of the petitioners. All that it is necessary to say upon that head of the petition is, that not one word of evidence has been offered in support of it, and therefore there is no more to be said about it.

The fourth complaint is, that the railway company afford to the rivals of the petitioners in business accommodation at their said station for carrying

on their business, which they refuse to the petitioners. Now, upon this matter Mr. Lee has reported, "that there are two small boxes, like sentry-boxes, within the gates of the station, which were built and are used for the accommodation of the company's carting agents. Pickford and Company had one of them when they were agents, and Messrs. Cameron had the other. In 1861 Robb and Company succeeded Pickford and Company as agents, and succeeded to their box. Robb and Company subsequently ceased to be agents, but did not immediately give up the box, being in terms for another contract; but they ultimately gave it up and it was closed. This was about the time when the petition was presented. Messrs. Cameron continued and continue to occupy the other." Now it appears to me that this question is to be solved just upon the same ground that I have suggested in regard to the mode of arranging the goods within the railway premises. Cameron and Company being the agents or servants of the railway company, are surely not getting an undue preference, as traders, over the other persons who come to receive goods as carriers at that station, by having a box within the station wherein they may keep their books and accounts. If Cameron and Company were separate traders altogether, exercising an independent trade as common carriers, that would be a different thing. But it is not Cameron and Company that are to be considered here at all, but, for the reasons I have already assigned, the railway company themselves; and the complaint here, therefore, is, that the railway company for the purpose of expediting their own business, and getting the goods carried away from the station by their own carters, have within the station a small box in which that part of the business is carried on. It is needless to say a single word about that. It is just as plain that that, no more than the other case to which I have referred, can by any reasonable construction be brought within the words of this act of parliament.

Now, this disposes of the whole complaint, except the first ground; and the first ground of complaint is this, that the railway company "have in some instances refused to hand over to the petitioners at their station in Buchanan Street, Glasgow, for delivery by the petitioners, goods which either arrived there labelled, consigned, or addressed to the petitioners' care, or with respect to which the consignees thereof directed them to hand over the same to the petitioners for delivery," and there is appended to the petition a very detailed statement of the cases in which these alleged contraventions of that statute have occurred, the cases being sixty-two in number. Now, it is admitted that in so far as these cases are concerned, only seven of them have any evidence to support them, and these are cases in which the goods were not labelled to the petitioners, and in which the goods were not addressed to the petitioners, but in which it is said that the goods were consigned to the petitioners; and the petitioners maintain that, to the extent of these seven cases, the respondents have contravened the statute by refusing to deliver these goods which were consigned to the petitioners' care. Now, the question is whether that has been proved; and it seems to me that in dealing with this part of the case, and the evidence applicable to it, the petitioners leave out of view altogether any consideration of the person who sends the goods, or of the person to whom the goods are sent. It looks as if the whole business of common carriers in this country were carried on, not for the purpose of transmitting goods from the manufacturer to the merchant, but for the benefit of carriers and railway companies. But we must look a little deeper than that. What is the state of the facts? There is a document which is handed by one railway company to another, and which is called an invoice. Now, that is a new use of the word invoice, and it is a little apt to mislead. It is a document that corresponds to the manifest of a ship in maritime carriage, and to what we used to know very well, in the good old days before the railways, as the way-bill of a coach. Now, we must keep in view that that is what is here called an invoice. But what has the sender of the goods to do with the way-bill? He has nothing in the world to do with it, except

in so far as his address upon the goods justifies anything to be said upon the way-bill; but he is not only not answerable for the way-bill ultra of the address on the goods, but he is not bound by it, nor does he know anything about it; and therefore, in the cases that we are dealing with, we must take it that the sender of the goods addresses his goods to his correspondent, a merchant in Glasgow, as the proper consignee and receiver of these goods; and, indeed, it is perfectly obvious, on the face of that so-called invoice, that he does so, because in the very case that was taken as an example—the case of *Spier and Jackson*—the goods are entered as sent by Spier and Jackson from London, as consigned to J. Dobie, 205, Argyle Street, Glasgow, as consignee, and the only thing that occurs to raise a question about the petitioners' interest is, that in a column which is headed "To whose care," the letters "P. & Co." occur. But who put these letters there, or who authorized them to be put there, we have no evidence whatever—not the slightest. It is suggested by the respondents that the meaning of that is, that Pickford and Company brought them to the station in London, or to the English station, whatever it was; but the petitioners say,—“No, no, it does not mean that; we did not bring them to the station—we repudiate that entirely.” Well, then, they did not bring them to the station from which they started, and how did “P. & Co.” get there? It is not alleged that the sender authorized it, and the sender would have been very far left to himself if he had done anything of the kind, having already given the precise address of his correspondents, viz., 205, Argyle Street. What occasion had he to do it, therefore? So that if neither the sender nor the petitioners desired “P. & Co.” to be put in that column, the only person that can have put it in, so far as I can see, is the person who made out this way-bill, and that is the Midland Railway Company. But are the Midland Railway Company entitled to bind the Caledonian Railway Company, merely because they choose to put these letters there, to deliver these goods only to Pickford and Company, when the consignor of the goods, who has the true title to tell them how they are to be delivered, desires that they shall be delivered at 205, Argyle Street? That is obviously quite out of the question; and, therefore, it appears to me that, so far from there being any ground of complaint here, the Caledonian Railway Company would not have been justified in attending to such marks as these. Suppose these marks had been in favour of some carter of inferior character and position, whom the railway company themselves, even if they had not carters of their own, would not have selected to deliver their goods in Glasgow, a person in whom they had no confidence, would they have been justified merely by the occurrence of these letters in this column to employ a man of that kind, whom otherwise they would not have employed? It is a very strange obligation to lay on a railway company, and one which might involve them in responsibilities which it is very difficult to foresee. Therefore, so far as regards these seven cases which are embraced within the schedule appended to the petition, I am for refusing the petition, because I think there is no evidence whatever to shew that, according to the averment of the petition, delivery to the petitioners was refused of goods consigned to them. Before leaving this matter I ought to notice that there is one individual case in which it appears that goods did appear to be consigned to the petitioners, and that was in the case of goods sent by Dykes and Company, where the invoice or way-bill bore that the consignment was, “Andrew Dougans, of Glasgow, care of Pickford & Co.,” the “care of Pickford & Co.” being entered in the column which is headed “Consignee,” and therefore being fairly to be interpreted as a direction to the railway company to deliver these goods to Pickford and Company for Andrew Dougans. That, I think, is the fair construction of the entry. Now, it is admitted that these goods came to hand at the Glasgow station of the Caledonian Railway, and that they did not so deliver them. They say they sent them to the warehouse of Pickford and Company, but that is a mere evasion of what they

were obviously bound to do in this particular case; and, therefore, if this really represented anything like a systematic proceeding on the part of the railway company, I should be inclined to say that it was clearly illegal and improper. . Whether it is exactly the case within the act of parliament is a different affair, and on that I do not think it necessary to offer any remarks at present. I shall only say that this being an isolated case, which the railway company themselves, through their counsel, say they have not the slightest intention of repeating, I do not think it makes a case within the act of parliament; and I think it falls clearly within the principle of the second branch of *Wannan v. The Scottish Central Railway Company* (1 Ry. & Can. Traff. Cas. 237), and therefore I do not attach any importance to that isolated example. But then it is said further, that where consignees of goods in Glasgow directed their goods to be delivered into the hands of Pickford and Company, the railway company refused to do so. Now, that is exactly the case that occurred in the first branch of *Wannan v. The Scottish Central Railway Company* (1 Ry. & Can. Traff. Cas. 237) because it is on a general order only that it proceeds. Mr. Dougans, for example, writes thus to the company: "Please deliver to Messrs. Pickford and Co. all goods consigned to me at Glasgow." We have held already in that case, and, I think, on solid grounds, that the railway company are not bound to attend to such general directions. But, besides that, I have the greatest possible difficulty in seeing that the failure of the railway company to comply with this request of Mr. Dougans is a case of which Pickford and Company are entitled to complain under the act of parliament. If there is any wrong done to anybody, it is to Dougans and not to Pickford and Company. Dougans would be the party to complain, and certainly not Pickford and Company. But it is unnecessary to go into that, because that is ruled conclusively by our previous judgment in the case of *Wannan v. The Scottish Central Railway Company* (1 Ry. & Can. Traff. Cas. 237).

Now that exhausts the whole subject-matter of this complaint, and really when one comes to see to what a miserably small size this clamorous petition and complaint is reduced in the result, I cannot help characterising it as altogether frivolous. There has unquestionably been misunderstanding and bad feeling between the railway company's officials and the representatives of Messrs. Pickford and Company in Glasgow, and the sooner that is put an end to the better; but the existence of a bad feeling will not make a relevant complaint under the act of parliament. Therefore I am for refusing the petition.

LORD COWAN.—Looking at the evidence, and on the grounds which your lordship has so clearly stated, it seems to me manifest that the whole case has dwindled down to the single instance of Dougans' bag of nails. But will that isolated act, assuming it to be truly stated, justify this statutory complaint? Take it to be true that one of the servants of the railway company, it may be from some ill-feeling or other, having probably quarrelled with Pickford and Company's people, did act in a way which, if followed out systematically, would have involved the company themselves, shall we say that that single act shall involve the company in such responsibility that this petition and complaint is to be entertained by the Court, and an injunction and interdict issued against them as if they had been contraveners of this statute? I cannot listen to such a complaint for a moment presented to us on such a meagre ground as that. I do not enter into this question how far the case of *Wannan* applies, because it seems to me that an isolated instance, like that with which we have to deal in the proof, never can be held to make out that this company have acted in contravention of the act of parliament; and, being of that opinion on the proof, I am clear that this petition and complaint was unjustifiable and ought to be refused.

LORD BENHOLME.—I have come to coincide entirely in the opinion which your lordship has announced. The only part of the case which has given me

any trouble, and which it is right that I should mention, is that which relates to the seven packages, as to which in the invoice, under the heading "To whose care," the letters "P. & Co." were introduced. It appears that the reporter, Mr. Lee, is rather against the company upon that point, which made it desirable to sift the matter more maturely. The reporter says at p. 8—"Occurring in the 'To whose care' column of Midland invoice, the reporter is of opinion that the result of the evidence is, that the mark 'P. & Co.' there meant that the goods to which it applied were, with the authority of the company by whom they were invoiced to the respondents, consigned to the care of Pickford and Company for delivery to the consignee. And he thinks the respondents must be held to have known that such was the meaning of the mark, because, in the opinion of the reporter, such a mark introduced into an invoice in this form, by the parties from whom the respondents received the goods therein referred to, has *primâ facie* no other meaning than that above stated; and if the respondents had any doubts about the meaning, they might have made inquiries on the subject. There is no evidence that the respondents made any inquiry of the Midland Company, or that they had any authority from the Midland Company to disregard such a remark. Nor is there, in the opinion of the reporter, any evidence of a usage among carriers, or railway companies acting as carriers, entitling the respondents to disregard such marks. The evidence, in the opinion of the reporter, shows that it was at their own hand, and without any inquiry of the Midland Railway, that the respondents disregarded such marks." Now, so far as the import of the evidence is concerned, I cannot help agreeing with the reporter that the railway company must have known that P. & Co. stood for Pickford and Company. I have no doubt about that; and it would rather appear to be the import of the evidence that the Midland Railway Company, who made out the invoice, intended that it should mean that which it actually bore to be, a consignment to Pickford and Company, and the notion that it might have bound them is not a little strengthened by some things in the evidence of Mr. Mason and Mr. Mathieson, the two witnesses on whom the railway company a good deal rely. Mr. Mason says: "By 'P. & Co.' in the column 'To whose care,' in Midland invoices, what do you understand? Depones, that is an obsolete form, it is a piece of waste ground, and I should not now necessarily consider it a consignment to Pickford and Company. If a question were raised upon it, we would refer to the consignment note. The use of the column when it was used was, I have no doubt, to put in the name of the parties to whose care. If such an invoice came to me now, I should not necessarily take it as meaning consignment to the party named; I would inquire of the forwarding company what they meant." By that I understand that they would inquire of the Midland Company what their intention was, appearing to concede that if the Midland Company intended it to mean what the words seem to suggest, they would have held themselves bound by that intention of the Midland Company. In the same way Mr. Mathieson puts his defence upon the difference between the initials and the full name. He says: "If the words 'Pickford & Co., Glasgow,' had been written in the 'To whose care' column, I would have given the goods to Pickford & Co." And he also says: "In the 'To whose care' column of the Midland invoices, I could not tell what these letters meant. They might mean various things. I did not trouble myself about it. If it had been fully written out we would have considered it to be a consignment." Then he goes on: "If goods were invoiced to Glasgow directed to Messrs. A. & B. Partick, with 'Pickford & Co.' written out in the 'To whose care' column, I would understand that to be a consignment to Pickford & Co. in Glasgow, although the word Glasgow was not written in the 'To whose care' column." I confess all this occasioned a good deal of hesitation in my mind. I found that the reporter had looked upon the evidence as hostile to the conduct of the railway company, and that their own witnesses place the matter upon a different issue from that on which, as ultimately advised, I think it ought to be placed. These witnesses seem to concede that if they had full

evidence of the intention of the Midland Railway Company to mark a consignment to Pickford and Company by the entry in the "To whose care" column, they would have obeyed it. If so, I cannot think that there is anything of importance in the fact of the entry being the mere initials, for no human being can doubt what "P. & Co." meant.

But we must go farther back and see if there is any evidence that the Midland Company, in marking out the invoice as they did, had any right to make that entry with a view to enjoin upon the Caledonian Railway Company the handing of these goods to a particular carrier. This is the part of the case upon which I think this complaint is entirely defective. We have no evidence that the Midland Railway Company had any power to make such an entry, especially where there was no address given by the sender of the goods, a positive consignment; and we are left very much in the dark as to what was the meaning of the Midland Railway Company, even if they had the power, because it would appear that many initials found their way into this column of persons who were not carriers in Glasgow at all, and as to whom, therefore, it would be a complete nullity, for these persons could not deliver the goods; and therefore there is some ground for the supposition that the use of the column must be different now from what it appeared at one time to have been. In this state of uncertainty I think your lordship has most justly come to the result that we have no evidence that the Midland Company had any right, if they had the intention, which seems doubtful, to designate or dictate the individual carrier by whom the goods should be delivered. We do not know what was the intention of the sender, and we have no evidence that the Midland Company had any right, according to the practice of railways, to dictate to the ultimate railway what particular carter should be employed. It would rather appear that they had no right at all except to do what was committed to them; and if the senders did not choose or dictate the ultimate carters who were to deliver their goods to the houses of the consignees, have the Midland Company any right to do so, or is such right consistent with the practice of railways? Now, that goes to the root of the matter, and that is a point which I think the reporter has not touched. His opinion is very good and very right, in so far as it states that the railway company could not have mistaken the initials, and even that it was the intention of the Midland Company that the entry should mean what it apparently does mean. But there remains another link, viz., whether they had any power, according to the practice of railways, to make that entry. As to that the evidence is a perfect blank. I very early intimated my surprise that no officer of the Midland Company was called to clear up this matter. I think it was the part of the complainers to make that plain upon the evidence; and as I see no proof that the Midland Company were entitled to make this appropriation, I cannot think that the Caledonian Company were to blame in disregarding it. On the whole matter I concur with your lordship.

LORD NEAVES.—I agree with the opinion of your lordship. I cannot say I concur in all the views expressed by LORD BENHOLME, because I think the failure to prove the point at issue, with regard to these seven or eight parcels of goods, is complete. The thing to be proved is, that the things were given to Cameron and Company, although consigned to Pickford and Company. How is that proved? A consignment to Pickford and Company means this, that the party who brought the goods to the station in England, entered into a contract of carriage, which has been duly communicated to the ultimate railway, and that the ultimate railway company has failed to fulfil that contract. Now, all that is adduced to prove that contract is a certain invoice, as it is called, though it is truly a way-bill, in which, under the heading "To whose care," there is an entry which, it is said, infers a contract between the known sender of the goods and the successive railway companies, to hold them as consigned to Pickford and Company. Now, this document cannot be a contract, because a contract must be a mutual instrument, and no human being is proved to be a party to this document except the Midland Company, who passed it on, and

even that is not proved. It would not be binding either on Pickford and Company or on the consignor. It is no proof of contract at all. All that can be said of it is, that it is a document from which a contract not proved may be inferred. Now, is not the best proof of a transaction the origin of it? What does the man, who was the proprietor of the goods, want done with them? He has addressed them, but there is not a word about Pickford and Company on the address. They are addressed to a certain party in Glasgow. Therefore there is nothing in the address, or in the written mandate and direction of the sender, to justify our regarding this as a consignment to Pickford and Company. Nor is there any parole proof as to that. Further, there is no proof of the animus of the Midland Company; and I beg to say, with reference to schedules and such documents, that they require explanation, for they are not probative instruments, they are not things that speak for themselves. The only evidence we have on this point is that of the man who received the document in Glasgow, and he said he did not understand that to be a consignment. And I think that the circumstances he refers to are in accordance with that, because if that is a column of consignment, it must be as effectual to consign the goods of H. & Co., that is, Hunt and Company, and of those other parties whose initials are there; and if it is a consignment, these goods must remain in the hands of the railway company at Glasgow till these parties appear; and the railway company cannot deliver them to the consignees mentioned in the other column, because, if this supersedes the other column, and contains the true consignees, it is the duty of the railway company to keep the goods, or give them into public custody, and not to deliver them to the parties to whom they are addressed. Now, that is not supported by the evidence. The evidence rather supports the other view, viz., that the initials represent the carters who brought the goods to the forwarding station, because all the names that I can see, except P. & Co., are the names of persons who do not carry on business in Glasgow at all. Now, that is the position of the evidence, and upon that evidence the Caledonian Company are sought to be subjected penally for not having delivered these goods to Pickford and Company as the consignees. I think it is utterly impossible to listen to that. I doubt also whether it would be within the statute, even if it was proved; but we need not go into that, because the evidence has failed. There is another part of the case which has not been cleared up to my mind at all. It is not necessary to my judgment that I should be right in this, but, as I understand, in all these questions between consignor and consignee, the cartage rates are included in the charge made by the railway company. If that be the case, the railway company, in such a contract, are truly the deliverers at the premises of the consignee; and if Pickford and Company interposed to get further payment from the consignee of their cartage in addition, that would be a violation of the contract.⁴ But what I take to be the meaning of this complaint is, not to enforce equality with him as a carter or carrier, but to enforce fulfilment of a special agreement, which is referred to in the papers, and which is a totally different affair. It appears from the agreement, which includes the goods where cartage is charged, but excludes the station to station rates, that Pickford and Company, though not the servants of the railway company, so far as regards the proper relation of master and servant, and not giving the services that Cameron and Company do with reference to canvassing for goods, &c., were allowed to get the same drawback—a greater drawback than is given to private individuals—from the company for carting goods, the company who received the *cumulo*, or total fare, paying to Pickford and

(4) It has been held, in *Baxendale v. Great Western Railway Co. (Reading Case)*, and confirmed in *Garton v. Great Western Railway Co.* and *Garton v. Bristol and Exeter Railway Co.*, 1 Ry. & Can. Traff. Cas. 202, 214, 218, that a railway company may not charge a through rate, including cartage to or from the station, to customers who do not require the company to perform such services, and that the imposition of such a rate is an undue preference by the company of themselves as carriers, and an undue prejudice to persons not requiring such cartage. As to what rebate for cartage should be allowed, see *Goddard's Case*, before the railway commissioners, 1 Ry & Can. Traff. Cas. 308.

Company the same rate that they paid to Cameron and Company. Now, at common law, they certainly were not bound to do that. If the railway company are the deliverers at the doors of the ultimate consignees, they are entitled to deliver the goods to anybody they please, and are not thirled to Pickford and Company, and are not bound to admit them to any participation in the rates. Now, if I am correct in this, Pickford and Company are not the consignees, and the goods are in the hands and at the risk of the railway company till they are delivered at the doors of the proper consignees, and this is an attempt to force the special agreement set out in the petition. The company agree to allow Pickford and Company the same rates of carriage for goods carted to and from the railway company's stations, as the railway company allow to their own carters, and the railway company "agree to give all goods at their said stations to Messrs. Pickford and Company to deliver which may be addressed or consigned to them, whether at such stations or to Pickford and Company's address." But that is done on the footing that the railway company are responsible for these goods, for they have got the fare for the carriage and are bound to do it, and, whatever may be Pickford and Company's right under an agreement, I cannot see any right which they have at common law to claim that they shall participate, as being the actual servants of the railway company. If I am right in that, I think it is an additional objection to the complaint. But suppose that the railway company have station to station rates, I still think that this is an irrelevant petition. If Pickford and Company were the consignees, in that case the railway company are only bound to give them the goods at the side of the railway. In either way I think the complaint is not supported by any evidence, and is truly a frivolous complaint, some of the grounds of complaint being utterly without foundation, and others arising from mutual irritation, there being probably some degree of blame on both sides. On the whole matter I agree with your Lordship that the case should be dismissed.

The Court pronounced the following interlocutor:—"Find that the petitioners have failed to establish any relevant ground of complaint under the Railway and Canal Traffic Act, 1854; therefore refuse the prayer of the petition and complaint, and decern," &c.⁵

(5) See *Wannan's Case* (1 Ry. & Can. Traff. Cas., p. 237), and note in *Parkinson v. Great Western Railway Co.* (1 Ry. & Can. Traff. Cas. p. 287). The question of undue preference by a railway company in favour of their own agents was considered by the railway commissioners in *Goddard's Case* (1 Ry. & Can. Traff. Cas. 306).

MEMORANDUM DECISIONS.

CRANWORTH, L.C., June 6, 1866.

Re THE UNIVERSAL BANK (LIMITED).

14 L. T. 691; 12 Jur. N.S. 477.

Practice—Winding up—Petition of appeal—Companies Act, 1862, sect. 124.

COMPANY. M.—The 124th section of the Companies Act of 1862, which regulated the mode and time of appeal from orders made in the matter of the winding up of a company, was held not to apply to appeals from any order made on the original petition for winding up the company.

MATRIMONIAL.

COOMBS *v.* COOMBS.

L. R. 1 P. & D. 218.

Alimony pendente lite—Fund in Wife's possession.

DIVORCE AND MATRIMONIAL CAUSES. A.—Where the husband's income did not exceed 60*l.* a year, and the wife had a sum of 70*l.* in her possession at the commencement of the suit, the Court refused to make an allotment of alimony *pendente lite*.

IN THE COMMON PLEAS.

ERLE, C.J., BYLES and KEATING, JJ., Nov. 11, 1865.

TWEED *v.* MILLS.

L. R. 1 C.P. 39.

Vendor and purchaser—Sale of Goodwill—Title.

VENDOR AND PURCHASER. A.—A., being tenant from year to year of a public-house, agreed to let it to B. "all his right, title, and interest" in the premises for 1,000*l.*, and to assign over to him the beer and other licences, and to sell him the fixtures, stock, &c., at a valuation; and B. agreed to accept the house and premises, "having a good title to the licences," to pay a deposit of 100*l.*, and the balance on completion," &c. Proviso, that, if B. should not be accepted as a tenant by F. & H., the superior landlords, at a certain rent, and subject to the terms named in the margin (which were, "Messrs. F. & H. agree to grant B. a lease of thirty-five years, at 200*l.* rent," &c.) the deposit to be returned, and this agreement void:—*Held*, that this agreement was not well declared on as a contract on the part of A., that F. & H. should grant B. a lease on the terms mentioned, and make a good title; it being in substance only an agreement for the sale by A. of his interest such as it was, with a proviso that the contract should be void if a valid lease from F. & H. could not be obtained.

IN THE COMMON PLEAS.

May 30, 1866.

EVANS *v.* LOUIS.

L. R. 1 C.P. 656.

Practice—Discovery under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

DISCOVERY. R.—To entitle a party to discovery under s. 50 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, it was *held* that he must shew by affidavit that his adversary is in possession of some document to the production of which he is entitled.

In an action against an attorney for negligence, the Court (Erle, C.J., Willes, Byles, and Montague Smith, JJ.) refused to order the production of his books, upon a mere suggestion of his client's belief that they contained entries relating to the matters complained of.

KINDERSLEY, V.C., Nov. 4, 6, 1865.TALBOT *v.* MARSHFIELD.

L. R. 1 Eq. 6.

DISCOVERY. A.—It was *held* that an application for liberty to seal up or not to deposit documents, possession of which had been admitted by the affidavit of a defendant who had not been required to answer as to documents, need not be made on the original summons for production, but would be granted on summons by the defendant, after he had filed his affidavit, without his being required to pay the costs of his summons.

CHELMSFORD, L.C., July 9, 1866.*In re* FULCHER.

L. R. 1 Ch. 519.

Under s. 192. of The Bankruptcy Act, 1861, the execution of a creditor's deed by a debtor had to be attested by a solicitor; a power of attorney to execute such a deed, however, did not need to be so executed.

IN THE QUEEN'S BENCH.

June 6, 1866.

EUSTACE *v.* SARGENT.

30 J. P. 583.

Cattle plague—Removing cattle across highway within same farm.

ANIMALS. A.—An order of Justices, made with reference to the cattle plague, prohibited the removal of certain animals specified from any one farm or place in the same county to any other farm or place therein, except that by license of Justices the owner might remove them from premises in his own occupation to other premises also in his occupation:—*Held*, the above order

did not prohibit the owner from removing cattle from a field on one side of a highway to a field on the other side of such highway, both fields being part of the same farm, though it might be otherwise if they belonged to different farms, though in the same occupation.

IN THE QUEEN'S BENCH.

May 30, 1866.

CHAPMAN v. CHAMBERS.

30 J. P. 583.

Cattle plague—Orders in council—Sending cattle by railway—Railway station in a different jurisdiction.

ANIMALS. A.—An order in council prohibited cattle being brought or sent without license from any place out of district C. into any place within such district, provided that it should not be unlawful to send or carry such animal by railway through such jurisdiction. A. drove cattle without license from a place out of C. into a railway station within C., thence to be conveyed by railway:—*Held*, he was rightly convicted, for he was not within the exception contained in the proviso.

IN THE QUEEN'S BENCH.

April 25, 1866.

MAY v. BROWN.

30 J. P. 406.

Factory Act—Young person—Casual employment by visitor.

FACTORY. C.—B., a young person formerly in the employment of an occupier of a factory, one day called on a friend engaged at the factory, and while waiting, did a little work after 6 p.m., but without the knowledge of the employer:—*Seemle*, the occupier was not liable to be convicted of employing B. after 6 p.m.

IN THE QUEEN'S BENCH.

April 25, 1866.

MAY v. BROWN.

30 J. P. 406.

Factory Act—Child employed—Casual visit at factory—16 & 17 Vict. c. 104, s. 1.

FACTORY. C.—S., a child not employed in a factory, called one evening to see a friend there, and one of the women employed there asked S. to fetch a box of coal, which otherwise such woman would in her ordinary employment have fetched herself. The act was done without the knowledge of the occupier of the factory:—*Seemle*, such occupier was not liable to be convicted for employing such child.

IN THE QUEEN'S BENCH.

COCKBURN, C.J., MELLOR and LUSH, JJ., Nov. 22, 1866.

CROSS v. HUTCHINSON.

7 B. & S. 849.

R. G. H. 1853, "Directions to the Masters of the Courts," r. 7—Writ of trial—Two causes of action joined.

Where two causes of action are joined, in one of which a writ of trial could not be issued, and in the other it could, and the plaintiff does not recover in respect of the former, but recovers a sum not exceeding 20*l.* in the latter, he is entitled to costs upon the higher scale, under *R. G. H. 1853, "Directions to the Masters of the Courts," r. 7.* (1 E. & B. App. p. lxvi.)

The first count of a declaration was for unliquidated damages: the second for work and labour. The defendant succeeded upon the first count, and the plaintiff recovered less than 20*l.* upon the second:—*Held*, that the Master was right in taxing the plaintiff his costs upon the higher scale.

STUART, V.C., Nov. 16, 1866.

EDMUNDS v. BROUGHAM.

12 Jur. N.S. 934.

Practice—Motion for a special jury before the Courts—Framing of issues—21 & 22 Vict. c. 27, s. 3—Order of the 5th February, 1861, r. 3.

It was *held* that an application for a special jury before the Court to try issues, or for *vivâ voce* evidence to be taken at the hearing, must be made at chambers, and not by motion in court.

IN THE COMMON PLEAS.

ERLE, C.J., KEATING and SMITH, JJ., Jan. 31, 1866.

DAVIS v. PERCY.

12 Jur. N.S. 692; L. R. 1 C.P. 256.

A certificate under s. 6 of the Private Arrangement Act, 1844 (7 & 8 Vict. c. 70), of the filing of a resolution of creditors agreeing to a composition, with the Commissioner's protection indorsed thereon, did not operate to protect the debtor's goods from seizure under a *fi. fa.* upon a judgment obtained before the date of the petition.

IN THE COMMON PLEAS.

WILLES and SMITH, JJ., Jan. 20, 1866.

ERWIN v. WHITE.

13 L. T. 767.

*Costs—Claim for debt of more than 2*l.*, verdict for less than 2*l.*—County Courts Acts.*

Costs. I.—Where a plaintiff residing more than twenty miles from a defendant sued for a debt of 8*l.* in the Common Pleas, and recovered a verdict

for 11., and on the application at chambers, an order to give the plaintiff his costs was refused:—*Held*, on motion for a rule calling on the defendant to shew cause why the plaintiff should not have his costs, that the Court could not interfere.

CRANWORTH, L.C., June 9, 1866.

In re HAMMON.

14 L. T. 692; 12 Jur. N.S. 460.

A trust-deed under s. 192 of the Bankruptcy Act, 1861, was received for registration, as assented to by a majority of creditors, when it had been assented to by the only two creditors for amounts above 10*l*.

STUART, V.C., June 26, 1866.

CAUSTON *v.* CITY OFFICES COMPANY (LIMITED).

14 L. T. 657; 12 Jur. N.S. 497.

Pleading — Demurrer — Want of equity — Action at law — Bill for Injunction.

Demurrer to a bill filed to restrain an action for a breach of a covenant in a lease, brought by an equitable owner of the property in the name of the legal owner allowed for want of equity.

IN THE QUEEN'S BENCH.

June 21, 1866.

SHAW *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

14 L. T. 623.

Practice—Moving for a new trial—Time for—Notice to opposite attorney.

When a motion for a new trial was not made within the prescribed time, but by leave of the court was postponed, or put into a list of reserved motions, it was *held* by Erle, C.J., and Willes and Byles, JJ., that notice thereof must be given to the attorney of the opposite party, or the rule obtained be discharged: (Reg. Gen. H. T. 1853, r. 50 and 53).

CRANWORTH, L.C., May 24, 1866.

HILL *v.* CURTIS.

14 L. T. 506; L. R. 1 Ch. 425.

Where a decree dismissing a bill had been enrolled by the defendants the Lord Chancellor refused to permit the plaintiff to vacate the enrolment on allegations of conversations from time to time between the solicitors of the parties, though upon one of such occasions the defendants' solicitors had given distinct notice of their intention to appeal, and upon another occasion, the plaintiff's solicitor had stated that he had no objection to an enlargement of the time.

Wood, V.C., May 22, 1866.

GOUCHER *v.* CLAYTON.

14 L. T. 494.

Practice—Contempt—Service of notice.

CONTEMPT OF COURT.—Where defendants had been improperly attached for an alleged contempt in not bringing into the chief clerk's office certain accounts directed by the decree to be brought in by them, and no decision had been made in chambers that such accounts as the defendants had brought in were insufficient. Wood, V.C., *held* that it was irregular to proceed to obtain a writ of attachment, and have them arrested thereon. The defendants having brought actions at law against the plaintiff for damages for such illegal taking into custody: *Semble*, that the leave of the court to bring such actions should have been previously obtained.

CRANWORTH, L.C., April 13, 14, 1866.

Ex parte WATSON, *re* WATSON.

14 L. T. 243.

Bankruptcy—Trade-debtor summons—Bond—Trust-deed—Bankruptcy Act, 1849, sects. 79, 80—Bankruptcy Act, 1861, sects. 192, 197.

BANKRUPTCY.—Where an inspectorship-deed had been duly registered under the 192nd section of the Bankruptcy Act, 1861, and a non-assenting creditor had sued out a trader-debtor summons against the debtor, it was *held* that the court had no power, in the exercise of its discretion under the 79th section of the Bankruptcy Act, 1849, to require the debtor to enter into a bond, with sureties, for payment of the amount therein specified, in the event of the action being successful; where the result of such an order would be to take the administration of the estate out of the inspectorship-deed, and cause it to be administered in bankruptcy.

BAIL COURT.

MELLOR and SHEE, JJ., Jan. 29, 1866.

REG. *v.* COBB.

13 L. T. 802.

A valuer who had, in pursuance of a contract with overseers, made a valuation under 25 & 26 Vict. c. 103, s. 14, was *held* not to be compellable to re-value under the provisions of 27 & 28 Vict. c. 39, s. 4, though that Act had been passed before his valuation was formally completed.

BAIL COURT.

SHEE, J., Jan. 27, 1866.

DUNSTAN *v.* NORTON.

13 L. T. 722.

ARBITRATION, REFERENCE AND AWARD.—An award bad, as being made out of time, is not cured by the party impeaching it having attended the first of

several meetings after the expiration of the period limited in the order of reference. Such attendances are only good *pro tanto*, and do not justify the arbitrator in going on when the parties are absent. Nor do they constitute a *parol* submission to a fresh arbitration. The later meetings take place on the terms of the original submission.

WOOD, V.C., July 18, 23, 28, Nov. 20, 21, 22, 23, 1865.

SINGLETON *v.* SELWYN AND OTHERS.

13 L. T. 534.

Deed of inspectorship—Covenant—Indemnity clauses—Trustees—Extent of powers of trustees and inspectors under such a deed—Discretion—Costs.

BANKRUPTCY. N. TRUST AND TRUSTEE. C.—Trustees and inspectors having been appointed to carry on the business of an extensive mercantile concern, the creditors, parties to the deed, severally covenanted to indemnify the inspectors, and “that, in case they, or either of them, or the heirs, executors, or administrators of them, or either of them, or any inspector or inspectors for the time being, should sustain or incur any loss, costs, charges, and expenses whatsoever, by reason or in consequence of having acted as such inspectors or inspector as aforesaid, or by reason or in consequence of their overdrawing the banker’s account to the amount of 10,000*l.*, or of any advance or advances which might be made to them of such sums amounting to 10,000*l.* as aforesaid, or of their application of such moneys or otherwise in relation thereto, or for, by reason, or in consequence of any act, matter, or thing whatsoever *bond fide* done by them or any of them, or arising out of or incidental to the arrangement intended by said deed, then and in every such case, each of the said parties to said deed, his heirs, &c., partner or partners, should, upon demand, pay to the person or persons having incurred or borne such loss, costs, charges, and expenses, a sum or sums of money bearing such proportion to the whole amount of such loss, &c., as the debt or debts of such covenanting creditor set forth in the schedule to said deed.”

The time for carrying on and winding-up the affairs had been extended from time to time; and, after the concern had been carried on for several years, it ended in a very considerable deficiency, and the assets realised were very inconsiderable.

The advances obtained by the inspectors from various parties were very much in excess of the 10,000*l.*

On bill filed by the inspectors against the creditors for contribution towards the inspectors’ liabilities:—*Held*, that they were only entitled to be indemnified to the extent of the 10,000*l.*; and, as there were assets more than sufficient for that purpose, bill dismissed with costs.

A trader conveyed all his real and personal estate and effects whatsoever to inspectors, trustees for the benefit of his creditors. A bill was afterwards filed by the inspectors against the creditors for contribution, to which the trader was a necessary party, and their bill was dismissed with costs:—*Held*, that the trader was not entitled to his costs of suit. He might have disclaimed.

IN THE COMMON PLEAS.

Nov. 25, 1865.

STUBBS *v.* HORN.

13 L. T. 529; L. R. 1 C.P. 56; H. & R. 89; 12 Jur. N.S. 210.

Bankruptcy—Petitioning creditor and trade assignee—Liability of each for

messenger's fees—Evidence of express contract—Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 114.

The petitioning creditor is liable at law, without any express contract, for the fees and costs of the messenger in possession down to the time of the appointment of the trade assignee, after which it is matter of evidence whether anything has been done, from which the inference may legitimately be drawn that the messenger is acting by the express orders of the trade assignee.

So held by Erle, C.J., Willes, J., Byles, J., and Keating, J.

CRANWORTH, L.C., Dec. 13, 1865.

Ex parte POWER.

13 L. T. 451.

Bankruptcy—Trust-deed—Registration—Bankruptcy Act, 1861, s. 192.

The LORD CHANCELLOR, sitting in bankruptcy, had no discretionary power to extend the period of twenty-eight days within which a deed was required, by the 192nd section of the Bankruptcy Act, 1861, to be produced and left at the office of the chief registrar, for the purpose of being registered.

CRANWORTH, L.C., Nov. 24, 25, 1865.

WILLIAMS *v.* GLENTON.

MCINTOSH *v.* GREAT WESTERN RAILWAY CO.

In re AGRICULTURAL CATTLE INSURANCE CO.

Ex parte STANHOPE.

14 W. R. 89.

Circumstances under which appeals might be transferred from the Lords Justices to the Lord Chancellor after the business of the sittings had been arranged, under the Court of Chancery Act, 1851 (14 & 15 Vict. c. 83), s. 10.

KINDERSLEY, V.C., July 6, 1866.

NEWLAND *v.* STEER.

18 L. T. 111; 18 W. R. 1014; 11 Jur. N.S. 596.

In an administration suit, one of the persons claiming as next-of-kin of the intestate, but not a party to the suit, served upon the defendant, the administrator who also claimed as next-of-kin, a *subpœna duces tecum* to produce all letters written to the intestate by certain persons, all family Bibles, &c. The defendant declined to produce them, and the claimant moved for production.

KINDERSLEY, V.C., refused the motion on the ground that the proper course would have been to have obtained in chambers an affidavit from the defendant of documents, &c., in his possession.

KINDERSLEY, V.C., April 25, 1866.

DARLOW v. SIMCOCK.

14 W. R. 664.

Practice—Pro confesso—Making decree absolute—Absence of service.

An order was made to take a bill *pro confesso*, notwithstanding that interrogatories had not been served or advertized. The decree was then made for taking accounts, &c., and it provided that service on the defendant under C. O. xxii. r. 11, should be dispensed with. A motion under C. O. xxii. r. 15 p. (3), to make the decree absolute at once, refused.

LORDS JUSTICES, March 8, 1866.

In re JOHNSON; STEELE v. COBHAM.

14 W. R. 493; L. R. 1 Ch. 325; 14 L. T. 242.

EXECUTOR AND ADMINISTRATOR. J.—In a creditors' suit (commenced by administration summons) against the sole trustee and executor of a will, the defendant having become bankrupt since the decree had been obtained, but his assignees not being parties to the suit, an order was made for the appointment of a receiver. Notice to be given to the assignees. Costs in the cause.

CRANWORTH, L.C., TURNER, L.J., March 10, 1866.

LEETE v. JENKINS.

14 W. R. 489.

PRACTICE.—An order having been made by one of the Vice Chancellors on a petition in a cause, leave was given to a person, not a party to the cause, nor served with the petition, to present a petition of re-hearing by the same Vice Chancellor, without signature of counsel, or payment of any deposit.

WOOD, V.C., Feb. 19, 1866.

14 W. R. 387; 14 L. T. 57.

ACOMB v. LANDED ESTATES COMPANY.

DISCOVERY. A.—A person properly made a party for discovery, as secretary to a company, cannot evade making such discovery simply by resigning his situation after the filing of the bill.

Speed applied for an order on defendant Pixley, to make a proper affidavit as to documents. Pixley had been secretary of the Landed Estates Company at the time of filing the bill, but had since ceased to be so. The affidavit had merely stated that since he had ceased to be secretary he had not had in his possession any books, &c.

Wickens, for the company, argued that as Pixley was no longer secretary, he was not the proper person to make the affidavit, and it is not the practice of an incorporated company to produce affidavits from every person who has ever been their secretary. The company was not interrogated as to documents.

Wood, V.C., held that the plaintiff was entitled to a better affidavit. A person representing Pixley was present at the time when the order was made, directing an affidavit as to documents that the company had in their possession. The company must pay the costs of the application.

KINDERSLEY, V.C., Feb. 9, 1866.

DARLOW *v.* SIMCOCK.

14 W. R. 383; 14 L. T. 509.

KINDERSLEY, V.C., held that an order to take a bill *pro confesso* might be made although interrogatories had not been served or advertised.

ROMILLY, M.R., Feb. 8, 1866.

LEIGH *v.* TURNER.

14 W. R. 361; 14 L. T. 8.

PRACTICE. U.—On a motion to dismiss a bill on the ground that the plaintiff had previously instituted a claim in the Palatine Court of the Duchy of Lancaster for substantially similar relief, and had inserted merely colourable alterations in the prayer of the present suit in order to prevent its dismissal, it was *held* by,

ROMILLY, M.R., that no step could be taken in opposition to a finding in a chief clerk's certificate, even in respect of matters appearing by the record unless there was a summons of motion to vary the certificate.

ROMILLY, M.R., Jan. 23, 1866.

TOWEND *v.* TOKER.

14 W. R. 300.

Practice—Revivor and supplement—Death of sole plaintiff.

PRACTICE, B.—This was a suit for specific performance, in which a decree had been obtained for the plaintiff. After the decree the plaintiff died, and this was an *ex parte* application by his executors and devisees for an order of supplement and revivor.

Plummer, for the applicant.

LORD ROMILLY, M.R., said that a supplemental bill must be filed. He would not grant an order of supplement and revivor. The applicant might, if he chose, apply to the registrar for such an order, leaving it to the other party to impeach it.

STUART, V.C., Dec. 22, 1865.

CLARK *v.* WARD.

14 W. R. 241; 13 L. T. 624.

See R.S.C., 1883, Ord. lv. r. 13 (a).

Practice—Vesting Order—Chambers

Costs.—The Consolidated Order XXXV., rule 1, art. (4), is imperative.

A bill was filed for foreclosure by the representatives of a certain deceased mortgagee, and an order for sale was made. The purchaser under the sale, which took place accordingly, required the concurrence of numerous parties interested in the estate of the mortgagor (who, like the mortgagee, had died before the institution of the suit), or that a vesting order should be obtained for

the purpose of conveying their interests. An application for the latter purpose was, in consequence of this requisition, made to the Court by petition.

Batten, for the petitioners, the personal representatives of the mortgagee.

Kay, for the representatives of the mortgagor.

Cozens-Hardy for the heir-at-law of the mortgagee.

STUART, V.C., said that the application ought certainly to have been made in Chambers. The order in question was imperative. He would, however, make the order, but the petitioners must pay all extra costs occasioned by the matter having been brought into Court. His Honour could not allow such extra costs to be costs in the foreclosure suit.

CRANWORTH, L.C., Nov. 2, 1865.

DE BEAUVOIR *v.* BENYON.

14 W. R. 41; 13 L. T. 234.

Petition for re-hearing received on the signature of one counsel, when that counsel alone was employed in the court below.

KINDERSLEY, V.C., Nov. 2, 1865.

CLEMENTS *v.* CLIFFORD.

14 W. R. 22; 13 L. T. 267; 11 Jur. N.S. 851.

Where two of several defendants disclaimed, the plaintiff was allowed, on motion *ex parte*, to dismiss the bill against them without prejudice to the question how their costs were ultimately to be borne.

KINDERSLEY, V.C., Nov. 9, 1865.

HITCHIN *v.* HUGHES.

14 W. R. 93; 13 L. T. 269; 11 Jur. N.S. 902.

In giving notice of motion to take a bill *pro confesso*, the Long Vacation was counted in the computation of the three weeks.

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